

111TH CONGRESS
1ST SESSION

S. 1212

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

IN THE SENATE OF THE UNITED STATES

JUNE 9, 2009

Mr. DURBIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the antitrust laws to ensure competitive market-based fees 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. DEFINITIONS.**

7 In this Act:

8 (1) ACCESS.—The term “access”—

9 (A) when used as a verb means to use to
10 conduct transaction authorization, clearance,

1 and settlement involving the acceptance of cred-
2 it cards or debit cards from consumers for pay-
3 ment for goods or services and the receipt of
4 payment for such goods or services; and

5 (B) when used as a noun means the per-
6 mission or authority to use to conduct trans-
7 actions described in subparagraph (A).

8 (2) ACCESS AGREEMENT.—The term “access
9 agreement” means an agreement between 1 or more
10 merchants and 1 or more providers giving the mer-
11 chant access to a covered electronic payment system,
12 conditioned solely upon the merchant complying with
13 the fees and terms specified in the agreement.

14 (3) ACQUIRER.—The term “acquirer”—

15 (A) means a financial institution that pro-
16 vides services allowing merchants to access an
17 electronic payment system to accept credit
18 cards or debit cards for payment; and

19 (B) does not include an independent third
20 party processor that may act as the agent of a
21 financial institution described in subparagraph
22 (A) in processing general-purpose credit card or
23 debit card transactions.

24 (4) ADJUDICATION.—The term “adjudication”
25 has the meaning given that term in section 551 of

1 title 5, United States Code, and does not include
2 mediation.

3 (5) ANTITRUST LAWS.—The term “antitrust
4 laws”—

5 (A) has the meaning given that term in
6 subsection (a) of the first section of the Clayton
7 Act (15 U.S.C. 12(a)); and

8 (B) includes—

9 (i) section 5 of the Federal Trade
10 Commission Act (15 U.S.C. 45) to the ex-
11 tent section 5 applies to unfair methods of
12 competition; and

13 (ii) State antitrust laws.

14 (6) CHAIRMAN.—The term “Chairman” means
15 the Chairman of the Federal Trade Commission.

16 (7) COVERED ELECTRONIC PAYMENT SYS-
17 TEM.—The term “covered electronic payment sys-
18 tem” means an electronic payment system that
19 routes information and data to facilitate transaction
20 authorization, clearance, and settlement for not less
21 than 10 percent of the combined dollar value of
22 credit card or debit card payments processed in the
23 United States in the most recent full calendar year.

24 (8) CREDIT CARD.—The term “credit card”
25 means any general-purpose card or other credit de-

1 vice issued or approved for use by a financial institu-
2 tion for use in allowing the cardholder to obtain
3 goods or services on credit on terms specified by
4 that financial institution.

5 (9) DEBIT CARD.—The term “debit card”
6 means any general-purpose card or other device
7 issued or approved for use by a financial institution
8 for use in debiting the account of a cardholder for
9 the purpose of that cardholder obtaining goods or
10 services, whether authorization is signature-based or
11 PIN-based.

12 (10) ELECTRONIC PAYMENT SYSTEM.—The
13 term “electronic payment system” means the propri-
14 etary services, infrastructure, and software that
15 route information and data to facilitate transaction
16 authorization, clearance, and settlement and that
17 merchants are required to access in order to accept
18 a specific brand of general-purpose credit cards or
19 debit cards as payment for goods or services.

20 (11) ELECTRONIC PAYMENT SYSTEM
21 JUDGES.—The term “Electronic Payment System
22 Judges” means the Electronic Payment System
23 Judges appointed under section 4(a).

24 (12) FEES.—The term “fees” means any mone-
25 tary charges, rates, assessments, or other payments

1 imposed by a provider upon a merchant for the mer-
2 chant to access an electronic payment system.

3 (13) FINANCIAL INSTITUTION.—The term “fi-
4 nancial institution” has the meaning given that term
5 in section 603(t) of the Fair Credit Reporting Act
6 (15 U.S.C. 1681a(t)).

7 (14) ISSUER.—The term “issuer”—

8 (A) means a financial institution that
9 issues credit cards or debit cards or approves
10 the use of other devices for use in an electronic
11 payment system; and

12 (B) does not include an independent third
13 party processor that may act as the agent of a
14 financial institution described in subparagraph
15 (A) in processing general-purpose credit or
16 debit card transactions.

17 (15) MARKET POWER.—The term “market
18 power” means the ability to profitably raise prices
19 above those that would be charged in a perfectly
20 competitive market.

21 (16) MERCHANT.—The term “merchant”
22 means any person who accepts or who seeks to ac-
23 cept credit cards or debit cards in payment for goods
24 or services provided by the person.

1 (17) NEGOTIATING PARTY.—The term “negoti-
2 ating party” means 1 or more providers of a covered
3 electronic payment system or 1 or more merchants
4 who have access to or who are seeking access to that
5 covered electronic payment system, as the case may
6 be, and who are in the process of negotiating or who
7 have executed a voluntarily negotiated access agree-
8 ment that is still in effect.

9 (18) NORMAL RATE OF RETURN.—The term
10 “normal rate of return” means the average rate of
11 return that a firm would receive in an industry when
12 conditions of perfect competition prevail.

13 (19) PROCEEDING PARTY.—The term “pro-
14 ceeding party” means collectively all providers of a
15 covered electronic payment system or collectively all
16 merchants who have access to or who are seeking ac-
17 cess to that covered electronic payment system, as
18 the case may be, during the period in which the
19 Electronic Payment System Judges are conducting a
20 proceeding under this Act relating to that covered
21 electronic payment system.

22 (20) PERSON.—The term “person” has the
23 meaning given that term in subsection (a) of the
24 first section of the Clayton Act (15 U.S.C. 12(a)).

1 (21) PROVIDER.—The term “provider” means
2 any person who owns, operates, controls, serves as
3 an issuer for, or serves as an acquirer for a covered
4 electronic payment system.

5 (22) STATE.—The term “State” has the mean-
6 ing given that term in section 4G(2) of the Clayton
7 Act (15 U.S.C. 15g(2)).

8 (23) TERMS.—The term “terms” means any
9 and all rules and conditions that are applicable to
10 providers of an electronic payment system or to mer-
11 chants, as the case may be, and that are required
12 in order for merchants to access that electronic pay-
13 ment system.

14 (24) VOLUNTARILY NEGOTIATED ACCESS
15 AGREEMENT.—The term “voluntarily negotiated ac-
16 cess agreement” means an access agreement volun-
17 tarily negotiated between 1 or more providers of a
18 covered electronic payment system and 1 or more
19 merchants that sets the fees and terms under which
20 the merchant can access that covered electronic pay-
21 ment system.

22 (25) WRITTEN DIRECT STATEMENTS.—The
23 term “written direct statements” means witness
24 statements, testimony, and exhibits to be presented
25 in proceedings under this Act, and such other infor-

1 mation that is necessary to establish fees and terms
2 for access to covered electronic payment systems as
3 set forth in regulations issued by the Electronic Pay-
4 ment System Judges under section 5(b)(4).

