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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Credit Card Fair Fee Act of 2009”.

SEC. 2. DEFINITIONS.

In this Act:

(1) Access.—The term “access”—

(A) when used as a verb means to use to conduct transaction authorization, clearance,
and settlement involving the acceptance of credit cards or debit cards from consumers for payment for goods or services and the receipt of payment for such goods or services; and

(B) when used as a noun means the permission or authority to use to conduct transactions described in subparagraph (A).

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

(3) ACQUIRER.—The term “acquirer”—

(A) means a financial institution that provides services allowing merchants to access an electronic payment system to accept credit cards or debit cards for payment; and

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

(4) ADJUDICATION.—The term “adjudication” has the meaning given that term in section 551 of
title 5, United States Code, and does not include mediation.

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

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

(B) includes—

(i) section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent section 5 applies to unfair methods of competition; and

(ii) State antitrust laws.

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

(7) **COVERED ELECTRONIC PAYMENT SYSTEM.**—The term “covered electronic payment system” means an electronic payment system that routes information and data to facilitate transaction authorization, clearance, and settlement for not less than 10 percent of the combined dollar value of credit card or debit card payments processed in the United States in the most recent full calendar year.

(8) **CREDIT CARD.**—The term “credit card” means any general-purpose card or other credit de-
vice issued or approved for use by a financial institution for use in allowing the cardholder to obtain goods or services on credit on terms specified by that financial institution.

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

(10) **Electronic Payment System.**—The term “electronic payment system” means the proprietary services, infrastructure, and software that route information and data to facilitate transaction authorization, clearance, and settlement and that merchants are required to access in order to accept a specific brand of general-purpose credit cards or debit cards as payment for goods or services.

(11) **Electronic Payment System Judges.**—The term “Electronic Payment System Judges” means the Electronic Payment System Judges appointed under section 4(a).

(12) **Fees.**—The term “fees” means any monetary charges, rates, assessments, or other payments
imposed by a provider upon a merchant for the merchant to access an electronic payment system.

(13) **FINANCIAL INSTITUTION.**—The term “financial institution” has the meaning given that term in section 603(t) of the Fair Credit Reporting Act (15 U.S.C. 1681a(t)).

(14) **ISSUER.**—The term “issuer”—

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

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

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

(16) **MERCHAND.**—The term “merchant” means any person who accepts or who seeks to accept credit cards or debit cards in payment for goods or services provided by the person.
(17) Negotiating Party.—The term “negotiating party” means 1 or more providers of a covered electronic payment system or 1 or more merchants who have access to or who are seeking access to that covered electronic payment system, as the case may be, and who are in the process of negotiating or who have executed a voluntarily negotiated access agreement that is still in effect.

(18) Normal Rate of Return.—The term “normal rate of return” means the average rate of return that a firm would receive in an industry when conditions of perfect competition prevail.

(19) Proceeding Party.—The term “proceeding party” means collectively all providers of a covered electronic payment system or collectively all merchants who have access to or who are seeking access to that covered electronic payment system, as the case may be, during the period in which the Electronic Payment System Judges are conducting a proceeding under this Act relating to that covered electronic payment system.

(20) Person.—The term “person” has the meaning given that term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).
(21) **PROVIDER.**—The term “provider” means any person who owns, operates, controls, serves as an issuer for, or serves as an acquirer for a covered electronic payment system.

(22) **STATE.**—The term “State” has the meaning given that term in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

(23) **TERMS.**—The term “terms” means any and all rules and conditions that are applicable to providers of an electronic payment system or to merchants, as the case may be, and that are required in order for merchants to access that electronic payment system.

(24) **VOLUNTARILY NEGOTIATED ACCESS AGREEMENT.**—The term “voluntarily negotiated access agreement” means an access agreement voluntarily negotiated between 1 or more providers of a covered electronic payment system and 1 or more merchants that sets the fees and terms under which the merchant can access that covered electronic payment system.

(25) **WRITTEN DIRECT STATEMENTS.**—The term “written direct statements” means witness statements, testimony, and exhibits to be presented in proceedings under this Act, and such other infor-
mation that is necessary to establish fees and terms for access to covered electronic payment systems as set forth in regulations issued by the Electronic Payment System Judges under section 5(b)(4).

SEC. 3. ACCESS TO COVERED ELECTRONIC PAYMENT SYSTEMS; LIMITED ANTITRUST IMMUNITY FOR THE NEGOTIATION AND DETERMINATION OF FEES AND TERMS; STANDARDS FOR ESTABLISHMENT OF FEES AND TERMS.

(a) Access to Covered Electronic Payment Systems.—Access by a merchant to any covered electronic payment system and the fees and terms of such access shall be subject to this Act.

