

Union Calendar No. 588

110TH CONGRESS
2D SESSION

H. R. 5546

[Report No. 110-913]

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

OCTOBER 3, 2008

Additional sponsors: Mr. CARNEY, Mr. ELLISON, Ms. EDDIE BERNICE JOHNSON of Texas, Ms. MCCOLLUM of Minnesota, Mr. YARMUTH, Mr. SHULER, Mr. WHITFIELD of Kentucky, Mr. ENGLISH of Pennsylvania, Mr. WAMP, Mr. TIBERI, Mr. PORTER, Mr. CARNAHAN, Mr. MARSHALL, Mr. ALLEN, Ms. JACKSON-LEE of Texas, Mr. KAGEN, Mr. GONZALEZ, Mr. MCNERNEY, Mr. JONES of North Carolina, Mr. BAIRD, Mr. MELANCON, Mr. DAVID DAVIS of Tennessee, Mr. KING of Iowa, Mr. INSLEE, Mr. JACKSON of Illinois, Mr. VISCLOSKEY, Mr. HOEKSTRA, Mr. RAHALL, Mr. BISHOP of Georgia, Mr. FATTAH, Mr. KLEIN of Florida, and Mr. STUPAK

OCTOBER 3, 2008

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on March 6, 2008]

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”.*

6 **SEC. 2. LIMITED ANTITRUST IMMUNITY FOR THE NEGOTIA-**
 7 **TION AND DETERMINATION OF RATES AND**
 8 **TERMS FOR ACCESS TO COVERED ELEC-**
 9 **TRONIC PAYMENT SYSTEMS.**

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

11 (1) *“Access agreement” means an agreement giv-*
 12 *ing a merchant permission to access a covered elec-*
 13 *tronic payment system to accept credit cards and/or*
 14 *debit cards from consumers for payment for goods*
 15 *and services as well as to receive payment for such*
 16 *goods and services, conditioned solely upon the mer-*
 17 *chant complying with the rates and terms specified in*
 18 *the agreement.*

1 (2) “Acquirer” means a financial institution
2 that provides services allowing merchants to access an
3 electronic payment system to accept credit cards and/
4 or debit cards for payment, but does not include inde-
5 pendent third party processors that may act as the
6 acquirer’s agent in processing general-purpose credit
7 or debit card transactions.

8 (3) “Antitrust Division” means the Antitrust
9 Division of the U.S. Department of Justice.

10 (4) “Antitrust laws” has the meaning given it in
11 subsection (a) of the first section of the Clayton Act
12 (15 U.S.C. 12(a)), except that such term includes sec-
13 tion 5 of the Federal Trade Commission Act (15
14 U.S.C. 45) to the extent such section 5 applies to un-
15 fair methods of competition as well as any similar
16 State law.

17 (5) “Credit card” means any general-purpose
18 card or other device issued or approved for use by a
19 financial institution allowing the cardholder to ob-
20 tain goods or services on credit on terms specified by
21 that financial institution.

22 (6) “Covered electronic payment system” means
23 an electronic payment system that has been used for
24 at least 20 percent of the combined dollar value of
25 U.S. credit card, signature-based debit card, and

1 *PIN-based debit card payments processed in the ap-*
2 *plicable calendar year immediately preceding the*
3 *year in which the conduct in question occurs.*

4 (7) “Debit card” means any general-purpose
5 *card or other device issued or approved for use by a*
6 *financial institution for use in debiting a cardholder’s*
7 *account for the purpose of that cardholder obtaining*
8 *goods or services, whether authorization is signature-*
9 *based or PIN-based.*

10 (8) “Electronic payment system” means the pro-
11 *prietary services and infrastructure that route infor-*
12 *mation and data to facilitate transaction authoriza-*
13 *tion, clearance, and settlement that merchants must*
14 *access in order to accept a specific brand of general-*
15 *purpose credit cards and/or debit cards as payment*
16 *for goods and services.*

17 (9) “Financial institution” has the same mean-
18 *ing as in section 603(t) of the Fair Credit Reporting*
19 *Act.*

20 (10) “Issuer” means a financial institution that
21 *issues credit cards and/or debit cards or approves the*
22 *use of other devices for use in an electronic payment*
23 *system, but does not include independent third party*
24 *processors that may act as the issuer’s agent in proc-*

1 *essing general-purpose credit card or debit card trans-*
2 *actions.*

3 (11) “Market power” means the ability profit-
4 *ably to raise prices above those that would be charged*
5 *in a perfectly competitive market.*

6 (12) “Merchant” means any person who accepts
7 *credit cards and/or debit cards in payment for goods*
8 *or services that they provide.*

9 (13) “Negotiating party” means 1 or more pro-
10 *viders of a covered electronic payment system or 1 or*
11 *more merchants who have access to or who are seeking*
12 *access to that covered electronic payment system, as*
13 *the case may be, and who are in the process of negoti-*
14 *ating or who have executed a voluntarily negotiated*
15 *access agreement that is still in effect.*

16 (14) “Person” has the meaning given it in sub-
17 *section (a) of the first section of the Clayton Act (15*
18 *U.S.C. 12(a)).*

