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REPORT
110–913

CREDIT CARD FAIR FEE ACT OF 2008

OCTOBER 3, 2008.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS AND DISSENTING VIEWS

[To accompany H.R. 5546]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5546) to amend the antitrust laws to ensure competitive market-based rates and terms for merchants' access to electronic payment systems, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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79–006

THE AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Credit Card Fair Fee Act of 2008".

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 Division" means the Antitrust Division of the U.S. Department of Justice.

(4) "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.

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

(6) "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.

(7) "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.

(8) "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.

(9) "Financial institution" has the same meaning as in section 603(t) of the Fair Credit Reporting Act.

(10) "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.

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

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

(13) "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.

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

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

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

(17) "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.

(18) "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 non-exclusive 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 any unlawful boycott.

(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 participating providers, regardless of provider category or volume of transactions (either in number or dollar value) generated.

(d) FACILITATION OF NEGOTIATION.—

(1) SCHEDULE.—Within one month following enactment of this Act, the negotiating parties shall file with the Antitrust Division a schedule for negotiations. If the negotiating parties do not file such a schedule within one month from the date of enactment, the Antitrust Division shall issue such a schedule and inform the negotiating parties of the schedule. In either case, the Antitrust Division shall make the schedule available to all negotiating parties.

(2) INITIAL DISCLOSURE.—Within one month following enactment of this Act, the persons described in this subsection shall make the initial disclosures described in paragraphs (3), (4), and (5) 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 Antitrust Division 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 Antitrust Division 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 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 Antitrust Division.

(6) ATTENDANCE OF ANTITRUST DIVISION.—A representative of the Antitrust Division shall attend all negotiation sessions conducted under the authority of this section.

(e) TRANSPARENCY OF VOLUNTARILY NEGOTIATED ACCESS AGREEMENTS.—

(1) VOLUNTARILY NEGOTIATED ACCESS 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.

(2) FILING AGREEMENTS WITH THE ANTITRUST DIVISION.—The negotiating parties shall jointly file with the Antitrust Division 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 enactment of this Act shall jointly file the voluntarily negotiated access agreement, and any documentation or amendments described in paragraph (2), with the Antitrust Division 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 Antitrust Division shall make publicly available any voluntarily negotiated access agreement, amendment, or accompanying documentation filed under this paragraph.

(f) REPORT TO CONGRESS BY THE ANTITRUST DIVISION.—Within seven months after the date of enactment of this Act, the Antitrust Division 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 six 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 Antitrust Division 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. CARDHOLDER SAVINGS.

Any agreements reached pursuant to the authority provided in section 2 shall provide that—

(1) when any fees that a merchant is charged for access to a covered electronic payment system are reduced pursuant to any such agreement, the merchant shall pass the benefits of any such reduction in fees on to its customers or employees; and

(2) when any fees that a financial institution collects for access to a covered electronic payment system are increased pursuant to any such agreement, the financial institution shall pass the benefits of any such increase in fees on to its customers or employees.

SEC. 5. EFFECTIVE DATE.

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

PURPOSE AND SUMMARY

The purpose of H.R. 5546, the "Credit Card Fair Fee Act of 2008," is to correct an imbalance that currently exists between

credit card companies on one side and merchants and consumers on the other. The bill does this by giving a limited antitrust exemption to merchants so they can negotiate with the credit card companies for interchange fee rates and rules. H.R. 5546 also helps to ensure that consumers receive the benefits of the exemption by mandating that any savings resulting from the bill be passed on by whoever receives the benefit, whether it be the merchants or the credit card companies.

BACKGROUND AND NEED FOR THE LEGISLATION

The credit card industry is a highly profitable business, with more than 691 million credit cards in circulation in the United States, accounting for $1.8 trillion of consumer spending.[1] The credit card companies' annual earnings are in the $40 billion range, and about half of all Americans reportedly carry a balance on their high interest rate credit cards. In addition, every time any credit card is used a merchant pays an "interchange fee."[2]

The Judiciary Committee's Task Force on Competition Policy and Antitrust Laws has held two hearings on this issue. At the first hearing, conducted in July of last year, concerns were expressed that the large credit card companies could charge excessive interchange fees because of market power; that retailers have little ability to negotiate the fees; and that there is a lack of transparency with regard to how the credit card companies calculate their fees.[3] After the hearing, Chairman John Conyers Jr. (D-MI) and Representative Chris Cannon (R-UT) introduced H.R. 5546, the "Credit Card Fair Fee Act of 2008."[4] The second hearing, conducted in May of this year, focused on the legislation, which created a limited antitrust immunity for negotiating voluntary agreements and, if necessary, participating in market-based proceedings before a panel of Electronic Payment System Judges to determine the appropriate interchange fee.

CREDIT CARD INTERCHANGE FEES

What is an Interchange Fee?

Credit card interchange fees are fees charged when a consumer uses any payment card at a retailer. The fees cover the cost of processing the transaction, fraud protection, billing statements, payment system innovations, and other expenses. The interchange fee serves as payment from the merchant's bank—the acquirer—to the cardholder's bank—the issuer—for the underwriting, funding, and billing of the merchant's customer.

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[1] U.S. GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS, INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 9 (Sept. 2006); *see also The Secret History of the Credit Card* (PBS television broadcast Nov. 23, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/credit/view/.

[2] *Id; see also* Brian K. Bucks, Arthur B. Kennickell, and Kevin B. Moore, *2004: Recent Changes in U.S. Family Finances: Evidence from the 2001 and 2004 Survey of Consumer Finances,* THE FED. RESERVE BD. (2004) available at http://www.federalreserve.gov/pubs/oss/oss2/2004/bull0206.pdf; CAROLYN B. MALONEY, FOREVER IN DEBT: ANTI-COMPETITIVE CREDIT CARD PRACTICES AND THEIR IMPACT ON THE ECONOMY (2008), available at http://maloney.house.gov/documents/financial/creditcards/20080730CreditCardFINALPub.pdf.

[3] *Credit Card Interchange Fees: Hearing Before the Task Force on Competition Policy and Antitrust Laws of the H. Comm. on the Judiciary,* 110th Cong. (2007).

[4] Original cosponsors of H.R. 5546 include Reps. Boozman (R-AR), Carney (D-PA), Delahunt (D-MA), Gohmert (R- TX), Hall (R-TX), Lofgren (D-CA), Peterson (R-PA), Platts (R-PA), Shuster (R-PA), Sullivan (R-OK), Weiner (D-NY), Welch (D-VT), and Wilson (R-SC). There are currently 44 cosponsors total.

The fee is a percentage established by the payment card company, such as Visa or MasterCard, and is the most significant portion of a "merchant's discount rate." This discount rate is the subject of an agreement between the merchant and his or her bank, and represents the total amount deducted by the merchant's bank from each card transaction. Ultimately, the merchant discount rate is divided three ways among the consumer's bank, the merchant's bank, and the credit card company. Most of these financial institutions are members of Visa, MasterCard, or both.

In the United States, the interchange fee averages approximately 1.75% and the merchant discount rate averages 2.20% of card transactions. In 2007, interchange fees totaled approximately $42 billion.[5]

In recent years, the merchant discount rate and interchange fee have become highly controversial, and the subject of regulatory and antitrust investigations as well as several lawsuits. Merchants and consumer groups insist that interchange fees in the United States are not in line with economies of scale, such as decreasing technology costs, as well as similar lower fees charged in other countries. They maintain that rising interchange fees are resulting in higher prices, lower profits, and a burden on the consumer.

The payment card industry, however, warns that a substantially greater harm to consumers will result if interchange fees are artificially lowered. They claim that if the fees are too low, consumers will ultimately suffer, because payment card companies will offer fewer rewards, and will charge higher annual fees and interest rates.[6]

How It Works

The electronic card transaction is completed in several virtually simultaneous steps:

Step 1: Customer presents the card to the Merchant for payment.

Step 2: Merchant's bank—the Acquirer—sends an authorization request to the payment card company whose name appears on the card, generally Visa or MasterCard.[7]

Step 3: Visa/MasterCard matches the Acquirer with the Cardholder's bank—the Issuer—and charges the Issuer an Association Assessment Fee.

Step 4: Issuer authorizes the transaction, debits Customer's account, credits Acquirer, and charges Acquirer an Interchange Fee.

[5] Press Release, Merchants Payment Coalition, Merchants Say that Visa Fee Cut is Less Than Meets the Eye (Jun. 27, 2008) (on file with The Merchants Payments Coalition (MPC), Unfair Credit Card Fees), http://www.unfaircreditcardfees.com/site/page/about.

[6] The payment card industry asserts interchange fees are already naturally constrained, because if the fees are too high, the merchants will not accept payment cards and will opt for competing forms of payment, such as cash and checks, or new forms of payment, including PayPal, Debitman, and Google Checkout.

[7] The other major competitor is American Express, which, unlike Visa and MasterCard, functions as a closed-loop network. Known as a "three-party" system, it includes cardholders, merchants and a single financial institution that offers proprietary network services. Thus, American Express issues the cards, signs up merchants to accept the cards, and performs the functions necessary to complete the transactions. In this case, the merchant discount is paid in full to the payment card company. The "four-party" system includes cardholders, merchants, card issuing banks, and merchant acquiring banks, using the services of a multiparty network such as Visa or MasterCard.

Step 5: Acquirer places payment in Merchant's account and charges a Processing Fee.

Step 6: Merchant pays the Acquirer a Discount Rate—which is a percentage of the total transaction—that ultimately covers the Processing Fee, Interchange Fee, and Association Assessment Fee.[8]

In order to accept credit cards as a method of payment, a merchant must first establish a merchant account by forming a relationship with an acquiring bank.[9] This relationship enables the merchant to process transactions and obtain payment from credit card purchases. The merchant discount rate, paid by the retailer each time a transaction occurs, is based on sales volume, type of payment card, type and size of accepting merchant (e.g. online, in-store, phone order), and risk. The rate is determined by multiplying the total credit card volume by a percentage charged by the bank. Most rates fall between one and 3 percent, and are based on the rate requirements of a credit card company, such as Visa or MasterCard.[10]

Market Power and Efforts to Address the Problem with Antitrust Laws

The issue of market power has been sufficiently borne out in the litigation between the merchants and the card companies over the years. For example, in 2003, the Second Circuit affirmed a district court's decision that Visa and MasterCard have market power.[11] Specific evidence supporting this affirmation was that approximately 85 percent of the general purpose cards issued in the United States are Visa and MasterCard. Based upon these and other findings, including that the market is very concentrated and there are high barriers to entry, the Second Circuit affirmed the trial court ruling that Visa and MasterCard "jointly and separately, have power within the market for network services." [12]

Liability has been established for antitrust violations by the credit card industry in recent years relating to the exclusionary rules the industry imposed and the tying of debit and credit cards.[13] The only recent case that has been resolved was dismissed because it was insufficiently plead,[14] and in March of this year, the Ninth Circuit affirmed the dismissal in *Kendall v. Visa USA, Inc.*[15]

[8] For example, if a customer makes a $100 purchase at a retailer, the merchant will pay on average $2.20 of that purchase to his bank—the acquirer. Of that amount, the acquirer receives a "processing fee" of approximately $.35 and pays an "interchange fee" of approximately $1.75 to the customer's bank—the issuer. The issuer in turn pays an "association assessment fee" of around $0.095 to Visa/MasterCard.

[9] In some cases, the merchant instead forms a relationship with a "transaction service," which matches the merchant and the bank offering an optimal merchant discount rate.

[10] *Merchant Discount.* FREE ENCYCLOPEDIA OF ECOMMERCE, http://ecommerce.hostip.info/pages/722/Merchant-Discount.html (last visited July 16, 2007).

[11] *U.S. v. Visa U.S.A., Inc.,* 344 F. 3d 229, 239–40 (2d Cir. 2003).

[12] *Id.* This case marked a departure from earlier suits challenging Visa's practices. A 1980 lawsuit, for example, challenged interchange on grounds that Visa's setting of the fees constituted unlawful horizontal price-fixing. The court rejected it on both per se and rule of reason analyses grounds. The appellate court also rejected the challenge and the Supreme Court declined to hear the case. *Nat'l Bancard Corp. v. Visa U.S.A., Inc.,* 596 F. Supp. 1231 (S.D. Fla. Sept. 20, 1984), *aff'd,* 779 F.2d 592 (11th Cir. 1986), *cert denied,* 479 U.S. 923 (1986).

[13] *See, e.g., In re Visa Check/Mastermoney Antitrust Litigation,* 2003 WL 1712568 (E.D.N.Y. April 1, 2003).

[14] *Kendall v. Visa USA, Inc.,* 2005 WL 2216941 (N.D. Cal. July 25, 2005).

[15] *Kendall v. Visa USA, Inc.,* 518 F.3d 1042 (9th Cir. 2008).

One case that is currently pending in district court may provide some resolution on the question of whether the card companies violate the antitrust laws in the setting of interchange fees. This class action, filed in New York in 2005 by a group of nationwide retailers,[16] alleges that Visa, MasterCard and U.S. banks engage in collusive practices to fix credit card interchange fees. The plaintiffs seek damages and injunctive relief "alleging that Visa, MasterCard and their member banks have colluded to establish and fix the 'interchange fees' and other fees charged to merchants for transactions processed over their credit card networks."[17] According to Labaton Sucharow LLP, serving on the Executive Committee of this class action, "defendants exploit their credit card monopoly by forcing retailers to pay these increasing fees, they forbid them from passing on the cost to customers, and they forbid them from bypassing the credit card networks and processing the transactions through agreements with member banks."[18] The plaintiffs have filed a consolidated complaint, and as of 2008, the case is still in discovery. A motion to dismiss by the defendants was recently denied.[19]

Further, on July 1, 2008, the Department of Justice closed an antitrust investigation into Visa Inc.'s restriction of particular PIN debit transactions after the credit card company repealed the regulation. The rule "required merchants to treat Visa-branded debit cards differently when used as a PIN-debit card (and processed via non-Visa networks) from the same cards when used as signature debit cards and processed on the Visa network."[20] It was alleged that this was restricting PIN debit transactions, specifically those of small value ($25 and below) and transactions over the Internet, and also may have reduced competition between Visa and PIN debit networks. Thomas Barnett, Assistant Attorney General, Antitrust Division, said that although this investigation is closed, "the Department remains prepared to investigate allegations of anticompetitive conduct in this important industry."[21]

MERCHANT AND CONSUMER PERSPECTIVES

Competition and Antitrust Issues

According to groups representing merchant interests, banks and their agents (Visa and MasterCard) collectively set interchange fees. They argue that as a result of this activity, the interchange fee is likely the same regardless of which bank issued the card used to make a purchase, or which bank signed up the merchant making the sale. MasterCard sets interchange fees on behalf of its approximately 20,000 member banks; Visa USA also sets interchange fees on behalf of its approximately 14,000 member banks. As MasterCard allows its member banks to also issue Visa cards,

[16] *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation,* No. 05-MD-1720, 2008 WL 2428213 (E.D.N.Y. May 14, 2008).

[17] Labaton Sucharow LLP, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* http://www.labaton.com/en/cases/In-re-Payment-Card-Interchange-Fee-and-Merchant-Discount-Antitrust-Litigation.cfm (last visited July 14, 2008).

[18] *Id.*

[19] *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation,* No. 05-MD-1720, 2008 WL 2428213 (E.D.N.Y. May 14, 2008).

[20] Press Release, U.S. Dep't of Justice, "Visa Inc. Rescinds Debit Card Rule as a Result of DOJ Dep't of Justice Antitrust Investigation (July 1, 2008) (on file with author), http://www.usdoj.gov/atr/public/press__releases/2008/234577.htm.

[21] *Id.*

and Visa USA likewise allows its members to issue MasterCard cards, many of Visa's 14,000 members are also members of the MasterCard network. Merchants assert that this behavior is anti-competitive and may constitute price fixing.

Higher Interchange Fees Benefit Banks

Another argument made by merchant groups is that card companies increase fees to encourage banks to issue their cards. The higher the interchange fees charged by Visa or MasterCard, the more money will flow to their member banks, thus making Visa and MasterCard more attractive compared to other systems. Further, special premium payment cards like Visa's Signature card or MasterCard's World card charge even higher interchange rates to offset offering additional rewards. Merchant groups assert that the result is that member banks have every incentive collectively to ensure that the card system sets high interchange fees.

Merchants also explain that because they must take the interchange fee into account when pricing products, consumers who pay by means other than payment cards end up subsidizing unrelated expenses such as marketing efforts by the card-issuing banks.[22] Yet only the payment card users, and not customers who pay the same price using cash, earn benefits through points, miles, cash-back features, and concierge services.

Given the size of the United States's economy and growing membership of Visa and MasterCard, merchant groups say that in a competitive market, scale and scope economies should result in declining interchange fees. Instead, they say the fees have doubled over the last 10 years. According to merchant group estimates, only 13 percent of the interchange fee covers processing costs, while 44 percent pays for rewards programs including marketing, advertising, network servicing, profits, and other expenses. They see this as the reason interchange fees have been on the rise, despite decreasing costs of technology. Other nations, including New Zealand, Australia, Poland, and those of the European Union, have already reduced, eliminated, or taken steps to limit interchange fees.[23]

Impact on Merchant Viability

From the merchant perspective, as card payments become an increasing percentage of consumer transactions—replacing checks and cash—they become an even greater concern to all retailers. The Food Marketing Institute (FMI) says that in the past 10 years, many supermarkets have seen an increase in costs associated with credit and debit card fees of 700 percent and the merchant discount rate is "exceeding the 1 percent profit margin of a typical grocery store."[24] Merchants maintain that the fee particularly impacts low margin businesses, where the charges have become the second

[22] *Id.*

[23] Terri Bradford and Fumiko Hayashi, *Developments in Interchange Fees in the United States and Abroad,* Payment System Research Briefing. (Federal Reserve Bank of Kansas City, Kansas City, MO), Apr. 2008, available at http://www.kc.frb.org/Econres/PSR/Briefings/PSR-BriefingApr08.pdf.