(b) Authority and Limited Antitrust Immunity for Negotiations of Fees and Terms and Participation in Proceedings.—

(1) In general.—Notwithstanding any provision of the antitrust laws—

(A) in negotiating fees and terms and participating in any proceedings under subsection (c), any providers of a covered electronic payment system and any merchants who have access to or who are seeking access to that covered electronic payment system may jointly negotiate and agree upon the fees and terms for
access to the covered electronic payment sys-
tem, including through the use of common
agents that represent the providers of the cov-
ered electronic payment system or the mer-
chants on a nonexclusive basis; and

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

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

(A) any unlawful boycott;

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

(C) any unlawful tying arrangement; or

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

(c) ESTABLISHMENT OF FEES AND TERMS.—
(1) Voluntarily Negotiated Access Agreements.—

(A) Agreements between Negotiating Parties.—A voluntarily negotiated access agreement may be executed at any time between 1 or more providers of a covered electronic payment system and 1 or more merchants. With respect to the negotiating parties, such executed voluntarily negotiated access agreement shall supersede any fees or terms established by the Electronic Payment System Judges under paragraph (3) relating to that covered electronic payment system.

(B) Filing Agreements with the Electronic Payment System Judges.—The negotiating parties shall jointly file with the Electronic Payment System Judges—

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

(ii) any documentation relating to a voluntarily negotiated access agreement evidencing any consideration being given or any marketing or promotional agreement between the negotiating parties; and
(iii) any amendment to that voluntarily negotiated access agreement or documentation.

(C) Timing and Availability of Filings.—The negotiating parties to any voluntarily negotiated access agreement executed after the date of enactment of this Act shall jointly file the voluntarily negotiated access agreement, and any documentation or amendment described in subparagraph (B), with the Electronic Payment System Judges not later than 30 days after the date of execution of the voluntarily negotiated access agreement or amendment or the date of the creation of the documentation, as the case may be. The Electronic Payment System Judges shall make publicly available any voluntarily negotiated access agreement, amendment, or accompanying documentation filed under this paragraph.

(2) Initiation of Proceedings.—The proceedings under this subsection to establish fees and terms for access to a covered electronic payment system shall be initiated in accordance with section 6.

(3) Proceedings.—
(A) **In General.**—The Electronic Payment System Judges shall conduct proceedings as specified under this Act to establish fees and terms for access to a covered electronic payment system. Except as specifically provided in a voluntarily negotiated access agreement, a provider of a covered electronic payment system may not directly or indirectly charge fees or set terms for access to a covered electronic payment system that are not in accordance with the fees and terms established by the Electronic Payment System Judges pursuant to proceedings under this Act.

(B) **Period of applicability.**—Except as provided in section 6, the fees and terms established under this paragraph with respect to a covered electronic payment system shall apply during the 3-year period beginning on January 1 of the second year following the year in which the proceedings to establish such fees and terms are commenced.

(C) **Standard for establishment of fees and terms by the Electronic Payment System Judges.**—
(i) IN GENERAL.—In establishing fees and terms for access to a covered electronic payment system under subparagraph (A), the Electronic Payment System Judges—

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

(II) shall select the final offer of fees and terms that most closely represent the fees and terms that would be negotiated in a hypothetical perfectly competitive marketplace for access to an electronic payment system between a willing buyer with no market power and a willing seller with no market power.

(ii) STANDARDS.—In determining which final offer of fees and terms to select, the Electronic Payment System Judges—

(I) shall consider the costs of transaction authorization, clearance,
and settlement that are necessary to operate and to access an electronic payment system;

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

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

(IV) may select a final offer that is a schedule of fees and terms that varies based upon cost-based differences in types of credit card and debit card transactions (which may include whether a transaction is of a signature-based, PIN-based, or card-not-present type);

(V) may select a final offer that is a schedule of fees and terms that provides alternative fees and terms for those acquirers or issuers that are regulated by the National Credit Union Administration or that, to-
gether with affiliates of the acquirer
or issuer, have assets in a total
amount of less than $1,000,000,000;
and

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

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

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

(ii) shall give significant weight to
fees in a voluntarily negotiated access
agreement that are substantially below the
fees reflective of the market power of the
covered electronic payment systems that existed before the date of enactment of this Act.

SEC. 4. ELECTRONIC PAYMENT SYSTEM JUDGES.

(a) APPOINTMENT.—The Attorney General and the Chairman shall jointly appoint 3 full-time Electronic Payment System Judges, and shall appoint 1 of the 3 Electronic Payment System Judges as the Chief Electronic Payment System Judge.