19 (15) “Provider” means any person who owns,
20 *operates, controls, serves as an issuer for, or serves as*
21 *an acquirer for a covered electronic payment system.*

22 (16) “State” has the meaning given it in section
23 *4G(2) of the Clayton Act (15 U.S.C. 15g(2)).*

24 (17) “Terms” means all rules applicable either to
25 *providers of a single covered electronic payment sys-*

1 *tem or to merchants, and that are required in order*
 2 *to provide or access that covered electronic payment*
 3 *system for processing credit card and/or debit card*
 4 *transactions.*

5 (18) “*Voluntarily negotiated access agreement*”
 6 *means an executed agreement voluntarily negotiated*
 7 *between 1 or more providers of a single covered elec-*
 8 *tronic payment system and 1 or more merchants that*
 9 *sets the rates and terms pursuant to which the 1 or*
 10 *more merchants can access that covered electronic*
 11 *payment system to accept credit cards and/or debit*
 12 *cards from consumers for payment of goods and serv-*
 13 *ices, and receive payment for such goods and services.*

14 (b) *LIMITED ANTITRUST IMMUNITY FOR NEGOTIATION*
 15 *OF ACCESS RATES AND TERMS TO COVERED ELECTRONIC*
 16 *PAYMENT SYSTEMS.—(1) Except as provided in paragraph*
 17 *(2) and notwithstanding any provision of the antitrust*
 18 *laws, in negotiating access rates and terms any providers*
 19 *of a single covered electronic payment system and any mer-*
 20 *chants may jointly negotiate and agree upon the rates and*
 21 *terms for access to the covered electronic payment system,*
 22 *including through the use of common agents that represent*
 23 *either providers of a single covered electronic payment sys-*
 24 *tem or merchants on a non-exclusive basis. Any providers*
 25 *of a single covered electronic payment system also may*

1 jointly determine the proportionate division among them-
 2 selves of paid access fees.

3 (2) Notwithstanding any other provision of this Act,
 4 the immunity otherwise applicable under paragraph (1)
 5 shall not apply to a provider of a single covered electronic
 6 payment system, or to a merchant, during any period in
 7 which such provider, or such merchant, is engaged in any
 8 unlawful boycott.

9 (c) NONDISCRIMINATION.—For any given covered elec-
 10 tronic payment system, the rates and terms of a voluntarily
 11 negotiated access agreement reached under the authority of
 12 this section shall be the same for all merchants, regardless
 13 of merchant category or volume of transactions (either in
 14 number or dollar value) generated. For any given covered
 15 electronic payment system, the rates and terms of a volun-
 16 tarily negotiated access agreement reached under the au-
 17 thority of this section shall be the same for all participating
 18 providers, regardless of provider category or volume of
 19 transactions (either in number or dollar value) generated.

20 (d) FACILITATION OF NEGOTIATION.—

21 (1) SCHEDULE.—Within one month following
 22 enactment of this Act, the negotiating parties shall
 23 file with the Antitrust Division a schedule for nego-
 24 tiations. If the negotiating parties do not file such a
 25 schedule within one month from the date of enact-

1 *ment, the Antitrust Division shall issue such a sched-*
 2 *ule and inform the negotiating parties of the schedule.*
 3 *In either case, the Antitrust Division shall make the*
 4 *schedule available to all negotiating parties.*

5 (2) *INITIAL DISCLOSURE.*—*Within one month*
 6 *following enactment of this Act, the persons described*
 7 *in this subsection shall make the initial disclosures*
 8 *described in paragraphs (3), (4), and (5) to facilitate*
 9 *negotiations under the limited antitrust immunity*
 10 *provided for by this section.*

11 (3) *ISSUERS, ACQUIRERS, AND OWNERS.*—*Any*
 12 *person who is 1 of the 10 largest issuers for a covered*
 13 *electronic payment system in terms of number of*
 14 *cards issued, any person who is 1 of the 10 largest*
 15 *acquirers for a covered electronic payment system in*
 16 *terms of number of merchants served, and any person*
 17 *who operates or controls a covered electronic payment*
 18 *system shall produce to the Antitrust Division and to*
 19 *all negotiating parties—*

20 (A) *an itemized list of the costs necessary to*
 21 *provide the covered electronic payment system*
 22 *that were incurred by the person during the most*
 23 *recent full calendar year before the initiation of*
 24 *the negotiation; and*

1 (B) any access agreement between that per-
 2 son and 1 or more merchants with regard to that
 3 covered electronic payment system.

4 (4) *MERCHANTS.*—Any person who is 1 of the 10
 5 largest merchants using the covered electronic pay-
 6 ment system, determined based on dollar amount of
 7 transactions made with the covered electronic pay-
 8 ment system, shall produce to the Antitrust Division
 9 and to all negotiating parties—

10 (A) an itemized list of the costs necessary to
 11 access an electronic payment system during the
 12 most recent full calendar year prior to the initi-
 13 ation of the proceeding; and

14 (B) any access agreement between that per-
 15 son and 1 or more providers with regard to that
 16 covered electronic payment system.

