

110TH CONGRESS
2D SESSION

S. 3086

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 5, 2008

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 2008”.

6 **SEC. 2. LIMITED ANTITRUST IMMUNITY FOR THE NEGOTIA-**
7 **TION AND DETERMINATION OF FEES AND**
8 **TERMS FOR ACCESS TO COVERED ELEC-**
9 **TRONIC PAYMENT SYSTEMS.**

10 (a) DEFINITIONS.—In this Act:

1 (1) ACCESS.—The term “access”—

2 (A) when used as a verb means to use to
3 conduct transaction authorization, clearance,
4 and settlement involving the acceptance of cred-
5 it cards or debit cards from consumers for pay-
6 ment for goods or services and the receipt of
7 payment for such goods or services; and

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

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

17 (3) ACQUIRER.—The term “acquirer”—

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

22 (B) does not include an independent third
23 party processor that may act as the agent of a
24 financial institution described in subparagraph

1 (A) in processing general-purpose credit card or
2 debit card transactions.

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

7 (5) ANTITRUST DIVISION.—The term “Anti-
8 trust Division” means the Antitrust Division of the
9 Department of Justice.

10 (6) ANTITRUST LAWS.—The term “antitrust
11 laws”—

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

15 (B) also includes—

16 (i) section 5 of the Federal Trade
17 Commission Act (15 U.S.C. 45) to the ex-
18 tent section 5 applies to unfair methods of
19 competition; and

20 (ii) State antitrust laws.

21 (7) ASSISTANT ATTORNEY GENERAL.—The
22 term “Assistant Attorney General” means the As-
23 sistant Attorney General in charge of the Antitrust
24 Division of the Department of Justice.

1 (8) CHAIRMAN.—The term “Chairman” means
2 the Chairman of the Federal Trade Commission.

3 (9) COMMISSION.—The term “Commission”
4 means the Bureau of Competition of the Federal
5 Trade Commission.

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

14 (11) CREDIT CARD.—The term “credit card”
15 means any general-purpose card or other credit de-
16 vice issued or approved for use by a financial institu-
17 tion for use in allowing the cardholder to obtain
18 goods or services on credit on terms specified by
19 that financial institution.

20 (12) DEBIT CARD.—The term “debit card”
21 means any general-purpose card or other device
22 issued or approved for use by a financial institution
23 for use in debiting the account of a cardholder for
24 the purpose of that cardholder obtaining goods or

1 services, whether authorization is signature-based or
2 PIN-based.

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

11 (14) ELECTRONIC PAYMENT SYSTEM
12 JUDGES.—The term “Electronic Payment System
13 Judges” means the Electronic Payment System
14 Judges appointed under section 3(a).

15 (15) FEES.—The term “fees” means any mone-
16 tary charges, rates, assessments, or other payments
17 imposed by a provider upon a merchant for the mer-
18 chant to access an electronic payment system.

19 (16) FINANCIAL INSTITUTION.—The term “fi-
20 nancial institution” has the meaning given that term
21 in section 603(t) of the Fair Credit Reporting Act
22 (15 U.S.C. 1681a(t)).

23 (17) ISSUER.—The term “issuer”—

24 (A) means a financial institution that
25 issues credit cards or debit cards or approves

1 the use of other devices for use in an electronic
2 payment system; and

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

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

12 (19) MERCHANT.—The term “merchant”
13 means any person who accepts or who seeks to ac-
14 cept credit cards or debit cards in payment for goods
15 or services provided by the person.

16 (20) NEGOTIATING PARTY.—The term “negoti-
17 ating party” means 1 or more providers of a covered
18 electronic payment system or 1 or more merchants
19 who have access to or who are seeking access to that
20 covered electronic payment system, as the case may
21 be, and who are in the process of negotiating or who
22 have executed a voluntarily negotiated access agree-
23 ment that is still in effect.

24 (21) NORMAL RATE OF RETURN.—The term
25 “normal rate of return” means the average rate of

1 return that a firm would receive in an industry when
2 conditions of perfect competition prevail.

3 (22) PROCEEDING PARTY.—The term “pro-
4 ceeding party” means collectively all providers of a
5 covered electronic payment system or collectively all
6 merchants who have access to or who are seeking ac-
7 cess to that covered electronic payment system, as
8 the case may be, during the period in which the
9 Electronic Payment System Judges are conducting a
10 proceeding under this Act relating to that covered
11 electronic payment system.

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

15 (24) PROVIDE.—The term “provide” means to
16 make available for access.

17 (25) PROVIDER.—The term “provider” means
18 any person who owns, operates, controls, serves as
19 an issuer for, or serves as an acquirer for a covered
20 electronic payment system.

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

24 (27) TERMS.—The term “terms” means any
25 and all rules and conditions that are applicable to

1 providers of an electronic payment system or to mer-
2 chants, as the case may be, and that are required
3 in order for merchants to access that electronic pay-
4 ment system.

5 (28) VOLUNTARILY NEGOTIATED ACCESS
6 AGREEMENT.—The term “voluntarily negotiated ac-
7 cess agreement” means an access agreement volun-
8 tarily negotiated between 1 or more providers of a
9 covered electronic payment system and 1 or more
10 merchants that sets the fees and terms under which
11 the merchant can access that covered electronic pay-
12 ment system.

13 (29) WRITTEN DIRECT STATEMENTS.—The
14 term “written direct statements” means witness
15 statements, testimony, and exhibits to be presented
16 in proceedings under this Act, and such other infor-
17 mation that is necessary to establish fees and terms
18 for access to covered electronic payment systems as
19 set forth in regulations issued by the Electronic Pay-
20 ment System Judges under section 4(b)(4).

21 (b) ACCESS TO COVERED ELECTRONIC PAYMENT
22 SYSTEMS.—Access by a merchant to any covered elec-
23 tronic payment system and the fees and terms of such ac-
24 cess shall be subject to this Act.