5 **SEC. 3. ACCESS TO COVERED ELECTRONIC PAYMENT SYS-**
6 **TEMS; LIMITED ANTITRUST IMMUNITY FOR**
7 **THE NEGOTIATION AND DETERMINATION OF**
8 **FEES AND TERMS; STANDARDS FOR ESTAB-**
9 **LISHMENT OF FEES AND TERMS.**

10 (a) ACCESS TO COVERED ELECTRONIC PAYMENT
11 SYSTEMS.—Access by a merchant to any covered elec-
12 tronic payment system and the fees and terms of such ac-
13 cess shall be subject to this Act.

14 (b) AUTHORITY AND LIMITED ANTITRUST IMMUNITY
15 FOR NEGOTIATIONS OF FEES AND TERMS AND PARTICI-
16 PATION IN PROCEEDINGS.—

17 (1) IN GENERAL.—Notwithstanding any provi-
18 sion of the antitrust laws—

19 (A) in negotiating fees and terms and par-
20 ticipating in any proceedings under subsection
21 (c), any providers of a covered electronic pay-
22 ment system and any merchants who have ac-
23 cess to or who are seeking access to that cov-
24 ered electronic payment system may jointly ne-
25 gotiate and agree upon the fees and terms for

1 access to the covered electronic payment sys-
2 tem, including through the use of common
3 agents that represent the providers of the cov-
4 ered electronic payment system or the mer-
5 chants on a nonexclusive basis; and

6 (B) any providers of a single covered elec-
7 tronic payment system also may jointly deter-
8 mine the proportionate division among such
9 providers of paid fees.

10 (2) LIMITATIONS.—The immunity from the
11 antitrust laws conferred under this subsection shall
12 not apply to a provider of a covered electronic pay-
13 ment system or to a merchant during any period in
14 which such provider, or such merchant, is engaged
15 in—

16 (A) any unlawful boycott;

17 (B) any allocation with a competitor of a
18 geographical area;

19 (C) any unlawful tying arrangement; or

20 (D) any exchange of information with, or
21 agreement with, a competitor that is not rea-
22 sonably required to carry out the negotiations
23 and proceedings described in subsection (c).

24 (c) ESTABLISHMENT OF FEES AND TERMS.—

1 (1) VOLUNTARILY NEGOTIATED ACCESS AGREE-
2 MENTS.—

3 (A) AGREEMENTS BETWEEN NEGOTIATING
4 PARTIES.—A voluntarily negotiated access
5 agreement may be executed at any time be-
6 tween 1 or more providers of a covered elec-
7 tronic payment system and 1 or more mer-
8 chants. With respect to the negotiating parties,
9 such executed voluntarily negotiated access
10 agreement shall supersede any fees or terms es-
11 tablished by the Electronic Payment System
12 Judges under paragraph (3) relating to that
13 covered electronic payment system.

14 (B) FILING AGREEMENTS WITH THE ELEC-
15 TRONIC PAYMENT SYSTEM JUDGES.—The nego-
16 tiating parties shall jointly file with the Elec-
17 tronic Payment System Judges—

18 (i) any voluntarily negotiated access
19 agreement that affects any market in the
20 United States or elsewhere;

21 (ii) any documentation relating to a
22 voluntarily negotiated access agreement ev-
23 idencing any consideration being given or
24 any marketing or promotional agreement
25 between the negotiating parties; and

1 (iii) any amendment to that volun-
2 tarily negotiated access agreement or docu-
3 mentation.

4 (C) TIMING AND AVAILABILITY OF FIL-
5 INGS.—The negotiating parties to any volun-
6 tarily negotiated access agreement executed
7 after the date of enactment of this Act shall
8 jointly file the voluntarily negotiated access
9 agreement, and any documentation or amend-
10 ment described in subparagraph (B), with the
11 Electronic Payment System Judges not later
12 than 30 days after the date of execution of the
13 voluntarily negotiated access agreement or
14 amendment or the date of the creation of the
15 documentation, as the case may be. The Elec-
16 tronic Payment System Judges shall make pub-
17 licly available any voluntarily negotiated access
18 agreement, amendment, or accompanying docu-
19 mentation filed under this paragraph.

20 (2) INITIATION OF PROCEEDINGS.—The pro-
21 ceedings under this subsection to establish fees and
22 terms for access to a covered electronic payment sys-
23 tem shall be initiated in accordance with section 6.

24 (3) PROCEEDINGS.—

1 (A) IN GENERAL.—The Electronic Pay-
2 ment System Judges shall conduct proceedings
3 as specified under this Act to establish fees and
4 terms for access to a covered electronic pay-
5 ment system. Except as specifically provided in
6 a voluntarily negotiated access agreement, a
7 provider of a covered electronic payment system
8 may not directly or indirectly charge fees or set
9 terms for access to a covered electronic pay-
10 ment system that are not in accordance with
11 the fees and terms established by the Electronic
12 Payment System Judges pursuant to pro-
13 ceedings under this Act.

14 (B) PERIOD OF APPLICABILITY.—Except
15 as provided in section 6, the fees and terms es-
16 tablished under this paragraph with respect to
17 a covered electronic payment system shall apply
18 during the 3-year period beginning on January
19 1 of the second year following the year in which
20 the proceedings to establish such fees and terms
21 are commenced.

22 (C) STANDARD FOR ESTABLISHMENT OF
23 FEES AND TERMS BY THE ELECTRONIC PAY-
24 MENT SYSTEM JUDGES.—

1 (i) IN GENERAL.—In establishing fees
2 and terms for access to a covered elec-
3 tronic payment system under subpara-
4 graph (A), the Electronic Payment System
5 Judges—

6 (I) shall be limited to selecting,
7 without modification, 1 of the 2 final
8 offers of fees and terms filed by the
9 proceeding parties pursuant to section
10 5(c)(2)(A); and

11 (II) shall select the final offer of
12 fees and terms that most closely rep-
13 resent the fees and terms that would
14 be negotiated in a hypothetical per-
15 fectly competitive marketplace for ac-
16 cess to an electronic payment system
17 between a willing buyer with no mar-
18 ket power and a willing seller with no
19 market power.

20 (ii) STANDARDS.—In determining
21 which final offer of fees and terms to se-
22 lect, the Electronic Payment System
23 Judges—

24 (I) shall consider the costs of
25 transaction authorization, clearance,

1 and settlement that are necessary to
2 operate and to access an electronic
3 payment system;

4 (II) shall consider a normal rate
5 of return in a hypothetical perfectly
6 competitive marketplace;

7 (III) shall avoid selecting a final
8 offer of fees and terms that would
9 have anticompetitive effects within the
10 issuer market, the acquirer market, or
11 the merchant market;

12 (IV) may select a final offer that
13 is a schedule of fees and terms that
14 varies based upon cost-based dif-
15 ferences in types of credit card and
16 debit card transactions (which may in-
17 clude whether a transaction is of a
18 signature-based, PIN-based, or card-
19 not-present type);

20 (V) may select a final offer that
21 is a schedule of fees and terms that
22 provides alternative fees and terms for
23 those acquirers or issuers that are
24 regulated by the National Credit
25 Union Administration or that, to-

1 gether with affiliates of the acquirer
2 or issuer, have assets in a total
3 amount of less than \$1,000,000,000;
4 and

5 (VI) may not select a final offer
6 that is a schedule of fees and terms
7 that varies based on type of merchant
8 or volume of transactions (either in
9 number or dollar value).

10 (D) USE OF EXISTING FEES AND TERMS
11 AS EVIDENCE.—In establishing fees and terms
12 for access to a covered electronic payment sys-
13 tem under this paragraph, the Electronic Pay-
14 ment System Judges—

15 (i) shall decide the weight to be given
16 to any evidence submitted by a proceeding
17 party regarding the fees and terms for ac-
18 cess to comparable electronic payment sys-
19 tems, including fees and terms in volun-
20 tarily negotiated access agreements filed
21 under paragraph (1); and

22 (ii) shall give significant weight to
23 fees in a voluntarily negotiated access
24 agreement that are substantially below the
25 fees reflective of the market power of the

1 covered electronic payment systems that
2 existed before the date of enactment of this
3 Act.

4 **SEC. 4. ELECTRONIC PAYMENT SYSTEM JUDGES.**

5 (a) APPOINTMENT.—The Attorney General and the
6 Chairman shall jointly appoint 3 full-time Electronic Pay-
7 ment System Judges, and shall appoint 1 of the 3 Elec-
8 tronic Payment System Judges as the Chief Electronic
9 Payment System Judge.

10 (b) DUTIES.—The Electronic Payment System
11 Judges shall establish fees and terms for access to covered
12 electronic payment systems in accordance with this Act.

13 (c) RULINGS.—The Electronic Payment System
14 Judges may make any necessary procedural or evidentiary
15 ruling in a proceeding under this Act and may, before
16 commencing a proceeding under this Act, make any proce-
17 dural ruling that will apply to a proceeding under this Act.

18 (d) ADMINISTRATIVE SUPPORT.—The Attorney Gen-
19 eral and Chairman shall provide the Electronic Payment
20 System Judges with the necessary administrative services
21 related to proceedings under this Act.

22 (e) LOCATION.—The offices of the Electronic Pay-
23 ment System Judges and staff shall be located in the of-
24 fices of the Department of Justice or the Federal Trade
25 Commission.

1 (f) QUALIFICATIONS OF ELECTRONIC PAYMENT SYS-
2 TEM JUDGES.—Each Electronic Payment System Judge
3 shall be an attorney who has at least 7 years of legal expe-
4 rience. The Chief Electronic Payment System Judge shall
5 have at least 5 years of experience in adjudications, arbi-
6 trations, or court trials. At least 1 Electronic Payment
7 System Judge who is not the Chief Electronic Payment
8 System Judge shall have significant knowledge of elec-
9 tronic payment systems. At least one Electronic Payment
10 System Judge shall have significant knowledge of econom-
11 ics. An individual may serve as an Electronic Payment
12 System Judge only if the individual is free of any financial
13 conflict of interest under the standards established under
14 subsection (m).

15 (g) STAFF.—The Chief Electronic Payment System
16 Judge shall hire, at minimum, 3 full-time staff members
17 to assist the Electronic Payment System Judges in per-
18 forming the duties of the Electronic Payment System
19 Judges under this Act.

20 (h) TERMS.—

21 (1) INITIAL APPOINTMENTS.—For the first ap-
22 pointments of Electronic Payment System Judges
23 after the date of enactment of this Act—

24 (A) the Chief Electronic Payment System
25 Judge shall be appointed for a term of 6 years;

1 (B) 1 Electronic Payment System Judge
2 who is not the Chief Electronic Payment Sys-
3 tem Judge shall be appointed for a term of 4
4 years; and

5 (C) 1 Electronic Payment System Judge
6 who is not the Chief Electronic Payment Sys-
7 tem Judge shall be appointed for a term of 2
8 years.

9 (2) SUBSEQUENT APPOINTMENT.—After the
10 appointments under paragraph (1), an Electronic
11 Payment System Judge shall be appointed for a
12 term of 6 years.

13 (3) REAPPOINTMENT.—An individual serving as
14 an Electronic Payment System Judge may be re-
15 appointed to subsequent terms.

16 (4) START AND END OF TERMS.—The term of
17 an Electronic Payment System Judge shall begin on
18 the date on which the term of the predecessor of
19 that Electronic Payment System Judge ends. If a
20 successor Electronic Payment System Judge has not
21 been appointed as of the date on which the term of
22 office of an Electronic Payment System Judge ends,
23 the individual serving that term may continue to
24 serve as an interim Electronic Payment System
25 Judge until a successor is appointed.

1 (i) VACANCIES OR INCAPACITY.—

2 (1) VACANCIES.—The Attorney General and the
3 Chairman shall act expeditiously to fill any vacancy
4 in the position of Electronic Payment System Judge,
5 and may appoint an interim Electronic Payment
6 System Judge to serve until an Electronic Payment
7 System Judge is appointed to fill the vacancy under
8 this section. An Electronic Payment System Judge
9 appointed to fill a vacancy occurring before the expi-
10 ration of the term for which the predecessor of that
11 individual was appointed shall be appointed for the
12 remainder of that term.

13 (2) INCAPACITY.—If an Electronic Payment
14 System Judge is temporarily unable to perform the
15 duties of an Electronic Payment System Judge, the
16 Attorney General and Chairman may appoint an in-
17 terim Electronic Payment System Judge to perform
18 such duties during the period of such incapacity.

19 (j) COMPENSATION.—

20 (1) JUDGES.—The Chief Electronic Payment
21 System Judge shall receive compensation at the rate
22 of basic pay payable for level AL-1 for administra-
23 tive law judges under section 5372(b) of title 5,
24 United States Code, and each Electronic Payment
25 System Judge who is not the Chief Electronic Pay-

1 ment System Judge shall receive compensation at
2 the rate of basic pay payable for level AL-2 for ad-
3 ministrative law judges under such section. The
4 compensation of the Electronic Payment System
5 Judges shall not be subject to any regulations adopt-
6 ed by the Office of Personnel Management under its
7 authority under section 5376(b)(1) of title 5, United
8 States Code.

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

11 (A) the rate of pay of 1 staff member shall
12 be not more than the basic rate of pay payable
13 for level 10 of GS-15 of the General Schedule;

14 (B) the rate of pay of 1 staff member shall
15 be not less than the basic rate of pay payable
16 for GS-13 of the General Schedule and not
17 more than the basic rate of pay payable for
18 level 10 of GS-14 of such Schedule; and

19 (C) the rate of pay of 1 staff member shall
20 be not less than the basic rate of pay payable
21 for GS-8 of the General Schedule and not more
22 than the basic rate of pay payable for level 10
23 of GS-11 of such Schedule.

1 (3) LOCALITY PAY.—All rates of pay estab-
2 lished under this subsection shall include locality
3 pay.

4 (k) INDEPENDENCE OF ELECTRONIC PAYMENT SYS-
5 TEM JUDGES.—

6 (1) IN MAKING DETERMINATIONS.—

7 (A) IN GENERAL.—Except as provided in
8 subparagraph (B), the Electronic Payment Sys-
9 tem Judges—

10 (i) shall have full independence in es-
11 tablishing fees and terms for access to cov-
12 ered electronic payment systems and in
13 issuing any other ruling under this Act;
14 and

15 (ii) may consult with the Attorney
16 General and the Chairman on any matter
17 other than a question of fact.

18 (B) CONSULTATION.—The Electronic Pay-
19 ment System Judges shall consult with the At-
20 torney General and the Chairman regarding
21 any determination or ruling that would require
22 that any act be performed by the Attorney Gen-
23 eral or the Chairman, and any such determina-
24 tion or ruling shall not be binding upon the At-
25 torney General or the Chairman.

1 (2) PERFORMANCE APPRAISALS.—

2 (A) IN GENERAL.—Notwithstanding any
3 other provision of law or any regulation of the
4 Department of Justice or Federal Trade Com-
5 mission, and subject to subparagraph (B), the
6 Electronic Payment System Judges shall not
7 receive performance appraisals.

8 (B) RELATING TO SANCTION OR RE-
9 MOVAL.—To the extent that the Attorney Gen-
10 eral and the Chairman adopt regulations under
11 subsection (m) relating to the sanction or re-
12 moval of an Electronic Payment System Judge
13 and such regulations require documentation to
14 establish the cause of such sanction or removal,
15 the Electronic Payment System Judge may re-
16 ceive an appraisal related specifically to the
17 cause of the sanction or removal.

18 (l) INCONSISTENT DUTIES BARRED.—No Electronic
19 Payment System Judge may undertake duties that conflict
20 with the duties and responsibilities of an Electronic Pay-
21 ment System Judge under this Act.

22 (m) STANDARDS OF CONDUCT.—The Attorney Gen-
23 eral and the Chairman shall adopt regulations regarding
24 the standards of conduct, including financial conflict of
25 interest and restrictions against ex parte communications,

1 which shall govern the Electronic Payment System Judges
2 and the proceedings under this Act.

3 (n) REMOVAL OR SANCTION.—The Attorney General
4 and the Chairman acting jointly may sanction or remove
5 an Electronic Payment System Judge for violation of the
6 standards of conduct adopted under subsection (m), mis-
7 conduct, neglect of duty, or any disqualifying physical or
8 mental disability. Any such sanction or removal may be
9 made only after notice and opportunity for a hearing. The
10 Attorney General and the Chairman may suspend an Elec-
11 tronic Payment System Judge during the pendency of
12 such a hearing. The Attorney General and the Chairman
13 shall appoint an interim Electronic Payment System
14 Judge during the period of any suspension under this sub-
15 section.

16 **SEC. 5. PROCEEDINGS OF ELECTRONIC PAYMENT SYSTEM**
17 **JUDGES.**

18 (a) PROCEEDINGS.—

19 (1) IN GENERAL.—The Electronic Payment
20 System Judges shall act in accordance with regula-
21 tions issued by the Electronic Payment System
22 Judges, the Attorney General, and the Chairman,
23 and on the basis of a written record, prior deter-
24 minations and interpretations of the Electronic Pay-

1 ment System Judges under this Act, and decisions
2 of the court of appeals of the United States.

3 (2) JUDGES ACTING AS PANEL AND INDIVID-
4 UALLY.—The Electronic Payment System Judges
5 shall preside over hearings in proceedings under this
6 Act en banc. The Chief Electronic Payment System
7 Judge may designate an Electronic Payment System
8 Judge to preside individually over such collateral
9 and administrative proceedings as the Chief Judge
10 considers appropriate.

11 (b) PROCEDURES.—

12 (1) COMMENCEMENT.—The Electronic Payment
13 System Judges shall cause to be published in the
14 Federal Register a notice of commencement of pro-
15 ceedings under section 3(c) to establish fees and
16 terms for access to a covered electronic payment sys-
17 tem.

18 (2) MANDATORY NEGOTIATION PERIOD.—

19 (A) IN GENERAL.—Promptly after the
20 commencement of a proceeding under section
21 3(c) to establish fees and terms for access to a
22 covered electronic payment system, the Elec-
23 tronic Payment System Judges shall initiate a
24 period for negotiations for the purpose of
25 achieving a voluntarily negotiated access agree-

1 ment. Nothing in this paragraph shall preclude
2 the proceeding parties or any members thereof
3 from conducting negotiations before or after the
4 mandatory negotiation period for the purpose of
5 achieving a voluntarily negotiated access agree-
6 ment.

7 (B) LENGTH.—The period for negotiations
8 initiated under subparagraph (A) shall be 3
9 months.

10 (C) DETERMINATION OF NEED FOR FUR-
11 THER PROCEEDINGS.—At the close of the pe-
12 riod for negotiations initiated under subpara-
13 graph (A), the Electronic Payment System
14 Judges shall determine if further proceedings
15 under this Act are necessary.

16 (3) PROCEEDING PARTIES IN FURTHER PRO-
17 CEEDINGS.—

18 (A) IN GENERAL.—In any further pro-
19 ceeding ordered by the Electronic Payment Sys-
20 tem Judges under paragraph (2)(C), there shall
21 be only 2 proceeding parties, 1 consisting of all
22 providers of the covered electronic payment sys-
23 tem and the other consisting of all merchants
24 that have access to or seek access to the cov-
25 ered electronic payment system. Each pro-

1 proceeding party shall bear its own costs. A pro-
2 vider of a covered electronic payment system or
3 a merchant that has access to or seeks access
4 to the covered electronic payment system may
5 choose not to participate in the proceeding as a
6 member of a proceeding party, but unless such
7 provider or merchant executes a voluntarily ne-
8 gotiated access agreement, such provider or
9 merchant shall be bound by the determination
10 of the Electronic Payment System Judges with
11 regard to the fees and terms for access to the
12 covered electronic payment system.

13 (B) RULE OF CONSTRUCTION.—Nothing in
14 this paragraph may be construed to prohibit the
15 proceeding parties or any members thereof in a
16 proceeding under subparagraph (A) from nego-
17 tiating and entering into a voluntarily nego-
18 tiated access agreement at any other time.

19 (4) REGULATIONS.—

20 (A) AUTHORIZATION.—

21 (i) IN GENERAL.—The Electronic
22 Payment System Judges may issue regula-
23 tions to carry out the duties of the Elec-
24 tronic Payment System Judges under this
25 Act. All regulations issued by the Elec-

1 tronic Payment System Judges are subject
2 to the approval of the Attorney General
3 and the Chairman. Not later than 120
4 days after the date on which all Electronic
5 Payment System Judges are appointed
6 under section 4(h)(1), the Electronic Pay-
7 ment System Judges shall issue regula-
8 tions to govern proceedings under this sub-
9 section. In setting these regulations, the
10 Electronic Payment System Judges shall
11 consider the regulations issued by the
12 Copyright Royalty Judges under section
13 803(b)(6) of title 17, United States Code.

14 (ii) SCOPE.—The regulations issued
15 under clause (i) shall include regulations
16 regarding the procedures described in sub-
17 paragraph (B).

18 (B) PROCEDURES.—

19 (i) WRITTEN DIRECT STATEMENTS.—
20 The written direct statements of the pro-
21 ceeding parties shall be filed by a date
22 specified by the Electronic Payment Sys-
23 tem Judges, which may be not earlier than
24 4 months, and not later than 5 months,
25 after the end of the voluntary negotiation

1 period under paragraph (2). Notwith-
2 standing the preceding sentence, the Elec-
3 tronic Payment System Judges may allow
4 a proceeding party to file an amended writ-
5 ten direct statement based on new infor-
6 mation received during the discovery proc-
7 ess, not later than 15 days after the end
8 of the discovery period specified in clause
9 (ii).

10 (ii) DISCOVERY SCHEDULE.—Fol-
11 lowing the submission to the Electronic
12 Payment System Judges of written direct
13 statements by the proceeding parties, the
14 Electronic Payment System Judges shall
15 meet with the proceeding parties to set a
16 schedule for conducting and completing
17 discovery. Such schedule shall be deter-
18 mined by the Electronic Payment System
19 Judges. Discovery in such proceedings
20 shall be permitted for a period of not
21 longer than 60 days, except for discovery
22 ordered by the Electronic Payment System
23 Judges in connection with the resolution of
24 motions, orders, and disputes pending at
25 the end of such period.

1 (iii) INITIAL DISCLOSURES.—

2 (I) IN GENERAL.—In a pro-
3 ceeding under this Act to determine
4 fees and terms for access to a covered
5 electronic payment system, certain
6 persons shall make initial disclosures
7 not later than 30 days after the date
8 of commencement of the proceeding,
9 in accordance with this clause.

10 (II) ISSUERS, ACQUIRERS, AND
11 OWNERS.—Any person who is 1 of the
12 10 largest issuers for a covered elec-
13 tronic payment system in terms of
14 number of cards issued, any person
15 who is 1 of the 10 largest acquirers
16 for a covered electronic payment sys-
17 tem based on dollar amount of trans-
18 actions made by merchants they serve,
19 and any person who owns or controls
20 the relevant covered electronic pay-
21 ment system and establishes the terms
22 and conditions through which issuers
23 and acquirers participate in the cov-
24 ered electronic payment system, shall
25 produce to the Electronic Payment

1 System Judges and to both pro-
2 ceedings parties—

3 (aa) an itemized list of the
4 costs necessary to operate the
5 covered electronic payment sys-
6 tem that were incurred by the
7 person during the most recent
8 full calendar year before the initi-
9 ation of the proceeding; and

10 (bb) any access agreement
11 between that person and 1 or
12 more merchants with regard to
13 that covered electronic payment
14 system.

15 (III) MERCHANTS.—Any person
16 who is 1 of the 10 largest merchants
17 using the relevant covered electronic
18 payment system, determined based on
19 dollar amount of transactions made
20 with the covered electronic payment
21 system, shall produce to the Elec-
22 tronic Payment System Judges and to
23 both proceeding parties—

24 (aa) an itemized list of the
25 costs necessary to access the elec-

1 tronic payment system during the
2 most recent full calendar year
3 prior to the initiation of the pro-
4 ceeding; and

5 (bb) any access agreement
6 between that person and 1 or
7 more providers with regard to
8 that covered electronic payment
9 system.

10 (IV) DISAGREEMENT.—Any dis-
11 agreement regarding whether a person
12 is required to make an initial disclo-
13 sure under this clause, or the contents
14 of such a disclosure, shall be resolved
15 by the Electronic Payment System
16 Judges.

17 (iv) DEPOSITIONS.—

18 (I) IN GENERAL.—In a pro-
19 ceeding under this Act to determine
20 fees and terms for access to a covered
21 electronic payment system, each pro-
22 ceeding party shall be permitted to
23 take depositions of every witness iden-
24 tified by the other proceeding party.
25 Except as provided in subclause (III),

1 each proceeding party also shall be
2 permitted to take 5 additional deposi-
3 tions in the entire proceeding.

4 (II) ORGANIZATIONAL ENTI-
5 TIES.—A deposition notice or sub-
6 poena may name as the deponent a
7 person who is an individual or a per-
8 son who is not an individual. Such
9 deposition notice or subpoena shall de-
10 scribe with reasonable particularity
11 the matters on which examination is
12 requested. If the deposition notice or
13 subpoena names a person who is not
14 an individual, the deponent person so
15 named shall designate 1 or more offi-
16 cers, directors, or managing agents, or
17 other individual persons who consent
18 to testify on behalf of the deponent
19 person, and may set forth, for each
20 individual person designated, the mat-
21 ters on which the individual person
22 will testify. A subpoena shall advise a
23 nonparty deponent person of the duty
24 of the deponent person to make such
25 a designation. An individual person

1 designated under this subclause shall
2 testify as to matters known or reason-
3 ably available to the deponent person.

4 (III) ADDITIONAL DEPOSI-
5 TIONS.—The Electronic Payment Sys-
6 tem Judges may increase the per-
7 mitted number of depositions for good
8 cause in exceptional circumstances,
9 and shall resolve any disputes among
10 persons within either proceeding party
11 regarding the allocation of the deposi-
12 tions permitted under this clause.

13 (v) WRITTEN DISCOVERY.—In a pro-
14 ceeding under this Act to determine fees
15 and terms for access to a covered elec-
16 tronic payment system, each proceeding
17 party shall be permitted to serve written
18 discovery requests on 10 persons. These
19 written discovery requests may include re-
20 quests for production or inspection, a total
21 of no more than 10 requests for admission
22 in the entire proceeding, and a total of no
23 more than 25 interrogatories in the entire
24 proceeding. The Electronic Payment Sys-
25 tem Judges may increase the permitted

1 number of requests for admission or inter-
2 rogatories for good cause in exceptional
3 circumstances, and shall resolve any dis-
4 putes among persons within either pro-
5 ceeding party regarding the allocation of
6 the requests for admission or interro-
7 gatories permitted under this clause.

8 (vi) SUBPOENAS.—Upon the request
9 of a party to a proceeding to determine
10 fees and terms for access to a covered elec-
11 tronic payment system, the Electronic Pay-
12 ment System Judges may issue a subpoena
13 commanding a person to appear and give
14 testimony, or to produce and permit in-
15 spection of documents or tangible things, if
16 the resolution of the proceeding by the
17 Electronic Payment System Judges may be
18 substantially impaired by the absence of
19 such testimony or production of documents
20 or tangible things. A subpoena under this
21 clause shall specify with reasonable par-
22 ticularity the materials to be produced or
23 the scope and nature of the required testi-
24 mony. Nothing in this clause shall preclude
25 the Electronic Payment System Judges

1 from requesting the production by a person
2 of information or materials relevant to the
3 resolution by the Electronic Payment Sys-
4 tem Judges of a material issue of fact.

5 (vii) OBJECTIONS TO DISCOVERY RE-
6 QUESTS.—

7 (I) IN GENERAL.—Any objection
8 to a request or subpoena under clause
9 (v) or (vi) shall be resolved by a mo-
10 tion or request to compel production
11 made to the Electronic Payment Sys-
12 tem Judges in accordance with regula-
13 tions adopted by the Electronic Pay-
14 ment System Judges. Each motion or
15 request to compel discovery shall be
16 determined by the Electronic Payment
17 System Judges, or by an Electronic
18 Payment System Judge when per-
19 mitted under subsection (a)(2). Upon
20 such motion or request to compel dis-
21 covery, the Electronic Payment Sys-
22 tem Judges may order discovery
23 under regulations established under
24 this paragraph.

1 (II) CONSIDERATIONS.—In deter-
2 mining whether discovery will be
3 granted under this clause, the Elec-
4 tronic Payment System Judges may
5 consider—

6 (aa) whether the burden or
7 expense of producing the re-
8 quested information or materials
9 outweighs the likely benefit, tak-
10 ing into account the needs and
11 resources of the proceeding par-
12 ties, the importance of the issues
13 at stake, and the probative value
14 of the requested information or
15 materials in resolving such
16 issues;

17 (bb) whether the requested
18 information or materials would
19 be unreasonably cumulative or
20 duplicative, or are obtainable
21 from another source that is more
22 convenient, less burdensome, or
23 less expensive; and

24 (cc) whether the proceeding
25 party seeking discovery has had

1 ample opportunity by discovery in
2 the proceeding or by other means
3 to obtain the information sought.

4 (viii) VOLUNTARILY NEGOTIATED AC-
5 CESS AGREEMENTS.—In proceedings to de-
6 termine fees and terms for access to a cov-
7 ered electronic payment system, the Elec-
8 tronic Payment System Judges shall make
9 available to the proceeding parties all docu-
10 ments filed under section 3(c)(1).

11 (ix) SETTLEMENT CONFERENCE.—
12 The Electronic Payment System Judges
13 shall order a settlement conference between
14 the proceeding parties to facilitate the
15 presentation of offers of settlement be-
16 tween the parties. The settlement con-
17 ference shall be held during the 21-day pe-
18 riod beginning on the date on which the
19 discovery period ends and shall take place
20 outside the presence of the Electronic Pay-
21 ment System Judges.

22 (x) DIRECT AND REBUTTAL HEAR-
23 INGS.—At the conclusion of the 21-day pe-
24 riod described in clause (ix), the Electronic
25 Payment System Judges shall determine if

1 further proceedings under this Act are nec-
2 essary. If the Electronic Payment System
3 Judges determine further proceedings
4 under this Act are necessary, the Elec-
5 tronic Payment System Judges shall
6 schedule a direct hearing of not more than
7 30 court days and a rebuttal hearing of
8 not more than 20 court days during which
9 both proceeding parties will be allowed to
10 offer witness testimony and documents.

11 (xi) SPONSORING WITNESSES.—No
12 evidence, including exhibits, may be sub-
13 mitted in the written direct statement or
14 written rebuttal statement of a proceeding
15 party without a sponsoring witness, except
16 for—

17 (I) requests for admission that
18 have been admitted by the receiving
19 proceeding party;

20 (II) evidence of which the Elec-
21 tronic Payment System Judges have
22 taken official notice;

23 (III) incorporation by reference
24 of past records; or

25 (IV) good cause shown.

1 (xii) HEARSAY.—Hearsay may be ad-
2 mitted in proceedings under this Act to the
3 extent determined relevant and reliable by
4 the Electronic Payment System Judges.

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

10 (5) PENALTIES FOR FAILURE TO COMPLY WITH
11 A DISCOVERY REQUEST.—

12 (A) FAILURE TO COMPLY.—A person has
13 failed to comply with a discovery request if the
14 person, or an employee or agent of the person,
15 fails, without substantial justification, to—

16 (i) make initial disclosures required
17 under paragraph (4)(B)(iii);

18 (ii) be sworn or answer a question as
19 a deponent after being directed to do so by
20 the Electronic Payment System Judges
21 under clause (iv) or (vi) of paragraph
22 (4)(B);

23 (iii) answer an interrogatory sub-
24 mitted under paragraph (4)(B)(v);

1 (iv) produce nonprivileged documents
2 requested under clause (v) or (vi) of para-
3 graph (4)(B); or

4 (v) admit the genuineness of any doc-
5 ument or the truth of any matter as re-
6 quested under paragraph (4)(B)(v), and
7 the person requesting the admissions
8 thereafter proves the genuineness of the
9 document or the truth of the matter.

10 (B) FALSE OR MISLEADING RESPONSES.—

11 For purposes of this Act, any disclosure, an-
12 swer, or response that is false or substantially
13 misleading, evasive, or incomplete shall be
14 deemed a failure to comply with a discovery re-
15 quest.

16 (C) 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 proceeding party seeking discovery and
25 obtaining the order.

1 (D) CIVIL PENALTY.—

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

10 (ii) NOTICE AND HEARINGS.—No civil
11 penalty may be assessed under this sub-
12 paragraph except under 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 under this subparagraph, the Elec-
22 tronic Payment System Judges shall take
23 into account the nature, circumstances, ex-
24 tent, and gravity of the violation or viola-
25 tions and, with respect to the violator, abil-

1 ity to pay, any prior history of such viola-
2 tions, the degree of culpability, economic
3 benefit or savings (if any) resulting from
4 the violation, and such other matters as
5 justice may require.

6 (iv) REVIEW.—Any person who re-
7 quested a hearing with respect to a civil
8 penalty under this subparagraph and who
9 is 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 not later than 30 days after the date
15 on which the order making such assess-
16 ment was issued. The United States Court
17 of Appeals for the District of Columbia
18 Circuit shall have jurisdiction to enter a
19 judgment affirming, modifying, or setting
20 aside in whole or in part, an order of the
21 Electronic Payment System Judges under
22 this subparagraph, or the court may re-
23 mand the proceeding to the Electronic
24 Payment System Judges for such further
25 action as the court may direct. The Attor-

1 ney General shall represent the Electronic
2 Payment System Judges before the court.

3 (v) ENFORCEMENT.—If any person
4 fails to pay an assessment of a civil pen-
5 alty after the civil penalty has become a
6 final and unappealable order or after the
7 appropriate court has entered final judg-
8 ment, the Electronic Payment System
9 Judges shall request the Attorney General
10 to institute a civil action in an appropriate
11 district court of the United States to col-
12 lect the penalty, and such court shall have
13 jurisdiction to hear and decide any such
14 action. In hearing such action, the court
15 shall have authority to review the violation
16 and the assessment of the civil penalty on
17 the record.

18 (c) DETERMINATION OF ELECTRONIC PAYMENT SYS-
19 TEM JUDGES.—

20 (1) TIMING.—The Electronic Payment System
21 Judges shall issue a determination in a proceeding
22 not later than the earlier of—

23 (A) 11 months after the end of the 21-day
24 settlement conference period under subsection
25 (b)(4)(B)(ix); or

1 (B) 15 days before the date on which the
2 fees and terms in effect for the relevant covered
3 electronic payment system expire.

4 (2) DETERMINATION.—

5 (A) FILING OF FINAL OFFER.—Before the
6 commencement of a direct hearing in a pro-
7 ceeding under subsection (b)(4)(B)(x), each
8 proceeding party shall file with the Electronic
9 Payment System Judges and with the other
10 proceeding party a final offer of fees and terms
11 for access to the covered electronic payment
12 system. A proceeding party may not amend a
13 final offer submitted under this subparagraph,
14 except with the express consent of the Elec-
15 tronic Payment System Judges and the other
16 proceeding party.

17 (B) SELECTION BETWEEN FINAL OF-
18 FERS.—After the conclusion of the direct hear-
19 ing and rebuttal hearing, the Electronic Pay-
20 ment System Judges shall make their deter-
21 mination by selecting 1 of the 2 final offers
22 filed by the proceeding parties. The Electronic
23 Payment System Judges shall make their selec-
24 tion in accordance with the standards described
25 in section 3(e)(3)(C).

1 (C) VOTING AND DISSENTING OPINIONS.—

2 A final determination of the Electronic Pay-
3 ment System Judges in a proceeding under this
4 Act shall be made by majority vote. An Elec-
5 tronic Payment System Judge dissenting from
6 the majority on any determination under this
7 Act may issue a dissenting opinion, which shall
8 be included with the determination.

9 (3) REHEARINGS.—

10 (A) IN GENERAL.—The Electronic Pay-
11 ment System Judges may, in exceptional cases,
12 upon motion of a proceeding party, order a re-
13 hearing, after the determination in the pro-
14 ceeding is issued under paragraph (2), on such
15 matters as the Electronic Payment System
16 Judges determine to be appropriate.

17 (B) TIMING FOR FILING MOTION.—Any
18 motion for a rehearing under subparagraph (A)
19 shall be filed not later than 15 days after the
20 date on which the Electronic Payment System
21 Judges deliver to the parties in the proceeding
22 their initial determination concerning fees and
23 terms.

24 (C) PARTICIPATION BY OPPOSING PARTY
25 NOT REQUIRED.—In any case in which a re-

1 hearing is ordered under this paragraph, any
2 opposing proceeding party shall not be required
3 to participate in the rehearing, except that non-
4 participation may give rise to the limitations
5 with respect to judicial review provided for in
6 subsection (d)(1).

7 (D) NO NEGATIVE INFERENCE.—The Elec-
8 tronic Payment System Judges may not draw a
9 negative inference from lack of participation in
10 a rehearing.

11 (E) CONTINUITY OF FEES AND TERMS.—

12 (i) IN GENERAL.—If the decision of
13 the Electronic Payment System Judges on
14 any motion for a rehearing is not rendered
15 before the expiration of the fees and terms
16 in effect for the relevant covered electronic
17 payment system, in the case of a pro-
18 ceeding to determine successor fees and
19 terms for fees and terms that expire on a
20 specified date, the initial determination of
21 the Electronic Payment System Judges
22 that is the subject of the rehearing motion
23 shall be effective as of the day following
24 the date on which the fees and terms that
25 were previously in effect expire.

1 (ii) FEE PAYMENTS.—The pendency
2 of a motion for a rehearing under this
3 paragraph shall not relieve a person obli-
4 gated to make fee payments for access to
5 a covered electronic payment system who
6 would be affected by the determination on
7 that motion from paying the fees required
8 and complying with the terms under the
9 relevant determination.

10 (iii) OVERPAYMENTS AND UNDERPAY-
11 MENTS.—Notwithstanding clause (ii), if
12 fees described in clause (ii) are paid—

13 (I) the recipient of such fees
14 shall, not later than 60 days after the
15 date on which the motion for rehear-
16 ing is resolved or, if the motion is
17 granted, 60 days after the date on
18 which the rehearing is concluded, re-
19 turn any excess fees described in
20 clause (ii), to the extent necessary to
21 comply with the final determination
22 by the Electronic Payment System
23 Judges of fees and terms for access to
24 the covered electronic payment sys-
25 tem; and

1 (II) a person obligated to make
2 fee payments shall, not later than 60
3 days after the date on which the mo-
4 tion for rehearing is resolved or, if the
5 motion is granted, 60 days after the
6 date on which the rehearing is con-
7 cluded, pay the recipient the amount
8 of any underpayment of fees described
9 in clause (ii), to the extent necessary
10 to comply with the final determination
11 by the Electronic Payment System
12 Judges of fees and terms for access to
13 the covered electronic payment sys-
14 tem.

15 (4) CONTENTS OF DETERMINATION.—A deter-
16 mination of the Electronic Payment System Judges
17 shall establish the fees and terms for access to the
18 relevant covered electronic payment system, shall be
19 supported by the written record, and shall set forth
20 the findings of fact relied on by the Electronic Pay-
21 ment System Judges. The Electronic Payment Sys-
22 tem Judges shall make publicly available in their en-
23 tirety all determinations issued under this para-
24 graph.

1 (5) CONTINUING JURISDICTION.—The Elec-
2 tronic Payment System Judges may, with the ap-
3 proval of the Attorney General and the Chairman,
4 issue an amendment to a written determination to
5 correct any technical or clerical errors in the deter-
6 mination in response to unforeseen circumstances
7 that would frustrate the proper implementation of
8 such determination. Such amendment shall be set
9 forth in a written addendum to the determination
10 that shall be distributed to the proceeding parties
11 and shall be published in the Federal Register.

12 (6) PROTECTIVE ORDER.—The Electronic Pay-
13 ment System Judges may issue such orders as may
14 be appropriate to protect confidential information,
15 including orders excluding confidential information
16 from the record of the determination that is pub-
17 lished or made available to the public, except that
18 any fees and terms of an access agreement, includ-
19 ing voluntarily negotiated access agreements filed
20 under section 3(c)(1), may not be excluded from
21 publication.

22 (7) PUBLICATION OF DETERMINATION.—Not
23 later than 60 days after the date on which the Elec-
24 tronic Payment System Judges issue a determina-
25 tion under this subsection, the Attorney General and

1 the Chairman shall cause the determination, and
2 any corrections thereto, to be published in the Fed-
3 eral Register. The Electronic Payment System
4 Judges also shall publicize the determination and
5 any corrections in such other manner as the Attor-
6 ney General and the Chairman consider appropriate,
7 including publication on the Internet. The Electronic
8 Payment System Judges also shall make the deter-
9 mination, corrections, and the accompanying record
10 available for public inspection and copying.

11 (8) LATE PAYMENT.—A determination of Elec-
12 tronic Payment System Judges—

13 (A) may include terms with respect to late
14 payment; and

15 (B) may not include any provision in such
16 terms described in subparagraph (A) that pre-
17 vents a provider of a covered electronic payment
18 system from asserting other rights or remedies
19 provided under this Act.

20 (d) JUDICIAL REVIEW.—

21 (1) APPEAL.—Any determination of the Elec-
22 tronic Payment System Judges under subsection (c)
23 may, not later than 30 days after the date of publi-
24 cation of the determination in the Federal Register,
25 be appealed, to the United States Court of Appeals

1 for the District of Columbia Circuit, by any ag-
2 grievied member of a proceeding party under this Act
3 who would be bound by the determination. Any pro-
4 ceeding party that did not participate in a rehearing
5 may not raise any issue that was the subject of that
6 rehearing at any stage of judicial review of the hear-
7 ing determination. If no appeal is brought within the
8 30-day period under this paragraph, the determina-
9 tion of the Electronic Payment System Judges shall
10 be final, and shall take effect as described in para-
11 graph (2).

12 (2) EFFECT OF FEES AND TERMS.—

13 (A) FEE PAYMENTS.—The pendency of an
14 appeal under this subsection shall not relieve a
15 person obligated to make fee payments for ac-
16 cess to a covered electronic payment system
17 who would be affected by the determination on
18 appeal from paying the fees required and com-
19 plying with the terms under the relevant deter-
20 mination or regulations.

21 (B) OVERPAYMENTS AND UNDERPAY-
22 MENTS.—Notwithstanding subparagraph (A), if
23 fees described in subparagraph (A) are paid—

24 (i) the recipient of such fees shall, not
25 later than 60 days after the date on which

1 the appeal is resolved return any excess
2 fees described in subparagraph (A) (and
3 interest thereon, if ordered under para-
4 graph (3)), to the extent necessary to com-
5 ply with the final determination of fees and
6 terms on appeal; and

7 (ii) a person obligated to make fee
8 payments shall, not later than 60 days
9 after the date on which the appeal is re-
10 solved, pay the recipient the amount of any
11 underpayment of fees described in sub-
12 paragraph (A) (and interest thereon, if or-
13 dered under paragraph (3)), to the extent
14 necessary to comply with the final deter-
15 mination of fees and terms on appeal.

16 (3) JURISDICTION OF COURT.—If the United
17 States Court of Appeals for the District of Columbia
18 Circuit, under section 706 of title 5, United States
19 Code, modifies or vacates a determination of the
20 Electronic Payment System Judges, the court may
21 enter its own determination with respect to the
22 amount or distribution of fees and costs, and order
23 the repayment of any excess fees, the payment of
24 any underpaid fees, and the payment of interest per-
25 taining respectively thereto, in accordance with its

1 final judgment. The court also may vacate the deter-
2 mination of the Electronic Payment System Judges
3 and remand the case to the Electronic Payment Sys-
4 tem Judges for further proceedings.

5 (e) AUTHORIZATION OF APPROPRIATIONS.—There
6 are authorized to be appropriated such sums as may be
7 necessary to carry out this Act.

8 **SEC. 6. INSTITUTION OF PROCEEDINGS BEFORE ELEC-**
9 **TRONIC PAYMENT SYSTEM JUDGES.**

10 (a) INITIAL PROCEEDINGS.—

11 (1) TIMING.—Proceedings under this Act shall
12 be commenced as soon as practicable after the date
13 of enactment of this Act to establish fees and terms
14 for access to covered electronic payment systems
15 under section 3(c), which shall be effective during
16 the period beginning on January 1, 2011, and end-
17 ing on December 31, 2012. The Electronic Payment
18 System Judges shall cause notice of commencement
19 of such proceedings to be published in the Federal
20 Register.

21 (2) PROCEDURES SPECIFIC TO THE INITIAL
22 PROCEEDINGS.—

23 (A) DISCOVERY PERIOD.—Notwithstanding
24 section 5(b)(4)(B)(ii), discovery in the initial
25 proceedings described in paragraph (1) shall be

1 permitted for a period of 90 days, except for
2 discovery ordered by the Electronic Payment
3 System Judges in connection with the resolu-
4 tion of motions, orders, and disputes pending at
5 the end of such period.

6 (B) CONSIDERATION OF CHANGES IN FEES
7 AND TERMS BETWEEN DATE OF ENACTMENT
8 AND INITIAL DETERMINATION.—In establishing
9 the fees and terms under section 3(c) for access
10 to covered electronic payment systems, to be ef-
11 fective during the period beginning on January
12 1, 2011, and ending on December 31, 2012, the
13 Electronic Payment System Judges shall con-
14 sider changes in fees and terms made by a cov-
15 ered electronic payments system between the
16 date of enactment of this Act and such initial
17 determination. Based upon such consideration,
18 the Electronic Payment System Judges may ad-
19 just the fees established for the period begin-
20 ning on January 1, 2011, and ending on De-
21 cember 31, 2012, to reflect the economic impact
22 such changes had on the parties.

23 (b) SUBSEQUENT PROCEEDINGS.—After completion
24 of the proceedings required under subsection (a), pro-
25 ceedings under section 3(c) to establish fees and terms for

1 access to covered electronic payment systems shall be com-
2 menced in 2011, and every 3 years thereafter.

3 **SEC. 7. GENERAL RULE FOR VOLUNTARILY NEGOTIATED**
4 **ACCESS AGREEMENTS.**

5 (a) IN GENERAL.—Any fees or terms described in
6 subsection (b) shall remain in effect for such period of
7 time as would otherwise apply to fees and terms estab-
8 lished under this Act, except that the Electronic Payment
9 System Judges shall adjust any such fees to reflect infla-
10 tion during any additional period the fees remain in effect
11 beyond that contemplated in the voluntarily negotiated ac-
12 cess agreement.

13 (b) FEES AND TERMS.—The fees or terms described
14 in this subsection are fees or terms for access to a covered
15 electronic payment system under this Act that—

16 (1) are agreed upon as part of a voluntarily ne-
17 gotiated access agreement for a period shorter than
18 would otherwise apply under a determination under
19 this Act; and

20 (2) are adopted by the Electronic Payment Sys-
21 tem Judges as part of a determination under this
22 Act.

○