

111TH CONGRESS
1ST SESSION

H. R. 2695

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

JUNE 4, 2009

Mr. CONYERS (for himself and Mr. SHUSTER) 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 2009".

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:

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

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

16 (3) “Antitrust laws” has the meaning given it
17 in subsection (a) of the first section of the Clayton
18 Act (15 U.S.C. 12(a)), except that such term in-
19 cludes section 5 of the Federal Trade Commission
20 Act (15 U.S.C. 45) to the extent such section 5 ap-
21 plies to unfair methods of competition as well as any
22 similar State law.

23 (4) “Credit card” means any general-purpose
24 card or other device issued or approved for use by
25 a financial institution allowing the cardholder to ob-

1 tain goods or services on credit on terms specified by
2 that financial institution.

3 (5) “Covered electronic payment system” means
4 an electronic payment system that has been used for
5 at least 20 percent of the combined dollar value of
6 U.S. credit card, signature-based debit card, and
7 PIN-based debit card payments processed in the ap-
8 plicable calendar year immediately preceding the
9 year in which the conduct in question occurs.

10 (6) “Debit card” means any general-purpose
11 card or other device issued or approved for use by
12 a financial institution for use in debiting a card-
13 holder’s account for the purpose of that cardholder
14 obtaining goods or services, whether authorization is
15 signature-based or PIN-based.

16 (7) “Electronic payment system” means the
17 proprietary services and infrastructure that route in-
18 formation and data to facilitate transaction author-
19 ization, clearance, and settlement that merchants
20 must access in order to accept a specific brand of
21 general-purpose credit cards and/or debit cards as
22 payment for goods and services.

23 (8) “Financial institution” has the same mean-
24 ing as in section 603(t) of the Fair Credit Reporting
25 Act.

1 (9) “Issuer” means a financial institution that
2 issues credit cards and/or debit cards or approves
3 the use of other devices for use in an electronic pay-
4 ment system, but does not include independent third
5 party processors that may act as the issuer’s agent
6 in processing general-purpose credit card or debit
7 card transactions.

8 (10) “Market power” means the ability profit-
9 ably to raise prices above those that would be
10 charged in a perfectly competitive market.

11 (11) “Merchant” means any person who ac-
12 cepts credit cards and/or debit cards in payment for
13 goods or services that they provide.

14 (12) “Negotiating party” means 1 or more pro-
15 viders of a covered electronic payment system or 1
16 or more merchants who have access to or who are
17 seeking access to that covered electronic payment
18 system, as the case may be, and who are in the proc-
19 ess of negotiating or who have executed a voluntarily
20 negotiated access agreement that is still in effect.

21 (13) “Person” has the meaning given it in sub-
22 section (a) of the first section of the Clayton Act (15
23 U.S.C. 12(a)).

24 (14) “Provider” means any person who owns,
25 operates, controls, serves as an issuer for, or serves

1 as an acquirer for a covered electronic payment sys-
2 tem.

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

5 (16) “Terms” means all rules applicable either
6 to providers of a single covered electronic payment
7 system or to merchants, and that are required in
8 order to provide or access that covered electronic
9 payment system for processing credit card and/or
10 debit card transactions.

11 (17) “Voluntarily negotiated access agreement”
12 means an executed agreement voluntarily negotiated
13 between 1 or more providers of a single covered elec-
14 tronic payment system and 1 or more merchants
15 that sets the rates and terms pursuant to which the
16 1 or more merchants can access that covered elec-
17 tronic payment system to accept credit cards and/or
18 debit cards from consumers for payment of goods
19 and services, and receive payment for such goods
20 and services.