1 (c) AUTHORITY AND LIMITED ANTITRUST IMMUNITY
2 FOR NEGOTIATIONS AND PARTICIPATION IN PRO-
3 CEEDINGS.—Notwithstanding any provision of the anti-
4 trust laws—

5 (1) in negotiating fees and terms and partici-
6 pating in any proceedings under subsection (d), any
7 providers of a covered electronic payment system
8 and any merchants who have access to or who are
9 seeking access to that covered electronic payment
10 system may jointly negotiate and agree upon the
11 fees and terms for access to the covered electronic
12 payment system, including through the use of com-
13 mon agents that represent the providers of the cov-
14 ered electronic payment system or the merchants on
15 a nonexclusive basis; and

16 (2) any providers of a single covered electronic
17 payment system also may jointly determine the pro-
18 portionate division among such providers of paid
19 fees.

20 (d) ESTABLISHMENT OF FEES AND TERMS.—

21 (1) VOLUNTARILY NEGOTIATED ACCESS AGREE-
22 MENTS.—

23 (A) AGREEMENTS BETWEEN NEGOTIATING
24 PARTIES.—A voluntarily negotiated access
25 agreement may be executed at any time be-

1 tween 1 or more providers of a covered elec-
2 tronic payment system and 1 or more mer-
3 chants. With respect to the negotiating parties,
4 such executed voluntarily negotiated access
5 agreement shall supersede any fees or terms es-
6 tablished by the Electronic Payment System
7 Judges under paragraph (3) relating to that
8 covered electronic payment system.

9 (B) FILING AGREEMENTS WITH THE ELEC-
10 TRONIC PAYMENT SYSTEM JUDGES.—The nego-
11 tiating parties shall jointly file with the Elec-
12 tronic Payment System Judges—

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

16 (ii) any documentation relating to a
17 voluntarily negotiated access agreement ev-
18 idencing any consideration being given or
19 any marketing or promotional agreement
20 between the negotiating parties; and

21 (iii) any amendment to that volun-
22 tarily negotiated access agreement or docu-
23 mentation.

24 (C) TIMING AND AVAILABILITY OF FIL-
25 INGS.—The negotiating parties to any volun-

1 tarily negotiated access agreement executed
2 after the date of enactment of this Act shall
3 jointly file the voluntarily negotiated access
4 agreement, and any documentation or amend-
5 ment described in subparagraph (B), with the
6 Electronic Payment System Judges not later
7 than 30 days after the date of execution of the
8 voluntarily negotiated access agreement or
9 amendment or the date of the creation of the
10 documentation, as the case may be. The Elec-
11 tronic Payment System Judges shall make pub-
12 licly available any voluntarily negotiated access
13 agreement, amendment, or accompanying docu-
14 mentation filed under this paragraph.

15 (2) INITIATION OF PROCEEDINGS.—The pro-
16 ceedings under this subsection to establish fees and
17 terms for access to a covered electronic payment sys-
18 tem shall be initiated in accordance with section 5.

19 (3) PROCEEDINGS.—

20 (A) IN GENERAL.—The Electronic Pay-
21 ment System Judges shall conduct proceedings
22 under this Act to establish fees and terms for
23 access to a covered electronic payment system.
24 Except as specifically provided in a voluntarily
25 negotiated access agreement, a provider of a

1 covered electronic payment system may not di-
2 rectly or indirectly charge fees or set terms for
3 access to a covered electronic payment system
4 that are not in accordance with the fees and
5 terms established by the Electronic Payment
6 System Judges pursuant to proceedings under
7 this Act.

8 (B) PERIOD OF APPLICABILITY.—Except
9 as provided in section 5, the fees and terms es-
10 tablished under this paragraph with respect to
11 a covered electronic payment system shall apply
12 during the 3-year period beginning on January
13 1 of the second year following the year in which
14 the proceedings to establish such fees and terms
15 are commenced.

16 (C) STANDARD FOR ESTABLISHMENT OF
17 FEES AND TERMS BY THE ELECTRONIC PAY-
18 MENT SYSTEM JUDGES.—

19 (i) IN GENERAL.—In establishing fees
20 and terms for access to a covered elec-
21 tronic payment system under subpara-
22 graph (A), the Electronic Payment System
23 Judges—

24 (I) shall be limited to selecting,
25 without modification, 1 of the 2 final

1 offers of fees and terms filed by the
2 proceeding parties pursuant to section
3 4(c)(2)(A); and

4 (II) shall select the final offer of
5 fees and terms that most closely rep-
6 resent the fees and terms that would
7 be negotiated in a hypothetical per-
8 fectly competitive marketplace for ac-
9 cess to an electronic payment system
10 between a willing buyer with no mar-
11 ket power and a willing seller with no
12 market power.

13 (ii) STANDARDS.—In determining
14 which final offer of fees and terms to se-
15 lect, the Electronic Payment System
16 Judges—

17 (I) shall consider the costs of
18 transaction authorization, clearance,
19 and settlement that are necessary to
20 provide and access an electronic pay-
21 ment system;

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

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

6 (IV) may select a final offer that
7 is a schedule of fees and terms that
8 varies based upon cost-based dif-
9 ferences in types of credit card and
10 debit card transactions (which may in-
11 clude whether a transaction is of a
12 signature-based, PIN-based, or card-
13 not-present type); and

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

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

24 (i) shall decide the weight to be given
25 to any evidence submitted by a proceeding

1 party regarding the fees and terms for ac-
2 cess to comparable electronic payment sys-
3 tems, including fees and terms in volun-
4 tarily negotiated access agreements filed
5 under paragraph (1); and

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

13 **SEC. 3. ELECTRONIC PAYMENT SYSTEM JUDGES.**

14 (a) APPOINTMENT.—The Assistant Attorney General
15 and the Chairman shall jointly appoint 3 full-time Elec-
16 tronic Payment System Judges, and shall appoint 1 of the
17 3 Electronic Payment System Judges as the Chief Elec-
18 tronic Payment System Judge.

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

22 (c) RULINGS.—The Electronic Payment System
23 Judges may make any necessary procedural or evidentiary
24 ruling in a proceeding under this Act and may, before

1 commencing a proceeding under this Act, make any proce-
2 dural ruling that will apply to a proceeding under this Act.