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

c) RULINGS.—The Electronic Payment System Judges may make any necessary procedural or evidentiary ruling in a proceeding under this Act and may, before commencing a proceeding under this Act, make any procedural ruling that will apply to a proceeding under this Act.

(d) ADMINISTRATIVE SUPPORT.—The Attorney General and Chairman shall provide the Electronic Payment System Judges with the necessary administrative services related to proceedings under this Act.

e) LOCATION.—The offices of the Electronic Payment System Judges and staff shall be located in the offices of the Department of Justice or the Federal Trade Commission.
(f) Qualifications of Electronic Payment System Judges.—Each Electronic Payment System Judge shall be an attorney who has at least 7 years of legal experience. The Chief Electronic Payment System Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials. At least 1 Electronic Payment System Judge who is not the Chief Electronic Payment System Judge shall have significant knowledge of electronic payment systems. At least one Electronic Payment System Judge shall have significant knowledge of economics. An individual may serve as an Electronic Payment System Judge only if the individual is free of any financial conflict of interest under the standards established under subsection (m).

(g) Staff.—The Chief Electronic Payment System Judge shall hire, at minimum, 3 full-time staff members to assist the Electronic Payment System Judges in performing the duties of the Electronic Payment System Judges under this Act.

(h) Terms.—

(1) Initial Appointments.—For the first appointments of Electronic Payment System Judges after the date of enactment of this Act—

(A) the Chief Electronic Payment System Judge shall be appointed for a term of 6 years;
(B) 1 Electronic Payment System Judge who is not the Chief Electronic Payment System Judge shall be appointed for a term of 4 years; and

(C) 1 Electronic Payment System Judge who is not the Chief Electronic Payment System Judge shall be appointed for a term of 2 years.

(2) Subsequent Appointment.—After the appointments under paragraph (1), an Electronic Payment System Judge shall be appointed for a term of 6 years.

(3) Reappointment.—An individual serving as an Electronic Payment System Judge may be reappointed to subsequent terms.

(4) Start and End of Terms.—The term of an Electronic Payment System Judge shall begin on the date on which the term of the predecessor of that Electronic Payment System Judge ends. If a successor Electronic Payment System Judge has not been appointed as of the date on which the term of office of an Electronic Payment System Judge ends, the individual serving that term may continue to serve as an interim Electronic Payment System Judge until a successor is appointed.
(i) **VACANCIES OR INCAPACITY.**—

(1) **VACANCIES.**—The Attorney General and the Chairman shall act expeditiously to fill any vacancy in the position of Electronic Payment System Judge, and may appoint an interim Electronic Payment System Judge to serve until an Electronic Payment System Judge is appointed to fill the vacancy under this section. An Electronic Payment System Judge appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed shall be appointed for the remainder of that term.

(2) **INCAPACITY.**—If an Electronic Payment System Judge is temporarily unable to perform the duties of an Electronic Payment System Judge, the Attorney General and Chairman may appoint an interim Electronic Payment System Judge to perform such duties during the period of such incapacity.

(j) **COMPENSATION.**—

(1) **JUDGES.**—The Chief Electronic Payment System Judge shall receive compensation at the rate of basic pay payable for level AL–1 for administrative law judges under section 5372(b) of title 5, United States Code, and each Electronic Payment System Judge who is not the Chief Electronic Pay-
ment System Judge shall receive compensation at
the rate of basic pay payable for level AL–2 for ad-
ministrative law judges under such section. The
compensation of the Electronic Payment System
Judges shall not be subject to any regulations adopt-
ed by the Office of Personnel Management under its
authority under section 5376(b)(1) of title 5, United
States Code.

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

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

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

(C) the rate of pay of 1 staff member shall
be not less than the basic rate of pay payable
for GS–8 of the General Schedule and not more
than the basic rate of pay payable for level 10
of GS–11 of such Schedule.
(3) Locality Pay.—All rates of pay established under this subsection shall include locality pay.

(k) Independence of Electronic Payment System Judges.—

(1) In making determinations.—

(A) In General.—Except as provided in subparagraph (B), the Electronic Payment System Judges—

(i) shall have full independence in establishing fees and terms for access to covered electronic payment systems and in issuing any other ruling under this Act; and

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

(B) Consultation.—The Electronic Payment System Judges shall consult with the Attorney General and the Chairman regarding any determination or ruling that would require that any act be performed by the Attorney General or the Chairman, and any such determination or ruling shall not be binding upon the Attorney General or the Chairman.
(2) PERFORMANCE APPRAISALS.—

(A) IN GENERAL.—Notwithstanding any other provision of law or any regulation of the Department of Justice or Federal Trade Commission, and subject to subparagraph (B), the Electronic Payment System Judges shall not receive performance appraisals.

(B) RELATING TO SANCTION OR REMOVAL.—To the extent that the Attorney General and the Chairman adopt regulations under subsection (m) relating to the sanction or removal of an Electronic Payment System Judge and such regulations require documentation to establish the cause of such sanction or removal, the Electronic Payment System Judge may receive an appraisal related specifically to the cause of the sanction or removal.

(l) INCONSISTENT DUTIES BARRED.—No Electronic Payment System Judge may undertake duties that conflict with the duties and responsibilities of an Electronic Payment System Judge under this Act.

(m) STANDARDS OF CONDUCT.—The Attorney General and the Chairman shall adopt regulations regarding the standards of conduct, including financial conflict of interest and restrictions against ex parte communications,
which shall govern the Electronic Payment System Judges and the proceedings under this Act.

(n) REMOVAL OR SANCTION.—The Attorney General and the Chairman acting jointly may sanction or remove an Electronic Payment System Judge for violation of the standards of conduct adopted under subsection (m), misconduct, neglect of duty, or any disqualifying physical or mental disability. Any such sanction or removal may be made only after notice and opportunity for a hearing. The Attorney General and the Chairman may suspend an Electronic Payment System Judge during the pendency of such a hearing. The Attorney General and the Chairman shall appoint an interim Electronic Payment System Judge during the period of any suspension under this subsection.

SEC. 5. PROCEEDINGS OF ELECTRONIC PAYMENT SYSTEM JUDGES.

(a) PROCEEDINGS.—

(1) IN GENERAL.—The Electronic Payment System Judges shall act in accordance with regulations issued by the Electronic Payment System Judges, the Attorney General, and the Chairman, and on the basis of a written record, prior determinations and interpretations of the Electronic Pay-
System Judges under this Act, and decisions
of the court of appeals of the United States.

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

(b) PROCEDURES.—

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

(2) MANDATORY NEGOTIATION PERIOD.—

(A) IN GENERAL.—Promptly after the
commencement of a proceeding under section
3(c) to establish fees and terms for access to a
covered electronic payment system, the Elec-
tronic Payment System Judges shall initiate a
period for negotiations for the purpose of
achieving a voluntarily negotiated access agree-
ment. Nothing in this paragraph shall preclude
the proceeding parties or any members thereof
from conducting negotiations before or after the
mandatory negotiation period for the purpose of
achieving a voluntarily negotiated access agree-
ment.

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

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

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

(A) IN GENERAL.—In any further pro-
ceeding ordered by the Electronic Payment Sys-
tem Judges under paragraph (2)(C), there shall
be only 2 proceeding parties, 1 consisting of all
providers of the covered electronic payment sys-
tem and the other consisting of all merchants
that have access to or seek access to the cov-
ered electronic payment system. Each pro-
ceeding party shall bear its own costs. A provider of a covered electronic payment system or a merchant that has access to or seeks access to the covered electronic payment system may choose not to participate in the proceeding as a member of a proceeding party, but unless such provider or merchant executes a voluntarily negotiated access agreement, such provider or merchant shall be bound by the determination of the Electronic Payment System Judges with regard to the fees and terms for access to the covered electronic payment system.

(B) RULE OF CONSTRUCTION.—Nothing in this paragraph may be construed to prohibit the proceeding parties or any members thereof in a proceeding under subparagraph (A) from negotiating and entering into a voluntarily negotiated access agreement at any other time.

(4) REGULATIONS.—

(A) AUTHORIZATION.—

(i) IN GENERAL.—The Electronic Payment System Judges may issue regulations to carry out the duties of the Electronic Payment System Judges under this Act. All regulations issued by the Elec-
Electronic Payment System Judges are subject to the approval of the Attorney General and the Chairman. Not later than 120 days after the date on which all Electronic Payment System Judges are appointed under section 4(h)(1), the Electronic Payment System Judges shall issue regulations to govern proceedings under this subsection. In setting these regulations, the Electronic Payment System Judges shall consider the regulations issued by the Copyright Royalty Judges under section 803(b)(6) of title 17, United States Code.

(ii) Scope.—The regulations issued under clause (i) shall include regulations regarding the procedures described in subparagraph (B).

(B) Procedures.—

(i) Written direct statements.—The written direct statements of the proceeding parties shall be filed by a date specified by the Electronic Payment System Judges, which may be not earlier than 4 months, and not later than 5 months, after the end of the voluntary negotiation
period under paragraph (2). Notwithstanding the preceding sentence, the Electronic Payment System Judges may allow a proceeding party to file an amended written direct statement based on new information received during the discovery process, not later than 15 days after the end of the discovery period specified in clause (ii).