21 (b) LIMITED ANTITRUST IMMUNITY FOR NEGOTIA-
22 TION OF ACCESS RATES AND TERMS TO COVERED ELEC-
23 TRONIC PAYMENT SYSTEMS.—(1) Except as provided in
24 paragraph (2) and notwithstanding any provision of the
25 antitrust laws, in negotiating access rates and terms any

1 providers of a single covered electronic payment system
2 and any merchants may jointly negotiate and agree upon
3 the rates and terms for access to the covered electronic
4 payment system, including through the use of common
5 agents that represent either providers of a single covered
6 electronic payment system or merchants on a nonexclusive
7 basis. Any providers of a single covered electronic payment
8 system also may jointly determine the proportionate divi-
9 sion among themselves of paid access fees.

10 (2) Notwithstanding any other provision of this Act,
11 the immunity otherwise applicable under paragraph (1)
12 shall not apply to a provider of a single covered electronic
13 payment system, or to a merchant, during any period in
14 which such provider, or such merchant, is engaged in—

15 (A) any unlawful boycott;

16 (B) any allocation with a competitor of a geo-
17 graphical area in which an interchange rate will be
18 charged or paid;

19 (C) any unlawful tying of an interchange rate
20 charged or paid to any other product or service; or

21 (D) any exchange of information with, or agree-
22 ment with, a competitor relating to the allocation of
23 revenues lost or redistribution of savings gained
24 from a voluntarily negotiated access agreement if
25 such information or agreement is not reasonably re-

1 quired to carry out the negotiations and agreements
2 described under paragraph (1).

3 (c) NONDISCRIMINATION.—For any given covered
4 electronic payment system, the rates and terms of a volun-
5 tarily negotiated access agreement reached under the au-
6 thority of this section shall be the same for all merchants,
7 regardless of merchant category or volume of transactions
8 (either in number or dollar value) generated. For any
9 given covered electronic payment system, the rates and
10 terms of a voluntarily negotiated access agreement
11 reached under the authority of this section shall be the
12 same for all providers participating in a negotiation ses-
13 sion conducted under the authority of this section, regard-
14 less of provider category or volume of transactions (either
15 in number or dollar value) generated.

16 (d) FACILITATION OF NEGOTIATION.—

17 (1) SCHEDULE.—Within 1 month following en-
18 actment of this Act, the negotiating parties shall file
19 with the Attorney General a schedule for negotia-
20 tions. If the negotiating parties do not file such a
21 schedule within 1 month from the date of enact-
22 ment, the Attorney General shall issue such a sched-
23 ule. In either case, the Attorney General shall make
24 the schedule available to all negotiating parties.

1 (2) INITIAL DISCLOSURE.—Within 1 month fol-
2 lowing enactment of this Act, the persons described
3 in this subsection shall make the initial disclosures
4 described in paragraphs (3) and (4) to facilitate ne-
5 gotiations under the limited antitrust immunity pro-
6 vided for by this section.

7 (3) ISSUERS, ACQUIRERS, AND OWNERS.—Any
8 person who is 1 of the 10 largest issuers for a cov-
9 ered electronic payment system in terms of number
10 of cards issued, any person who is 1 of the 10 larg-
11 est acquirers for a covered electronic payment sys-
12 tem in terms of number of merchants served, and
13 any person who operates or controls a covered elec-
14 tronic payment system shall produce to the Attorney
15 General and to all negotiating parties—

16 (A) an itemized list of the costs necessary
17 to provide the covered electronic payment sys-
18 tem that were incurred by the person during
19 the most recent full calendar year before the
20 initiation of the negotiation; and

21 (B) any access agreement between that
22 person and 1 or more merchants with regard to
23 that covered electronic payment system.

24 (4) MERCHANTS.—Any person who is 1 of the
25 10 largest merchants using the covered electronic

1 payment system, determined based on dollar amount
2 of transactions made with the covered electronic
3 payment system, shall produce to the Attorney Gen-
4 eral and to all negotiating parties—

5 (A) an itemized list of the costs necessary
6 to access an electronic payment system during
7 the most recent full calendar year prior to the
8 initiation of the proceeding; and

9 (B) any access agreement between that
10 person and 1 or more providers with regard to
11 that covered electronic payment system.