3 (d) ADMINISTRATIVE SUPPORT.—The Assistant At-
4 torney General and Chairman shall provide the Electronic
5 Payment System Judges with the necessary administrative
6 services related to proceedings under this Act.

7 (e) LOCATION.—The offices of the Electronic Pay-
8 ment System Judges and staff shall be located in the of-
9 fices of the Antitrust Division or Commission.

10 (f) QUALIFICATIONS OF ELECTRONIC PAYMENT SYS-
11 TEM JUDGES.—Each Electronic Payment System Judge
12 shall be an attorney who has at least 7 years of legal expe-
13 rience. The Chief Electronic Payment System Judge shall
14 have at least 5 years of experience in adjudications, arbi-
15 trations, or court trials. One Electronic Payment System
16 Judge who is not the Chief Electronic Payment System
17 Judge shall have significant knowledge of electronic pay-
18 ment systems, and the other such Electronic Payment
19 System Judge shall have significant knowledge of econom-
20 ics. An individual may serve as an Electronic Payment
21 System Judge only if the individual is free of any financial
22 conflict of interest under the standards established under
23 subsection (m).

24 (g) STAFF.—The Chief Electronic Payment System
25 Judge shall hire 3 full-time staff members to assist the

1 Electronic Payment System Judges in performing the du-
2 ties of the Electronic Payment System Judges under this
3 Act.

4 (h) TERMS.—

5 (1) INITIAL APPOINTMENTS.—For the first ap-
6 pointments of Electronic Payment System Judges
7 after the date of enactment of this Act—

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

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

14 (C) 1 Electronic Payment System Judge
15 who is not the Chief Electronic Payment Sys-
16 tem Judge shall be appointed for a term of 2
17 years.

18 (2) SUBSEQUENT APPOINTMENT.—After the
19 appointments under paragraph (1), an Electronic
20 Payment System Judge shall be appointed for a
21 term of 6 years.

22 (3) REAPPOINTMENT.—An individual serving as
23 an Electronic Payment System Judge may be re-
24 appointed to subsequent terms.

1 (4) START AND END OF TERMS.—The term of
2 an Electronic Payment System Judge shall begin on
3 the date on which the term of the predecessor of
4 that Electronic Payment System Judge ends. If a
5 successor Electronic Payment System Judge has not
6 been appointed as of the date on which the term of
7 office of an Electronic Payment System Judge ends,
8 the individual serving that term may continue to
9 serve until a successor is appointed.

10 (i) VACANCIES OR INCAPACITY.—

11 (1) VACANCIES.—The Assistant Attorney Gen-
12 eral and the Chairman shall act expeditiously to fill
13 any vacancy in the position of Electronic Payment
14 System Judge, and may appoint an interim Elec-
15 tronic Payment System Judge to serve until an
16 Electronic Payment System Judge is appointed to
17 fill the vacancy under this section. An individual ap-
18 pointed to fill a vacancy occurring before the expira-
19 tion of the term for which the predecessor of that
20 individual was appointed shall be appointed for the
21 remainder of that term.

22 (2) INCAPACITY.—If an Electronic Payment
23 System Judge is temporarily unable to perform the
24 duties of an Electronic Payment System Judge, the
25 Assistant Attorney General and the Commissioner

1 may appoint an interim Electronic Payment System
2 Judge to perform such duties during the period of
3 such incapacity.

4 (j) COMPENSATION.—

5 (1) JUDGES.—The Chief Electronic Payment
6 System Judge shall receive compensation at the rate
7 of basic pay payable for level AL-1 for administra-
8 tive law judges under section 5372(b) of title 5,
9 United States Code, and each Electronic Payment
10 System Judge who is not the Chief Electronic Pay-
11 ment System Judge shall receive compensation at
12 the rate of basic pay payable for level AL-2 for ad-
13 ministrative law judges under such section. The
14 compensation of the Electronic Payment System
15 Judges shall not be subject to any regulations adopt-
16 ed by the Office of Personnel Management under its
17 authority under section 5376(b)(1) of title 5, United
18 States Code.

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

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

24 (B) the rate of pay of 1 staff member shall
25 be not less than the basic rate of pay payable

1 for GS-13 of the General Schedule and not
2 more than the basic rate of pay payable for
3 level 10 of GS-14 of such Schedule; and

4 (C) the rate of pay of 1 staff member shall
5 be not less than the basic rate of pay payable
6 for GS-8 of the General Schedule and not more
7 than the basic rate of pay payable for level 10
8 of GS-11 of such Schedule.

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

12 (k) INDEPENDENCE OF ELECTRONIC PAYMENT SYS-
13 TEM JUDGES.—

14 (1) IN MAKING DETERMINATIONS.—

15 (A) IN GENERAL.—Except as provided in
16 subparagraph (B), the Electronic Payment Sys-
17 tem Judges—

18 (i) shall have full independence in es-
19 tablishing fees and terms for access to cov-
20 ered electronic payment systems and in
21 issuing any other ruling under this Act;
22 and

23 (ii) may consult with the Assistant At-
24 torney General and the Chairman on any
25 matter other than a question of fact.

1 (B) CONSULTATION.—The Electronic Pay-
2 ment System Judges shall consult with the As-
3 sistant Attorney General and the Commissioner
4 regarding any determination or ruling that
5 would require that any act be performed by the
6 Assistant Attorney General or the Chairman,
7 and any such determination or ruling shall not
8 be binding upon the Assistant Attorney General
9 or the Chairman.

10 (2) PERFORMANCE APPRAISALS.—

11 (A) IN GENERAL.—Notwithstanding any
12 other provision of law or any regulation of the
13 Antitrust Division or Commission, and subject
14 to subparagraph (B), the Electronic Payment
15 System Judges shall not receive performance
16 appraisals.

17 (B) RELATING TO SANCTION OR RE-
18 MOVAL.—To the extent that the Assistant At-
19 torney General and the Chairman adopt regula-
20 tions under subsection (m) relating to the sanc-
21 tion or removal of an Electronic Payment Sys-
22 tem Judge and such regulations require docu-
23 mentation to establish the cause of such sanc-
24 tion or removal, the Electronic Payment System

1 Judge may receive an appraisal related specifi-
2 cally to the cause of the sanction or removal.

3 (l) INCONSISTENT DUTIES BARRED.—No Electronic
4 Payment System Judge may undertake duties that conflict
5 with the duties and responsibilities of an Electronic Pay-
6 ment System Judge under this Act.

