To amend the antitrust laws to ensure competitive market-based rates 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. LIMITED ANTITRUST IMMUNITY FOR THE NEGOTIATION AND DETERMINATION OF RATES AND TERMS FOR ACCESS TO COVERED ELECTRONIC PAYMENT SYSTEMS.

(a) DEFINITIONS.—For purposes of this Act:
(1) “Access agreement” means an agreement giving a merchant permission to access a covered electronic payment system to accept credit cards and/or debit cards from consumers for payment for goods and services as well as to receive payment for such goods and services, conditioned solely upon the merchant complying with the rates and terms specified in the agreement.

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

(3) “Antitrust laws” has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section 5 applies to unfair methods of competition as well as any similar State law.

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

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

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

(7) “Electronic payment system” means the proprietary services and infrastructure that route information and data to facilitate transaction authorization, clearance, and settlement that merchants must access in order to accept a specific brand of general-purpose credit cards and/or debit cards as payment for goods and services.

(8) “Financial institution” has the same meaning as in section 603(t) of the Fair Credit Reporting Act.
(9) “Issuer” means a financial institution that issues credit cards and/or debit cards or approves the use of other devices for use in an electronic payment system, but does not include independent third party processors that may act as the issuer’s agent in processing general-purpose credit card or debit card transactions.

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

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

(12) “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.

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

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

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

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

(17) “Voluntarily negotiated access agreement” means an executed agreement voluntarily negotiated between 1 or more providers of a single covered electronic payment system and 1 or more merchants that sets the rates and terms pursuant to which the 1 or more merchants can access that covered electronic payment system to accept credit cards and/or debit cards from consumers for payment of goods and services, and receive payment for such goods and services.

(b) LIMITED ANTITRUST IMMUNITY FOR NEGOTIATION OF ACCESS RATES AND TERMS TO COVERED ELECTRONIC PAYMENT SYSTEMS.—(1) Except as provided in paragraph (2) and notwithstanding any provision of the antitrust laws, in negotiating access rates and terms any
providers of a single covered electronic payment system and any merchants may jointly negotiate and agree upon the rates and terms for access to the covered electronic payment system, including through the use of common agents that represent either providers of a single covered electronic payment system or merchants on a nonexclusive basis. Any providers of a single covered electronic payment system also may jointly determine the proportionate division among themselves of paid access fees.

(2) Notwithstanding any other provision of this Act, the immunity otherwise applicable under paragraph (1) shall not apply to a provider of a single covered electronic payment 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 in which an interchange rate will be charged or paid;

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

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

(c) NONDISCRIMINATION.—For any given covered electronic payment system, the rates and terms of a voluntarily negotiated access agreement reached under the authority of this section shall be the same for all merchants, regardless of merchant category or volume of transactions (either in number or dollar value) generated. For any given covered electronic payment system, the rates and terms of a voluntarily negotiated access agreement reached under the authority of this section shall be the same for all providers participating in a negotiation session conducted under the authority of this section, regardless of provider category or volume of transactions (either in number or dollar value) generated.

(d) FACILITATION OF NEGOTIATION.—

(1) SCHEDULE.—Within 1 month following enactment of this Act, the negotiating parties shall file with the Attorney General a schedule for negotiations. If the negotiating parties do not file such a schedule within 1 month from the date of enactment, the Attorney General shall issue such a schedule. In either case, the Attorney General shall make the schedule available to all negotiating parties.
(2) INITIAL DISCLOSURE.—Within 1 month following enactment of this Act, the persons described in this subsection shall make the initial disclosures described in paragraphs (3) and (4) to facilitate negotiations under the limited antitrust immunity provided for by this section.

(3) 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 in terms of number of merchants served, and any person who operates or controls a covered electronic payment system shall produce to the Attorney General and to all negotiating parties—

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

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

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

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

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

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

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

(e) TRANSPARENCY OF VOLUNTARILY NEGOTIATED
ACCESS AGREEMENTS.—

(1) VOLUNTARILY NEGOTIATED ACCESS AGRE-
MENTS BETWEEN NEGOTIATING PARTIES.—A volun-
tarily 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.

(2) Filing agreements with the attorney general.—The negotiating parties shall jointly file with the Attorney General a clear intelligible copy of—

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

(B) the various components of the interchange fee;

(C) a description of how access fees that merchants pay are allocated among financial institutions and how they are spent;

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

(E) any documentation relating to a voluntarily negotiated access agreement evidencing any consideration being given or any marketing or promotional agreements between the negotiating parties;

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

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

(3) Timing and Availability of Filings.—
The negotiating parties to any voluntarily negotiated
access agreement executed after the date of enact-
ment of this Act shall jointly file the voluntarily ne-
gotiated access agreement, and any documentation
or amendments described in paragraph (2), with the
Attorney General not later than 30 days after the
date of execution of the voluntarily negotiated access
agreement or amendment or after the creation of the
documentation. The Attorney General shall make
publicly available any voluntarily negotiated access
agreement, amendment, or accompanying docu-
mentation filed under this paragraph.

(f) Report to Congress by the Attorney Gen-
eral.—Within 7 months after the date of enactment of
this Act, the Attorney General shall transmit to the House
Committee on the Judiciary and the Senate Committee on
the Judiciary a report on the negotiations conducted
under the authority of this section during the first 6
months after the date of enactment and, if a voluntarily
negotiated agreement is reached, whether such access
rates and terms will have an adverse effect on competition and how such rates compare with access rates and terms in current use in other countries. Such report shall contain a chronology of the negotiations, an assessment of whether the parties have negotiated in good faith, an assessment of the quality of the data provided by the parties in their initial disclosures, a description of any voluntarily negotiated agreements reached during the negotiations, and any recommendations of the Attorney General concerning how Congress should respond to the conduct of the negotiations.

(g) Effect on Pending Lawsuits.—Nothing in this section shall affect liability in any action pending on the date of enactment of this section.

SEC. 3. OPT-OUT.

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

SEC. 4. EFFECTIVE DATE.

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

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