12 (5) DISAGREEMENT.—Any disagreement re-
13 garding whether a person is required to make an ini-
14 tial disclosure under this clause, or the contents of
15 such a disclosure, shall be resolved by the Attorney
16 General.

17 (6) ATTENDANCE OF THE DEPARTMENT OF
18 JUSTICE.—A representative of the Attorney General
19 shall attend all negotiation sessions conducted under
20 the authority of this section.

21 (e) TRANSPARENCY OF VOLUNTARILY NEGOTIATED
22 ACCESS AGREEMENTS.—

23 (1) VOLUNTARILY NEGOTIATED ACCESS AGREE-
24 MENTS BETWEEN NEGOTIATING PARTIES.—A volun-
25 tarily negotiated access agreement may be executed

1 at any time between 1 or more providers of a cov-
2 ered electronic payment system and 1 or more mer-
3 chants.

4 (2) FILING AGREEMENTS WITH THE ATTORNEY
5 GENERAL.—The negotiating parties shall jointly file
6 with the Attorney General a clear intelligible copy
7 of—

8 (A) any voluntarily negotiated access
9 agreement that affects any market in the
10 United States or elsewhere;

11 (B) the various components of the inter-
12 change fee;

13 (C) a description of how access fees that
14 merchants pay are allocated among financial in-
15 stitutions and how they are spent;

16 (D) whether a variation in fees exists
17 among card types;

18 (E) any documentation relating to a volun-
19 tarily negotiated access agreement evidencing
20 any consideration being given or any marketing
21 or promotional agreements between the negoti-
22 ating parties;

23 (F) a comparison of interchange rates in
24 current use in the 10 foreign countries having
25 the highest volume of credit card transactions

1 with the interchange rates charged in the
2 United States under such agreement; and

3 (G) any amendments to that voluntarily
4 negotiated access agreement or documentation.

5 (3) TIMING AND AVAILABILITY OF FILINGS.—

6 The negotiating parties to any voluntarily negotiated
7 access agreement executed after the date of enact-
8 ment of this Act shall jointly file the voluntarily ne-
9 gotiated access agreement, and any documentation
10 or amendments described in paragraph (2), with the
11 Attorney General not later than 30 days after the
12 date of execution of the voluntarily negotiated access
13 agreement or amendment or after the creation of the
14 documentation. The Attorney General shall make
15 publicly available any voluntarily negotiated access
16 agreement, amendment, or accompanying docu-
17 mentation filed under this paragraph.

18 (f) REPORT TO CONGRESS BY THE ATTORNEY GEN-
19 ERAL.—Within 7 months after the date of enactment of
20 this Act, the Attorney General shall transmit to the House
21 Committee on the Judiciary and the Senate Committee on
22 the Judiciary a report on the negotiations conducted
23 under the authority of this section during the first 6
24 months after the date of enactment and, if a voluntarily
25 negotiated agreement is reached, whether such access

1 rates and terms will have an adverse effect on competition
2 and how such rates compare with access rates and terms
3 in current use in other countries. Such report shall contain
4 a chronology of the negotiations, an assessment of whether
5 the parties have negotiated in good faith, an assessment
6 of the quality of the data provided by the parties in their
7 initial disclosures, a description of any voluntarily nego-
8 tiated agreements reached during the negotiations, and
9 any recommendations of the Attorney General concerning
10 how Congress should respond to the conduct of the nego-
11 tiations.

12 (g) EFFECT ON PENDING LAWSUITS.—Nothing in
13 this section shall affect liability in any action pending on
14 the date of enactment of this section.

15 **SEC. 3. OPT-OUT.**

16 Nothing in this Act shall limit the ability of acquirers
17 or issuers that are regulated by the National Credit Union
18 Administration or that, together with affiliates, have as-
19 sets of less than \$1,000,000,000, to opt out of negotia-
20 tions under this Act.

21 **SEC. 4. EFFECTIVE DATE.**

22 This Act shall take effect on the date of the enact-
23 ment of this Act.

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