7 (m) STANDARDS OF CONDUCT.—The Assistant At-
8 torney General and the Chairman shall adopt regulations
9 regarding the standards of conduct, including financial
10 conflict of interest and restrictions against ex parte com-
11 munications, which shall govern the Electronic Payment
12 System Judges and the proceedings under this Act.

13 (n) REMOVAL OR SANCTION.—The Assistant Attor-
14 ney General and the Chairman acting jointly may sanction
15 or remove an Electronic Payment System Judge for viola-
16 tion of the standards of conduct adopted under subsection
17 (m), misconduct, neglect of duty, or any disqualifying
18 physical or mental disability. Any such sanction or re-
19 moval may be made only after notice and opportunity for
20 a hearing. The Assistant Attorney General and the Chair-
21 man may suspend an Electronic Payment System Judge
22 during the pendency of such a hearing. The Assistant At-
23 torney General and the Chairman shall appoint an interim
24 Electronic Payment System Judge during the period of
25 any suspension under this subsection.

1 **SEC. 4. PROCEEDINGS OF ELECTRONIC PAYMENT SYSTEM**

2 **JUDGES.**

3 (a) PROCEEDINGS.—

4 (1) IN GENERAL.—The Electronic Payment
5 System Judges shall act in accordance with regula-
6 tions issued by the Electronic Payment System
7 Judges, the Assistant Attorney General, and the
8 Chairman, and on the basis of a written record,
9 prior determinations and interpretations of the Elec-
10 tronic Payment System Judges under this Act, and
11 decisions of the court of appeals of the United
12 States.

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

21 (b) PROCEDURES.—

22 (1) COMMENCEMENT.—The Electronic Payment
23 System Judges shall cause to be published in the
24 Federal Register a notice of commencement of pro-
25 ceedings under section 2(d) to establish fees and

1 terms for access to a covered electronic payment sys-
2 tem.

3 (2) MANDATORY NEGOTIATION PERIOD.—

4 (A) IN GENERAL.—Promptly after the
5 commencement of a proceeding under section
6 2(d) to establish fees and terms for access to a
7 covered electronic payment system, the Elec-
8 tronic Payment System Judges shall initiate a
9 period for negotiations for the purpose of
10 achieving a voluntarily negotiated access agree-
11 ment. Nothing in this paragraph shall preclude
12 the proceeding parties or any members thereof
13 from conducting negotiations before or after the
14 mandatory negotiation period for the purpose of
15 achieving a voluntarily negotiated access agree-
16 ment.

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

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

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

3 (A) IN GENERAL.—In any further pro-
4 ceeding ordered by the Electronic Payment Sys-
5 tem Judges under paragraph (2)(C), there shall
6 be only 2 proceeding parties, 1 consisting of all
7 providers of the covered electronic payment sys-
8 tem and the other consisting of all merchants
9 that have access to or seek access to the cov-
10 ered electronic payment system. Each pro-
11 ceeding party shall bear its own costs. A pro-
12 vider of a covered electronic payment system or
13 a merchant that has access to or seeks access
14 to the covered electronic payment system may
15 choose not to participate in the proceeding as a
16 member of a proceeding party, but unless such
17 provider or merchant executes a voluntarily ne-
18 gotiated access agreement, such provider or
19 merchant shall be bound by the determination
20 of the Electronic Payment System Judges with
21 regard to the fees and terms for access to the
22 covered electronic payment system.

23 (B) RULE OF CONSTRUCTION.—Nothing in
24 this paragraph may be construed to prohibit the
25 proceeding parties or any members thereof in a

1 proceeding under subparagraph (A) from nego-
2 tiating and entering into a voluntarily nego-
3 tiated access agreement at any other time.

4 (4) REGULATIONS.—

5 (A) AUTHORIZATION.—

6 (i) IN GENERAL.—The Electronic
7 Payment System Judges may issue regula-
8 tions to carry out the duties of the Elec-
9 tronic Payment System Judges under this
10 Act. All regulations issued by the Elec-
11 tronic Payment System Judges are subject
12 to the approval of the Assistant Attorney
13 General and the Chairman. Not later than
14 120 days after the date on which all Elec-
15 tronic Payment System Judges are ap-
16 pointed under section 3(h)(1), the Elec-
17 tronic Payment System Judges shall issue
18 regulations to govern proceedings under
19 this subsection. In setting these regula-
20 tions, the Electronic Payment System
21 Judges shall consider the regulations
22 issued by the Copyright Royalty Judges
23 under section 803(b)(6) of title 17, United
24 States Code.

1 (ii) SCOPE.—The regulations issued
2 under clause (i) shall include regulations
3 regarding the procedures described in sub-
4 paragraph (B).

5 (B) PROCEDURES.—

6 (i) WRITTEN DIRECT STATEMENTS.—
7 The written direct statements of the pro-
8 ceeding parties shall be filed by a date
9 specified by the Electronic Payment Sys-
10 tem Judges, which may be not earlier than
11 4 months, and not later than 5 months,
12 after the end of the voluntary negotiation
13 period under paragraph (2). Notwith-
14 standing the preceding sentence, the Elec-
15 tronic Payment System Judges may allow
16 a proceeding party to file an amended writ-
17 ten direct statement based on new infor-
18 mation received during the discovery proc-
19 ess, not later than 15 days after the end
20 of the discovery period specified in clause
21 (ii).

22 (ii) DISCOVERY SCHEDULE.—Fol-
23 lowing the submission to the Electronic
24 Payment System Judges of written direct
25 statements by the proceeding parties, the

1 Electronic Payment System Judges shall
2 meet with the proceeding parties to set a
3 schedule for conducting and completing
4 discovery. Such schedule shall be deter-
5 mined by the Electronic Payment System
6 Judges. Discovery in such proceedings
7 shall be permitted for a period of not
8 longer than 60 days, except for discovery
9 ordered by the Electronic Payment System
10 Judges in connection with the resolution of
11 motions, orders, and disputes pending at
12 the end of such period.