17 (5) *DISAGREEMENT.*—Any disagreement regard-
 18 ing whether a person is required to make an initial
 19 disclosure under this clause, or the contents of such a
 20 disclosure, shall be resolved by the Antitrust Division.

21 (6) *ATTENDANCE OF ANTITRUST DIVISION.*—A
 22 representative of the Antitrust Division shall attend
 23 all negotiation sessions conducted under the authority
 24 of this section.

1 (e) *TRANSPARENCY OF VOLUNTARILY NEGOTIATED AC-*
 2 *CESS AGREEMENTS.*—

3 (1) *VOLUNTARILY NEGOTIATED ACCESS AGREE-*
 4 *MENTS BETWEEN NEGOTIATING PARTIES.*—*A volun-*
 5 *tarily negotiated access agreement may be executed at*
 6 *any time between 1 or more providers of a covered*
 7 *electronic payment system and 1 or more merchants.*

8 (2) *FILING AGREEMENTS WITH THE ANTITRUST*
 9 *DIVISION.*—*The negotiating parties shall jointly file*
 10 *with the Antitrust Division a clear intelligible copy*
 11 *of—*

12 (A) *any voluntarily negotiated access agree-*
 13 *ment that affects any market in the United*
 14 *States or elsewhere;*

15 (B) *the various components of the inter-*
 16 *change fee;*

17 (C) *a description of how access fees that*
 18 *merchants pay are allocated among financial in-*
 19 *stitutions and how they are spent;*

20 (D) *whether a variation in fees exists*
 21 *among card types;*

22 (E) *any documentation relating to a volun-*
 23 *tarily negotiated access agreement evidencing*
 24 *any consideration being given or any marketing*

1 or promotional agreements between the negoti-
2 ating parties;

3 (F) a comparison of interchange rates in
4 current use in the 10 foreign countries having
5 the highest volume of credit card transactions
6 with the interchange rates charged in the United
7 States under such agreement; and

8 (G) any amendments to that voluntarily ne-
9 gotiated access agreement or documentation.

10 (3) *TIMING AND AVAILABILITY OF FILINGS.*—The
11 negotiating parties to any voluntarily negotiated ac-
12 cess agreement executed after the date of enactment of
13 this Act shall jointly file the voluntarily negotiated
14 access agreement, and any documentation or amend-
15 ments described in paragraph (2), with the Antitrust
16 Division not later than 30 days after the date of exe-
17 cution of the voluntarily negotiated access agreement
18 or amendment or after the creation of the documenta-
19 tion. The Antitrust Division shall make publicly
20 available any voluntarily negotiated access agree-
21 ment, amendment, or accompanying documentation
22 filed under this paragraph.

23 (f) *REPORT TO CONGRESS BY THE ANTITRUST DIVI-*
24 *SION.*—Within seven months after the date of enactment of
25 this Act, the Antitrust Division shall transmit to the House

1 *Committee on the Judiciary and the Senate Committee on*
2 *the Judiciary a report on the negotiations conducted under*
3 *the authority of this section during the first six months after*
4 *the date of enactment and, if a voluntarily negotiated agree-*
5 *ment is reached, whether such access rates and terms will*
6 *have an adverse effect on competition and how such rates*
7 *compare with access rates and terms in current use in other*
8 *countries. Such report shall contain a chronology of the ne-*
9 *gotiations, an assessment of whether the parties have nego-*
10 *tiated in good faith, an assessment of the quality of the data*
11 *provided by the parties in their initial disclosures, a de-*
12 *scription of any voluntarily negotiated agreements reached*
13 *during the negotiations, and any recommendations of the*
14 *Antitrust Division concerning how Congress should respond*
15 *to the conduct of the negotiations.*

16 (g) *EFFECT ON PENDING LAWSUITS.—Nothing in this*
17 *section shall affect liability in any action pending on the*
18 *date of enactment of this section.*

19 **SEC. 3. OPT-OUT.**

20 *Nothing in this Act shall limit the ability of acquirers*
21 *or issuers that are regulated by the National Credit Union*
22 *Administration or that, together with affiliates, have assets*
23 *of less than \$1,000,000,000, to opt out of negotiations under*
24 *this Act.*

1 **SEC. 4. CARDHOLDER SAVINGS.**

2 *Any agreements reached pursuant to the authority*
3 *provided in section 2 shall provide that—*

4 *(1) when any fees that a merchant is charged for*
5 *access to a covered electronic payment system are re-*
6 *duced pursuant to any such agreement, the merchant*
7 *shall pass the benefits of any such reduction in fees*
8 *on to its customers or employees; and*

9 *(2) when any fees that a financial institution*
10 *collects for access to a covered electronic payment sys-*
11 *tem are increased pursuant to any such agreement,*
12 *the financial institution shall pass the benefits of any*
13 *such increase in fees on to its customers or employees.*

14 **SEC. 5. EFFECTIVE DATE.**

15 *This Act shall take effect on the date of the enactment*
16 *of this Act.*

Union Calendar No. 588

110TH CONGRESS
2^D Session

H. R. 5546

[Report No. 110-913]

A BILL

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

OCTOBER 3, 2008

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed