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(Original Signature of Member)

111TH CONGRESS
1ST SESSION

H. R. _____

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

Mr. CONYERS (for himself and _____) introduced the following bill; which was referred to the Committee on _____

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".

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 laws” has the meaning given it
22 in subsection (a) of the first section of the Clayton
23 Act (15 U.S.C. 12(a)), except that such term in-
24 cludes section 5 of the Federal Trade Commission
25 Act (15 U.S.C. 45) to the extent such section 5 ap-

1 plies to unfair methods of competition as well as any
2 similar State law.

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

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

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

21 (7) “Electronic payment system” means the
22 proprietary services and infrastructure that route in-
23 formation and data to facilitate transaction author-
24 ization, clearance, and settlement that merchants
25 must access in order to accept a specific brand of

1 general-purpose credit cards and/or debit cards as
2 payment for goods and services.

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

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

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

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

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

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

4 (14) “Provider” means any person who owns,
5 operates, controls, serves as an issuer for, or serves
6 as an acquirer for a covered electronic payment sys-
7 tem.

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

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

16 (17) “Voluntarily negotiated access agreement”
17 means an executed agreement voluntarily negotiated
18 between 1 or more providers of a single covered elec-
19 tronic payment system and 1 or more merchants
20 that sets the rates and terms pursuant to which the
21 1 or more merchants can access that covered elec-
22 tronic payment system to accept credit cards and/or
23 debit cards from consumers for payment of goods
24 and services, and receive payment for such goods
25 and services.

1 (b) LIMITED ANTITRUST IMMUNITY FOR NEGOTIA-
2 TION OF ACCESS RATES AND TERMS TO COVERED ELEC-
3 TRONIC PAYMENT SYSTEMS.—(1) Except as provided in
4 paragraph (2) and notwithstanding any provision of the
5 antitrust laws, in negotiating access rates and terms any
6 providers of a single covered electronic payment system
7 and any merchants may jointly negotiate and agree upon
8 the rates and terms for access to the covered electronic
9 payment system, including through the use of common
10 agents that represent either providers of a single covered
11 electronic payment system or merchants on a non-exclu-
12 sive basis. Any providers of a single covered electronic pay-
13 ment system also may jointly determine the proportionate
14 division among themselves of paid access fees.

15 (2) Notwithstanding any other provision of this Act,
16 the immunity otherwise applicable under paragraph (1)
17 shall not apply to a provider of a single covered electronic
18 payment system, or to a merchant, during any period in
19 which such provider, or such merchant, is engaged in—

20 (A) any unlawful boycott;

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

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

1 (D) any exchange of information with, or agree-
2 ment with, a competitor relating to the allocation of
3 revenues lost or redistribution of savings gained
4 from a voluntarily negotiated access agreement if
5 such information or agreement is not reasonably re-
6 quired to carry out the negotiations and agreements
7 described under paragraph (1).

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

21 (d) FACILITATION OF NEGOTIATION.—

22 (1) SCHEDULE.—Within 1 month following en-
23 actment of this Act, the negotiating parties shall file
24 with the Attorney General a schedule for negotia-
25 tions. If the negotiating parties do not file such a

1 schedule within 1 month from the date of enact-
2 ment, the Attorney General shall issue such a sched-
3 ule. In either case, the Attorney General shall make
4 the schedule available to all negotiating parties.

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

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

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

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

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

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

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

17 (5) DISAGREEMENT.—Any disagreement re-
18 garding whether a person is required to make an ini-
19 tial disclosure under this clause, or the contents of
20 such a disclosure, shall be resolved by the Attorney
21 General.

22 (6) ATTENDANCE OF THE DEPARTMENT OF
23 JUSTICE.—A representative of the Attorney General
24 shall attend all negotiation sessions conducted under
25 the authority of this section.

1 (e) TRANSPARENCY OF VOLUNTARILY NEGOTIATED
2 ACCESS AGREEMENTS.—

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

9 (2) FILING AGREEMENTS WITH THE ATTORNEY
10 GENERAL.—The negotiating parties shall jointly file
11 with the Attorney General a clear intelligible copy
12 of—

13 (A) any voluntarily negotiated access
14 agreement that affects any market in the
15 United States or elsewhere;

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

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

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

23 (E) any documentation relating to a volun-
24 tarily negotiated access agreement evidencing
25 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
7 United States under such agreement; and

8 (G) any amendments to that voluntarily
9 negotiated access agreement or documentation.

10 (3) TIMING AND AVAILABILITY OF FILINGS.—

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

23 (f) REPORT TO CONGRESS BY THE ATTORNEY GEN-
24 ERAL.—Within 7 months after the date of enactment of
25 this Act, the Attorney General shall transmit to the House

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

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

20 **SEC. 3. OPT-OUT.**

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

1 **SEC. 4. EFFECTIVE DATE.**

2 This Act shall take effect on the date of the enact-
3 ment of this Act.