13 (iii) INITIAL DISCLOSURES.—

14 (I) IN GENERAL.—In a pro-
15 ceeding under this Act to determine
16 fees and terms for access to a covered
17 electronic payment system, certain
18 persons shall make initial disclosures
19 not later than 30 days after the date
20 of commencement of the proceeding,
21 in accordance with this clause.

22 (II) ISSUERS, ACQUIRERS, AND
23 OWNERS.—Any person who is 1 of the
24 10 largest issuers for a covered elec-
25 tronic payment system in terms of

1 number of cards issued, any person
2 who is 1 of the 10 largest acquirers
3 for a covered electronic payment sys-
4 tem based on dollar amount of trans-
5 actions made by merchants they serve,
6 and any person who operates or con-
7 trols the relevant covered electronic
8 payment system shall produce to the
9 Electronic Payment System Judges
10 and to both proceedings parties—

11 (aa) an itemized list of the
12 costs necessary to provide the
13 covered electronic payment sys-
14 tem that were incurred by the
15 person during the most recent
16 full calendar year before the initi-
17 ation of the proceeding; and

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

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

1 payment system, determined based on
2 dollar amount of transactions made
3 with the covered electronic payment
4 system, shall produce to the Elec-
5 tronic Payment System Judges and to
6 both proceeding parties—

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

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

18 (IV) DISAGREEMENT.—Any dis-
19 agreement regarding whether a person
20 is required to make an initial disclo-
21 sure under this clause, or the contents
22 of such a disclosure, shall be resolved
23 by the Electronic Payment System
24 Judges.

25 (iv) DEPOSITIONS.—

1 (I) IN GENERAL.—In a pro-
2 ceeding under this Act to determine
3 fees and terms for access to a covered
4 electronic payment system, each pro-
5 ceeding party shall be permitted to
6 take depositions of every witness iden-
7 tified by the other proceeding party.
8 Except as provided in subclause (III),
9 each proceeding party also shall be
10 permitted to take 5 additional deposi-
11 tions in the entire proceeding.

12 (II) ORGANIZATIONAL ENTI-
13 TIES.—A deposition notice or sub-
14 poena may name as the deponent a
15 person who is an individual or a per-
16 son who is not an individual. Such
17 deposition notice or subpoena shall de-
18 scribe with reasonable particularity
19 the matters on which examination is
20 requested. If the deposition notice or
21 subpoena names a person who is not
22 an individual, the deponent person so
23 named shall designate 1 or more offi-
24 cers, directors, or managing agents, or
25 other individual persons who consent

1 to testify on behalf of the deponent
2 person, and may set forth, for each
3 individual person designated, the mat-
4 ters on which the individual person
5 will testify. A subpoena shall advise a
6 nonparty deponent person of the duty
7 of the deponent person to make such
8 a designation. An individual person
9 designated under this subclause shall
10 testify as to matters known or reason-
11 ably available to the deponent person.

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

21 (v) WRITTEN DISCOVERY.—In a pro-
22 ceeding under this Act to determine fees
23 and terms for access to a covered elec-
24 tronic payment system, each proceeding
25 party shall be permitted to serve written

1 discovery requests on 10 persons. These
2 written discovery requests may include re-
3 quests for production or inspection, a total
4 of no more than 10 requests for admission
5 in the entire proceeding, and a total of no
6 more than 25 interrogatories in the entire
7 proceeding. The Electronic Payment Sys-
8 tem Judges may increase the permitted
9 number of requests for admission or inter-
10 rogatories for good cause in exceptional
11 circumstances, and shall resolve any dis-
12 putes among persons within either pro-
13 ceeding party regarding the allocation of
14 the requests for admission or interroga-
15 tories permitted under this clause.

16 (vi) SUBPOENAS.—Upon the request
17 of a party to a proceeding to determine
18 fees and terms for access to a covered elec-
19 tronic payment system, the Electronic Pay-
20 ment System Judges may issue a subpoena
21 commanding a person to appear and give
22 testimony, or to produce and permit in-
23 spection of documents or tangible things, if
24 the resolution of the proceeding by the
25 Electronic Payment System Judges may be

1 substantially impaired by the absence of
2 such testimony or production of documents
3 or tangible things. A subpoena under this
4 clause shall specify with reasonable par-
5 ticularity the materials to be produced or
6 the scope and nature of the required testi-
7 mony. Nothing in this clause shall preclude
8 the Electronic Payment System Judges
9 from requesting the production by a person
10 of information or materials relevant to the
11 resolution by the Electronic Payment Sys-
12 tem Judges of a material issue of fact.

13 (vii) OBJECTIONS TO DISCOVERY RE-
14 QUESTS.—

15 (I) IN GENERAL.—Any objection
16 to a request or subpoena under clause
17 (v) or (vi) shall be resolved by a mo-
18 tion or request to compel production
19 made to the Electronic Payment Sys-
20 tem Judges in accordance with regula-
21 tions adopted by the Electronic Pay-
22 ment System Judges. Each motion or
23 request to compel discovery shall be
24 determined by the Electronic Payment
25 System Judges, or by an Electronic

1 Payment System Judge when per-
2 mitted under subsection (a)(2). Upon
3 such motion or request to compel dis-
4 covery, the Electronic Payment Sys-
5 tem Judges may order discovery
6 under regulations established under
7 this paragraph.

8 (II) CONSIDERATIONS.—In deter-
9 mining whether discovery will be
10 granted under this clause, the Elec-
11 tronic Payment System Judges may
12 consider—

13 (aa) whether the burden or
14 expense of producing the re-
15 quested information or materials
16 outweighs the likely benefit, tak-
17 ing into account the needs and
18 resources of the proceeding par-
19 ties, the importance of the issues
20 at stake, and the probative value
21 of the requested information or
22 materials in resolving such
23 issues;

24 (bb) whether the requested
25 information or materials would

1 be unreasonably cumulative or
2 duplicative, or are obtainable
3 from another source that is more
4 convenient, less burdensome, or
5 less expensive; and

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

11 (viii) VOLUNTARILY NEGOTIATED AC-
12 CESS AGREEMENTS.—In proceedings to de-
13 termine fees and terms for access to a cov-
14 ered electronic payment system, the Elec-
15 tronic Payment System Judges shall make
16 available to the proceeding parties all docu-
17 ments filed under section 2(d)(1).