(ii) DISCOVERY SCHEDULE.—Following the submission to the Electronic Payment System Judges of written direct statements by the proceeding parties, the Electronic Payment System Judges shall meet with the proceeding parties to set a schedule for conducting and completing discovery. Such schedule shall be determined by the Electronic Payment System Judges. Discovery in such proceedings shall be permitted for a period of not longer than 60 days, except for discovery ordered by the Electronic Payment System Judges in connection with the resolution of motions, orders, and disputes pending at the end of such period.
(iii) Initial disclosures.—

(I) In general.—In a proceeding under this Act to determine fees and terms for access to a covered electronic payment system, certain persons shall make initial disclosures not later than 30 days after the date of commencement of the proceeding, in accordance with this clause.

(II) Issuers, acquirers, and owners.—Any person who is 1 of the 10 largest issuers for a covered electronic payment system in terms of number of cards issued, any person who is 1 of the 10 largest acquirers for a covered electronic payment system based on dollar amount of transactions made by merchants they serve, and any person who owns or controls the relevant covered electronic payment system and establishes the terms and conditions through which issuers and acquirers participate in the covered electronic payment system, shall produce to the Electronic Payment
System Judges and to both proceeding parties—

(aa) an itemized list of the costs necessary to operate the covered electronic payment system that were incurred by the person during the most recent full calendar year before the initiation of the proceeding; and

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

(III) MERCHANTS.—Any person who is 1 of the 10 largest merchants using the relevant covered electronic payment system, determined based on dollar amount of transactions made with the covered electronic payment system, shall produce to the Electronic Payment System Judges and to both proceeding parties—

(aa) an itemized list of the costs necessary to access the elec-
tronic payment system during the
most recent full calendar year
prior to the initiation of the pro-
ceeding; and

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

(IV) Disagreement.—Any dis-
agreement regarding whether a person
is required to make an initial disclosure under this clause, or the contents
of such a disclosure, shall be resolved
by the Electronic Payment System
Judges.

(iv) Depositions.—

(I) In general.—In a pro-
ceeding under this Act to determine
fees and terms for access to a covered
electronic payment system, each pro-
ceeding party shall be permitted to
take depositions of every witness iden-
tified by the other proceeding party.
Except as provided in subclause (III),
each proceeding party also shall be permitted to take 5 additional depositions in the entire proceeding.

(II) ORGANIZATIONAL ENTITIES.—A deposition notice or subpoena may name as the deponent a person who is an individual or a person who is not an individual. Such deposition notice or subpoena shall describe with reasonable particularity the matters on which examination is requested. If the deposition notice or subpoena names a person who is not an individual, the deponent person so named shall designate 1 or more officers, directors, or managing agents, or other individual persons who consent to testify on behalf of the deponent person, and may set forth, for each individual person designated, the matters on which the individual person will testify. A subpoena shall advise a nonparty deponent person of the duty of the deponent person to make such a designation. An individual person...
designated under this subclause shall
testify as to matters known or reason-
ably available to the deponent person.

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

(v) WRITTEN DISCOVERY.—In a pro-
ceeding under this Act to determine fees
and terms for access to a covered elec-
tronic payment system, each proceeding
party shall be permitted to serve written
discovery requests on 10 persons. These
written discovery requests may include re-
quests for production or inspection, a total
of no more than 10 requests for admission
in the entire proceeding, and a total of no
more than 25 interrogatories in the entire
proceeding. The Electronic Payment Sys-
tem Judges may increase the permitted
number of requests for admission or interrogatories for good cause in exceptional circumstances, and shall resolve any disputes among persons within either proceeding party regarding the allocation of the requests for admission or interrogatories permitted under this clause.

(vi) SUBPOENAS.—Upon the request of a party to a proceeding to determine fees and terms for access to a covered electronic payment system, the Electronic Payment System Judges may issue a subpoena commanding a person to appear and give testimony, or to produce and permit inspection of documents or tangible things, if the resolution of the proceeding by the Electronic Payment System Judges may be substantially impaired by the absence of such testimony or production of documents or tangible things. A subpoena under this clause shall specify with reasonable particularity the materials to be produced or the scope and nature of the required testimony. Nothing in this clause shall preclude the Electronic Payment System Judges
from requesting the production by a person of information or materials relevant to the resolution by the Electronic Payment System Judges of a material issue of fact.

(vii) OBJECTIONS TO DISCOVERY REQUESTS.—

(I) IN GENERAL.—Any objection to a request or subpoena under clause (v) or (vi) shall be resolved by a motion or request to compel production made to the Electronic Payment System Judges in accordance with regulations adopted by the Electronic Payment System Judges. Each motion or request to compel discovery shall be determined by the Electronic Payment System Judges, or by an Electronic Payment System Judge when permitted under subsection (a)(2). Upon such motion or request to compel discovery, the Electronic Payment System Judges may order discovery under regulations established under this paragraph.
(II) CONSIDERATIONS.—In determining whether discovery will be granted under this clause, the Electronic Payment System Judges may consider—

(aa) whether the burden or expense of producing the requested information or materials outweighs the likely benefit, taking into account the needs and resources of the proceeding parties, the importance of the issues at stake, and the probative value of the requested information or materials in resolving such issues;

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

(cc) whether the proceeding party seeking discovery has had
ample opportunity by discovery in
the proceeding or by other means
to obtain the information sought.

(viii) Voluntarily negotiated access agreements.—In proceedings to de-
determine fees and terms for access to a covered electronic payment system, the Electronic Payment System Judges shall make available to the proceeding parties all documents filed under section 3(c)(1).

(ix) Settlement conference.—The Electronic Payment System Judges shall order a settlement conference between the proceeding parties to facilitate the presentation of offers of settlement between the parties. The settlement conference shall be held during the 21-day period beginning on the date on which the discovery period ends and shall take place outside the presence of the Electronic Payment System Judges.

(x) Direct and rebuttal hearings.—At the conclusion of the 21-day period described in clause (ix), the Electronic Payment System Judges shall determine if
further proceedings under this Act are necessary. If the Electronic Payment System Judges determine further proceedings under this Act are necessary, the Electronic Payment System Judges shall schedule a direct hearing of not more than 30 court days and a rebuttal hearing of not more than 20 court days during which both proceeding parties will be allowed to offer witness testimony and documents.

(xi) Sponsoring witnesses.—No evidence, including exhibits, may be submitted in the written direct statement or written rebuttal statement of a proceeding party without a sponsoring witness, except for—

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

(II) evidence of which the Electronic Payment System Judges have taken official notice;

(III) incorporation by reference of past records; or

(IV) good cause shown.
(xii) **Hearsay.**—Hearsay may be admitted in proceedings under this Act to the extent determined relevant and reliable by the Electronic Payment System Judges.

(xiii) **Applicability of the Federal Rules of Evidence.**—To the extent not inconsistent with this subparagraph, the Federal Rules of Evidence shall apply to proceedings under this Act.

(5) **Penalties for failure to comply with a discovery request.**—

(A) **Failure to comply.**—A person has failed to comply with a discovery request if the person, or an employee or agent of the person, fails, without substantial justification, to—

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

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

(iii) answer an interrogatory submitted under paragraph (4)(B)(v);
(iv) produce nonprivileged documents requested under clause (v) or (vi) of paragraph (4)(B); or

(v) admit the genuineness of any document or the truth of any matter as requested under paragraph (4)(B)(v), and the person requesting the admissions thereafter proves the genuineness of the document or the truth of the matter.

(B) FALSE OR MISLEADING RESPONSES.—For purposes of this Act, any disclosure, answer, or response that is false or substantially misleading, evasive, or incomplete shall be deemed a failure to comply with a discovery request.

(C) NEGATIVE INFERENCE IN CURRENT PROCEEDING.—If any person fails to comply with a discovery request, the Electronic Payment System Judges may issue an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the current proceeding in accordance with the claim of the proceeding party seeking discovery and obtaining the order.
(D) Civil penalty.—

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

(ii) Notice and hearings.—No civil penalty may be assessed under this subparagraph except under an order of the Electronic Payment System Judges and unless the person accused of the violation was given prior notice and opportunity to request and participate in a hearing before the Electronic Payment System Judges with respect to the violation.

(iii) Determining amount.—In determining the amount of any penalty assessed under this subparagraph, the Electronic Payment System Judges shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, abil-
ity to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(iv) Review.—Any person who requested a hearing with respect to a civil penalty under this subparagraph and who is aggrieved by an order assessing the civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit. Such a petition may be filed not later than 30 days after the date on which the order making such assessment was issued. The United States Court of Appeals for the District of Columbia Circuit shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in part, an order of the Electronic Payment System Judges under this subparagraph, or the court may remand the proceeding to the Electronic Payment System Judges for such further action as the court may direct. The Attor-
ney General shall represent the Electronic Payment System Judges before the court.

(v) Enforcement.—If any person fails to pay an assessment of a civil penalty after the civil penalty has become a final and unappealable order or after the appropriate court has entered final judgment, the Electronic Payment System Judges shall request the Attorney General to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record.

(c) Determination of Electronic Payment System Judges.—

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

(A) 11 months after the end of the 21-day settlement conference period under subsection (b)(4)(B)(ix); or
(B) 15 days before the date on which the fees and terms in effect for the relevant covered electronic payment system expire.

(2) Determination.—

(A) Filing of Final Offer.—Before the commencement of a direct hearing in a proceeding under subsection (b)(4)(B)(x), each proceeding party shall file with the Electronic Payment System Judges and with the other proceeding party a final offer of fees and terms for access to the covered electronic payment system. A proceeding party may not amend a final offer submitted under this subparagraph, except with the express consent of the Electronic Payment System Judges and the other proceeding party.

(B) Selection Between Final Offers.—After the conclusion of the direct hearing and rebuttal hearing, the Electronic Payment System Judges shall make their determination by selecting 1 of the 2 final offers filed by the proceeding parties. The Electronic Payment System Judges shall make their selection in accordance with the standards described in section 3(e)(3)(C).
(C) Voting and dissenting opinions.—
A final determination of the Electronic Payment System Judges in a proceeding under this Act shall be made by majority vote. An Electronic Payment System Judge dissenting from the majority on any determination under this Act may issue a dissenting opinion, which shall be included with the determination.

(3) Rehearings.—

(A) In general.—The Electronic Payment System Judges may, in exceptional cases, upon motion of a proceeding party, order a rehearing, after the determination in the proceeding is issued under paragraph (2), on such matters as the Electronic Payment System Judges determine to be appropriate.

(B) Timing for filing motion.—Any motion for a rehearing under subparagraph (A) shall be filed not later than 15 days after the date on which the Electronic Payment System Judges deliver to the parties in the proceeding their initial determination concerning fees and terms.

(C) Participation by opposing party not required.—In any case in which a re-
hearing is ordered under this paragraph, any opposing proceeding party shall not be required to participate in the rehearing, except that non-participation may give rise to the limitations with respect to judicial review provided for in subsection (d)(1).

(D) NO NEGATIVE INFERENCE.—The Electronic Payment System Judges may not draw a negative inference from lack of participation in a rehearing.

(E) CONTINUITY OF FEES AND TERMS.—

(i) IN GENERAL.—If the decision of the Electronic Payment System Judges on any motion for a rehearing is not rendered before the expiration of the fees and terms in effect for the relevant covered electronic payment system, in the case of a proceeding to determine successor fees and terms for fees and terms that expire on a specified date, the initial determination of the Electronic Payment System Judges that is the subject of the rehearing motion shall be effective as of the day following the date on which the fees and terms that were previously in effect expire.
(ii) Fee Payments.—The pendency of a motion for a rehearing under this paragraph shall not relieve a person obligated to make fee payments for access to a covered electronic payment system who would be affected by the determination on that motion from paying the fees required and complying with the terms under the relevant determination.

(iii) Overpayments and Underpayments.—Notwithstanding clause (ii), if fees described in clause (ii) are paid—

(I) the recipient of such fees shall, not later than 60 days after the date on which the motion for rehearing is resolved or, if the motion is granted, 60 days after the date on which the rehearing is concluded, return any excess fees described in clause (ii), to the extent necessary to comply with the final determination by the Electronic Payment System Judges of fees and terms for access to the covered electronic payment system; and
(II) a person obligated to make fee payments shall, not later than 60 days after the date on which the motion for rehearing is resolved or, if the motion is granted, 60 days after the date on which the rehearing is concluded, pay the recipient the amount of any underpayment of fees described in clause (ii), to the extent necessary to comply with the final determination by the Electronic Payment System Judges of fees and terms for access to the covered electronic payment system.

(4) Contents of determination.—A determination of the Electronic Payment System Judges shall establish the fees and terms for access to the relevant covered electronic payment system, shall be supported by the written record, and shall set forth the findings of fact relied on by the Electronic Payment System Judges. The Electronic Payment System Judges shall make publicly available in their entirety all determinations issued under this paragraph.
(5) **CONTINUING JURISDICTION.**—The Electronic Payment System Judges may, with the approval of the Attorney General and the Chairman, issue an amendment to a written determination to correct any technical or clerical errors in the determination in response to unforeseen circumstances that would frustrate the proper implementation of such determination. Such amendment shall be set forth in a written addendum to the determination that shall be distributed to the proceeding parties and shall be published in the Federal Register.

(6) **PROTECTIVE ORDER.**—The Electronic Payment System Judges may issue such orders as may be appropriate to protect confidential information, including orders excluding confidential information from the record of the determination that is published or made available to the public, except that any fees and terms of an access agreement, including voluntarily negotiated access agreements filed under section 3(c)(1), may not be excluded from publication.

(7) **PUBLICATION OF DETERMINATION.**—Not later than 60 days after the date on which the Electronic Payment System Judges issue a determination under this subsection, the Attorney General and
the Chairman shall cause the determination, and any corrections thereto, to be published in the Federal Register. The Electronic Payment System Judges also shall publicize the determination and any corrections in such other manner as the Attorney General and the Chairman consider appropriate, including publication on the Internet. The Electronic Payment System Judges also shall make the determination, corrections, and the accompanying record available for public inspection and copying.

(8) Late payment.—A determination of Electronic Payment System Judges—

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

(B) may not include any provision in such terms described in subparagraph (A) that prevents a provider of a covered electronic payment system from asserting other rights or remedies provided under this Act.

(d) Judicial Review.—

(1) Appeal.—Any determination of the Electronic Payment System Judges under subsection (c) may, not later than 30 days after the date of publication of the determination in the Federal Register, be appealed, to the United States Court of Appeals...
for the District of Columbia Circuit, by any aggrieved member of a proceeding party under this Act who would be bound by the determination. Any proceeding party that did not participate in a rehearing may not raise any issue that was the subject of that rehearing at any stage of judicial review of the hearing determination. If no appeal is brought within the 30-day period under this paragraph, the determination of the Electronic Payment System Judges shall be final, and shall take effect as described in paragraph (2).

(2) Effect of Fees and Terms.—

(A) Fee Payments.—The pendency of an appeal under this subsection shall not relieve a person obligated to make fee payments for access to a covered electronic payment system who would be affected by the determination on appeal from paying the fees required and complying with the terms under the relevant determination or regulations.

(B) Overpayments and Underpayments.—Notwithstanding subparagraph (A), if fees described in subparagraph (A) are paid—

(i) the recipient of such fees shall, not later than 60 days after the date on which
the appeal is resolved return any excess fees described in subparagraph (A) (and interest thereon, if ordered under paragraph (3)), to the extent necessary to comply with the final determination of fees and terms on appeal; and

(ii) a person obligated to make fee payments shall, not later than 60 days after the date on which the appeal is resolved, pay the recipient the amount of any underpayment of fees described in subparagraph (A) (and interest thereon, if ordered under paragraph (3)), to the extent necessary to comply with the final determination of fees and terms on appeal.

(3) JURISDICTION OF COURT.—If the United States Court of Appeals for the District of Columbia Circuit, under section 706 of title 5, United States Code, modifies or vacates a determination of the Electronic Payment System Judges, the court may enter its own determination with respect to the amount or distribution of fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its
final judgment. The court also may vacate the determination of the Electronic Payment System Judges and remand the case to the Electronic Payment System Judges for further proceedings.

(e) Authorization of Appropriations.—There are authorized to be appropriated such sums as may be necessary to carry out this Act.

SEC. 6. INSTITUTION OF PROCEEDINGS BEFORE ELECTRONIC PAYMENT SYSTEM JUDGES.

(a) Initial Proceedings.—

(1) Timing.—Proceedings under this Act shall be commenced as soon as practicable after the date of enactment of this Act to establish fees and terms for access to covered electronic payment systems under section 3(c), which shall be effective during the period beginning on January 1, 2011, and ending on December 31, 2012. The Electronic Payment System Judges shall cause notice of commencement of such proceedings to be published in the Federal Register.

(2) Procedures specific to the initial proceedings.—

(A) Discovery period.—Notwithstanding section 5(b)(4)(B)(ii), discovery in the initial proceedings described in paragraph (1) shall be
permitted for a period of 90 days, except for
discovery ordered by the Electronic Payment
System Judges in connection with the resolu-
tion of motions, orders, and disputes pending at
the end of such period.

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

(b) SUBSEQUENT PROCEEDINGS.—After completion
of the proceedings required under subsection (a), pro-
cedings under section 3(c) to establish fees and terms for
access to covered electronic payment systems shall be commenced in 2011, and every 3 years thereafter.

SEC. 7. GENERAL RULE FOR VOLUNTARILY NEGOTIATED ACCESS AGREEMENTS.

(a) In General.—Any fees or terms described in subsection (b) shall remain in effect for such period of time as would otherwise apply to fees and terms established under this Act, except that the Electronic Payment System Judges shall adjust any such fees to reflect inflation during any additional period the fees remain in effect beyond that contemplated in the voluntarily negotiated access agreement.

(b) Fees and Terms.—The fees or terms described in this subsection are fees or terms for access to a covered electronic payment system under this Act that—

(1) are agreed upon as part of a voluntarily negotiated access agreement for a period shorter than would otherwise apply under a determination under this Act; and

(2) are adopted by the Electronic Payment System Judges as part of a determination under this Act.