18 (ix) SETTLEMENT CONFERENCE.—
19 The Electronic Payment System Judges
20 shall order a settlement conference between
21 the proceeding parties to facilitate the
22 presentation of offers of settlement be-
23 tween the parties. The settlement con-
24 ference shall be held during the 21-day pe-
25 riod beginning on the date on which the

1 discovery period ends and shall take place
2 outside the presence of the Electronic Pay-
3 ment System Judges.

4 (x) DIRECT AND REBUTTAL HEAR-
5 INGS.—At the conclusion of the 21-day pe-
6 riod described in clause (ix), the Electronic
7 Payment System Judges shall determine if
8 further proceedings under this Act are nec-
9 essary. If the Electronic Payment System
10 Judges determine further proceedings
11 under this Act are necessary, the Elec-
12 tronic Payment System Judges shall
13 schedule a direct hearing of not more than
14 30 court days and a rebuttal hearing of
15 not more than 20 court days during which
16 both proceeding parties will be allowed to
17 offer witness testimony and documents.

18 (xi) SPONSORING WITNESSES.—No
19 evidence, including exhibits, may be sub-
20 mitted in the written direct statement or
21 written rebuttal statement of a proceeding
22 party without a sponsoring witness, except
23 for—

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

4 (II) evidence of which the Elec-
5 tronic Payment System Judges have
6 taken official notice;

7 (III) incorporation by reference
8 of past records; or

9 (IV) good cause shown.

10 (xii) HEARSAY.—Hearsay may be ad-
11 mitted in proceedings under this Act to the
12 extent determined relevant and reliable by
13 the Electronic Payment System Judges.

14 (xiii) APPLICABILITY OF THE FED-
15 ERAL RULES OF EVIDENCE.—To the extent
16 not inconsistent with this subparagraph,
17 the Federal Rules of Evidence shall apply
18 to proceedings under this Act.

19 (5) PENALTIES FOR FAILURE TO COMPLY WITH
20 A DISCOVERY REQUEST.—

21 (A) FAILURE TO COMPLY.—A person has
22 failed to comply with a discovery request if the
23 person, or an employee or agent of the person,
24 fails, without substantial justification, to—

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

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

8 (iii) answer an interrogatory sub-
9 mitted under paragraph (4)(B)(v);

10 (iv) produce nonprivileged documents
11 requested under clause (v) or (vi) of para-
12 graph (4)(B); or

13 (v) admit the genuineness of any doc-
14 ument or the truth of any matter as re-
15 quested under paragraph (4)(B)(v), and
16 the person requesting the admissions
17 thereafter proves the genuineness of the
18 document or the truth of the matter.

19 (B) FALSE OR MISLEADING RESPONSES.—
20 For purposes of this Act, any disclosure, an-
21 swer, or response that is false or substantially
22 misleading, evasive, or incomplete shall be
23 deemed a failure to disclose, answer, or re-
24 spond.

1 (C) NEGATIVE INFERENCE IN CURRENT
2 PROCEEDING.—If any person fails to comply
3 with a discovery request, the Electronic Pay-
4 ment System Judges may issue an order that
5 the matters regarding which the order was
6 made or any other designated facts shall be
7 taken to be established for the purposes of the
8 current proceeding in accordance with the claim
9 of the proceeding party seeking discovery and
10 obtaining the order.

11 (D) CIVIL PENALTY.—

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

20 (ii) NOTICE AND HEARINGS.—No civil
21 penalty may be assessed under this sub-
22 paragraph except under an order of the
23 Electronic Payment System Judges and
24 unless the person accused of the violation
25 was given prior notice and opportunity to

1 request and participate in a hearing before
2 the Electronic Payment System Judges
3 with respect to the violation.

4 (iii) DETERMINING AMOUNT.—In de-
5 termining the amount of any penalty as-
6 sessed under this subparagraph, the Elec-
7 tronic Payment System Judges shall take
8 into account the nature, circumstances, ex-
9 tent, and gravity of the violation or viola-
10 tions and, with respect to the violator, abil-
11 ity to pay, any prior history of such viola-
12 tions, the degree of culpability, economic
13 benefit or savings (if any) resulting from
14 the violation, and such other matters as
15 justice may require.

16 (iv) REVIEW.—Any person who re-
17 quested a hearing with respect to a civil
18 penalty under this subparagraph and who
19 is aggrieved by an order assessing the civil
20 penalty may file a petition for judicial re-
21 view of such order with the United States
22 Court of Appeals for the District of Co-
23 lumbia Circuit. Such a petition may be
24 filed not later than 30 days after the date
25 on which the order making such assess-

1 ment was issued. The United States Court
2 of Appeals for the District of Columbia
3 Circuit shall have jurisdiction to enter a
4 judgment affirming, modifying, or setting
5 aside in whole or in part, an order of the
6 Electronic Payment System Judges under
7 this subparagraph, or the court may re-
8 mand the proceeding to the Electronic
9 Payment System Judges for such further
10 action as the court may direct. The Assist-
11 ant Attorney General shall represent the
12 Electronic Payment System Judges before
13 the court.

14 (v) ENFORCEMENT.—If any person
15 fails to pay an assessment of a civil pen-
16 alty after the civil penalty has become a
17 final and unappealable order or after the
18 appropriate court has entered final judg-
19 ment, the Electronic Payment System
20 Judges shall request the Assistant Attor-
21 ney General to institute a civil action in an
22 appropriate district court of the United
23 States to collect the penalty, and such
24 court shall have jurisdiction to hear and
25 decide any such action. In hearing such ac-

1 tion, the court shall have authority to re-
2 view the violation and the assessment of
3 the civil penalty on the record.

4 (c) DETERMINATION OF ELECTRONIC PAYMENT SYS-
5 TEM JUDGES.—

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

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

12 (B) 15 days before the date on which the
13 fees and terms in effect for a covered electronic
14 payment system expire.

15 (2) DETERMINATION.—

16 (A) FILING OF FINAL OFFER.—Before the
17 commencement of a direct hearing in a pro-
18 ceeding under subsection (b)(4)(B)(x), each
19 proceeding party shall file with the Electronic
20 Payment System Judges and with the other
21 proceeding party a final offer of fees and terms
22 for access to the covered electronic payment
23 system. A proceeding party may not amend a
24 final offer submitted under this subparagraph.

1 (B) SELECTION BETWEEN FINAL OF-
2 FERS.—After the conclusion of the direct hear-
3 ing and rebuttal hearing, the Electronic Pay-
4 ment System Judges shall make their deter-
5 mination by selecting 1 of the 2 final offers
6 filed by the proceeding parties. The Electronic
7 Payment System Judges shall make their selec-
8 tion in accordance with the standards described
9 in section 2(d)(3)(C).

10 (C) VOTING AND DISSENTING OPINIONS.—
11 A final determination of the Electronic Pay-
12 ment System Judges in a proceeding under this
13 Act shall be made by majority vote. An Elec-
14 tronic Payment System Judge dissenting from
15 the majority on any determination under this
16 Act may issue a dissenting opinion, which shall
17 be included with the determination.

18 (3) REHEARINGS.—

19 (A) IN GENERAL.—The Electronic Pay-
20 ment System Judges may, in exceptional cases,
21 upon motion of a proceeding party, order a re-
22 hearing, after the determination in the pro-
23 ceeding is issued under paragraph (2), on such
24 matters as the Electronic Payment System
25 Judges determine to be appropriate.

1 (B) TIMING FOR FILING MOTION.—Any
2 motion for a rehearing under subparagraph (A)
3 shall be filed not later than 15 days after the
4 date on which the Electronic Payment System
5 Judges deliver to the parties in the proceeding
6 their initial determination concerning fees and
7 terms.

8 (C) PARTICIPATION BY OPPOSING PARTY
9 NOT REQUIRED.—In any case in which a re-
10 hearing is ordered under this paragraph, any
11 opposing proceeding party shall not be required
12 to participate in the rehearing, except that non-
13 participation may give rise to the limitations
14 with respect to judicial review provided for in
15 subsection (d)(1).

16 (D) NO NEGATIVE INFERENCE.—The Elec-
17 tronic Payment System Judges may not draw a
18 negative inference from lack of participation in
19 a rehearing.

20 (E) CONTINUITY OF FEES AND TERMS.—

21 (i) IN GENERAL.—If the decision of
22 the Electronic Payment System Judges on
23 any motion for a rehearing is not rendered
24 before the expiration of the fees and terms
25 in effect for a covered electronic payment

1 system, in the case of a proceeding to de-
2 termine successor fees and terms for fees
3 and terms that expire on a specified date,
4 the initial determination of the Electronic
5 Payment System Judges that is the subject
6 of the rehearing motion shall be effective
7 as of the day following the date on which
8 the fees and terms that were previously in
9 effect expire.

10 (ii) FEE PAYMENTS.—The pendency
11 of a motion for a rehearing under this
12 paragraph shall not relieve a person obli-
13 gated to make fee payments for access to
14 a covered electronic payment system who
15 would be affected by the determination on
16 that motion from paying the fees required
17 and complying with the terms under the
18 relevant determination.

19 (iii) OVERPAYMENTS AND UNDERPAY-
20 MENTS.—Notwithstanding clause (ii), if
21 fees described in clause (ii) are paid—

22 (I) the recipient of such fees
23 shall, not later than 60 days after the
24 date on which the motion for rehear-
25 ing is resolved or, if the motion is

1 granted, 60 days after the date on
2 which the rehearing is concluded, re-
3 turn any excess fees described in
4 clause (ii), to the extent necessary to
5 comply with the final determination
6 by the Electronic Payment System
7 Judges of fees and terms for access to
8 the covered electronic payment sys-
9 tem; and

10 (II) a person obligated to make
11 fee payments shall, not later than 60
12 days after the date on which the mo-
13 tion for rehearing is resolved or, if the
14 motion is granted, 60 days after the
15 date on which the rehearing is con-
16 cluded, pay the recipient the amount
17 of any underpayment of fees described
18 in clause (ii), to the extent necessary
19 to comply with the final determination
20 by the Electronic Payment System
21 Judges of fees and terms for access to
22 the covered electronic payment sys-
23 tem.

24 (4) CONTENTS OF DETERMINATION.—A deter-
25 mination of the Electronic Payment System Judges

1 shall establish the fees and terms for access to the
2 relevant covered electronic payment system, shall be
3 supported by the written record, and shall set forth
4 the findings of fact relied on by the Electronic Pay-
5 ment System Judges. The Electronic Payment Sys-
6 tem Judges shall make publicly available in their en-
7 tirety all determinations issued under this para-
8 graph.

9 (5) CONTINUING JURISDICTION.—The Elec-
10 tronic Payment System Judges may, with the ap-
11 proval of the Assistant Attorney General and the
12 Chairman, issue an amendment to a written deter-
13 mination to correct any technical or clerical errors in
14 the determination in response to unforeseen cir-
15 cumstances that would frustrate the proper imple-
16 mentation of such determination. Such amendment
17 shall be set forth in a written addendum to the de-
18 termination that shall be distributed to the pro-
19 ceeding parties and shall be published in the Federal
20 Register.

21 (6) PROTECTIVE ORDER.—The Electronic Pay-
22 ment System Judges may issue such orders as may
23 be appropriate to protect confidential information,
24 including orders excluding confidential information
25 from the record of the determination that is pub-

1 lished or made available to the public, except that
2 any fees and terms of an access agreement, includ-
3 ing voluntarily negotiated access agreements filed
4 under section 2(d)(1), may not be excluded from
5 publication.

6 (7) PUBLICATION OF DETERMINATION.—Not
7 later than 60 days after the date on which the Elec-
8 tronic Payment System Judges issue a determina-
9 tion under this subsection, the Assistant Attorney
10 General and the Chairman shall cause the deter-
11 mination, and any corrections thereto, to be pub-
12 lished in the Federal Register. The Electronic Pay-
13 ment System Judges also shall publicize the deter-
14 mination and any corrections in such other manner
15 as the Assistant Attorney General and the Chairman
16 consider appropriate, including publication on the
17 Internet. The Electronic Payment System Judges
18 also shall make the determination, corrections, and
19 the accompanying record available for public inspec-
20 tion and copying.

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

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

1 (B) may not include any provision in such
2 terms described in subparagraph (A) that pre-
3 vents a provider of a covered electronic payment
4 system from asserting other rights or remedies
5 provided under this Act.

6 (d) JUDICIAL REVIEW.—

7 (1) APPEAL.—Any determination of the Elec-
8 tronic Payment System Judges under subsection (c)
9 may, not later than 30 days after the date of publi-
10 cation of the determination in the Federal Register,
11 be appealed, to the United States Court of Appeals
12 for the District of Columbia Circuit, by any ag-
13 grieved member of a proceeding party under this Act
14 who would be bound by the determination. Any pro-
15 ceeding party that did not participate in a rehearing
16 may not raise any issue that was the subject of that
17 rehearing at any stage of judicial review of the hear-
18 ing determination. If no appeal is brought within the
19 30-day period under this paragraph, the determina-
20 tion of the Electronic Payment System Judges shall
21 be final, and shall take effect as described in para-
22 graph (2).

23 (2) EFFECT OF FEES AND TERMS.—

24 (A) FEE PAYMENTS.—The pendency of an
25 appeal under this subsection shall not relieve a

1 person obligated to make fee payments for ac-
2 cess to a covered electronic payment system
3 who would be affected by the determination on
4 appeal from paying the fees required and com-
5 plying with the terms under the relevant deter-
6 mination or regulations.

7 (B) OVERPAYMENTS AND UNDERPAY-
8 MENTS.—Notwithstanding subparagraph (A), if
9 fees described in subparagraph (A) are paid—

10 (i) the recipient of such fees shall, not
11 later than 60 days after the date on which
12 the appeal is resolved return any excess
13 fees described in subparagraph (A) (and
14 interest thereon, if ordered under para-
15 graph (3)), to the extent necessary to com-
16 ply with the final determination of fees and
17 terms on appeal; and

18 (ii) a person obligated to make fee
19 payments shall, not later than 60 days
20 after the date on which the appeal is re-
21 solved, pay the recipient the amount of any
22 underpayment of fees described in sub-
23 paragraph (A) (and interest thereon, if or-
24 dered under paragraph (3)), to the extent

1 necessary to comply with the final deter-
2 mination of fees and terms on appeal.

3 (3) JURISDICTION OF COURT.—If the United
4 States Court of Appeals for the District of Columbia
5 Circuit, under section 706 of title 5, United States
6 Code, modifies or vacates a determination of the
7 Electronic Payment System Judges, the court may
8 enter its own determination with respect to the
9 amount or distribution of fees and costs, and order
10 the repayment of any excess fees, the payment of
11 any underpaid fees, and the payment of interest per-
12 taining respectively thereto, in accordance with its
13 final judgment. The court also may vacate the deter-
14 mination of the Electronic Payment System Judges
15 and remand the case to the Electronic Payment Sys-
16 tem Judges for further proceedings.

17 (e) AUTHORIZATION OF APPROPRIATIONS.—There
18 are authorized to be appropriated such sums as may be
19 necessary to carry out this Act.

20 **SEC. 5. INSTITUTION OF PROCEEDINGS BEFORE ELEC-**
21 **TRONIC PAYMENT SYSTEM JUDGES.**

22 (a) INITIAL PROCEEDINGS.—

23 (1) TIMING.—Proceedings under this Act shall
24 be commenced as soon as practicable after the date
25 of enactment of this Act to establish fees and terms

1 for access to covered electronic payment systems
2 under section 2(d), which shall be effective during
3 the period beginning on January 1, 2010, and end-
4 ing on December 31, 2011. The Electronic Payment
5 System Judges shall cause notice of commencement
6 of such proceedings to be published in the Federal
7 Register.

8 (2) PROCEDURES SPECIFIC TO THE INITIAL
9 PROCEEDINGS.—

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

18 (B) CONSIDERATION OF CHANGES IN FEES
19 AND TERMS BETWEEN DATE OF ENACTMENT
20 AND INITIAL DETERMINATION.—In establishing
21 the fees and terms under section 2(d) for access
22 to covered electronic payment systems, to be ef-
23 fective during the period beginning on January
24 1, 2010, and ending on December 31, 2011, the
25 Electronic Payment System Judges shall con-

1 sider changes in fees and terms made by a cov-
2 ered electronic payments system between the
3 date of enactment of this Act and such initial
4 determination. Based upon such consideration,
5 the Electronic Payment System Judges may ad-
6 just the fees established for the period begin-
7 ning on January 1, 2010, and ending on De-
8 cember 31, 2011, to reflect the economic impact
9 such changes had on the parties.

10 (b) **SUBSEQUENT PROCEEDINGS.**—After completion
11 of the proceedings required under subsection (a), pro-
12 ceedings under section 2(d) to establish fees and terms
13 for access to covered electronic payment systems shall be
14 commenced in 2010, and every 3 years thereafter.

15 **SEC. 6. GENERAL RULE FOR VOLUNTARILY NEGOTIATED**
16 **ACCESS AGREEMENTS.**

17 (a) **IN GENERAL.**—Any fees or terms described in
18 subsection (b) shall remain in effect for such period of
19 time as would otherwise apply to fees and terms estab-
20 lished under this Act, except that the Electronic Payment
21 System Judges shall adjust any such fees to reflect infla-
22 tion during any additional period the fees remain in effect
23 beyond that contemplated in the voluntarily negotiated ac-
24 cess agreement.

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

4 (1) are agreed upon as part of a voluntarily ne-
5 gotiated access agreement for a period shorter than
6 would otherwise apply under a determination under
7 this Act; and

8 (2) are adopted by the Electronic Payment Sys-
9 tem Judges as part of a determination under this
10 Act.

○