[24] The Food Marketing Institute (FMI), *Hidden Credit/Debit Card Interchange Fees* 1, available at http://www.fmi.org/gr/interchange/FMIonepager.pdf.

highest expense, below only labor costs, with annual increases exceeding health care and energy costs.[25]

With the price of gas exceeding $4 a gallon and interchange fees still on the rise, gas station owners in particular have found their viability under serious threat. Last year, convenience stores paid nearly $7.6 billion in credit card fees, or more than double the industry profit of about $3.4 billion that year.[26] As the Associated Press reports, in one case a small gas station owner yielded $60 profit in 1 month on gasoline sales, but paid nearly $500 that same month in interchange fees.

Although MasterCard has placed a cap on the fees for gasoline purchases of $50 or greater, and Visa recently announced that it would adjust its interchange rate schedule in response to gas prices, merchants insist that the change is not enough—or may even have the reverse impact.[27] Visa, for example, lowered the interchange fees applied to all gas station purchases to 1.15 percent (from 1.5 percent) of the transaction price plus 25 cents flat fee. Closer analysis, however, shows that the result will be that consumers "making high dollar amount transactions [using Visa Signature Preferred Card] will pay less, but consumers with small transactions [using a regular rewards card] will pay more."[28] Thus, most gas station owners—those that operate in an area where customers use the standard cards—will fail to benefit.

The *Wall Street Journal* explains that higher gas prices "compound the fees that station operators must pay to credit-card companies, because the fees are calculated as a percentage of sales."[29] Large energy companies as well as many one-store owners are exiting the gas-retailing business. Exxon Mobil announced in June that "it plans to sell its 2,220 stations in the U.S.; other oil companies already have shed most of theirs."[30] For example, the *Boston Globe* wrote that, "[d]ozens of gas stations in Massachusetts have stopped selling gas or shut down, and hundreds more are expected to follow suit because rising costs coupled with crippling credit card fees and fewer customers make it impossible for them to afford the roughly $40,000 it costs to refill their underground tanks."[31] Further, ABC News reports that "to combat the hefty fees that card companies are charging gas stations, many owners have passed the costs on to the consumer by charging more per gallon if the payment is made with plastic instead of cash."[32]

HEARINGS

The Committee on the Judiciary Task Force on Competition Policy and Antitrust Laws held two hearings on this issue. First, the

[25] *Id.*
[26] Tom Breen, *Credit Card Fees: Some Gas Stations Say "No More,"* ASSOCIATED PRESS, June 18, 2008, available at http://ap.google.com/article/ALeqM5hOFuBRfjgTqd4WKI1nbvnX3VUOPAD91CKD800.
[27] *Id.*
[28] Posting of Adam Levitin to http://www.creditslips.org/creditslips/2008/07/interchange-and.html#more (July 1, 2008, 23:22 EST). Credit Slips: A Discussion on Credit and Bankruptcy.
[29] Ana Campoy, *Gas Stations Hit Skids,* WALL ST. J., July 7, 2008, at B12, available at http://s.wsj.net/article/SB121538602450331005.html?mod=autos__feature—articles.
[30] *Id.*
[31] Michael Levenson, *Gas Prices Drive Many Stations Out of Business,* THE BOSTON GLOBE, June 19, 2008, available at http://www.boston.com/news/local/articles/2008/06/19/gas__prices__drive__many__stations__out__of__business/.
[32] Bianna Golodryga and Lee Ferran, *Credit Card Fees Up Gas Prices,* ABC NEWS, July 9, 2008, available at http://abcnews.go.com/GMA/story?id=5338007&page=1.

Task Force held a hearing on July 19, 2007, titled "Credit Card Interchange Fees." Testimony was received from Steve Smith, President and CEO, K-VA-T Food Stores, Inc.; John Buhrmaster, President, First National Bank of Scotia, New York; Edmund Mierzwinski, Consumer Program Director, U.S. PIRG; Timothy Muris, Of Counsel, O'Melveny & Myers; and Mallory Duncan, Senior Vice President and General Counsel, National Retail Federation. Second, the Committee held a legislative hearing on H.R. 5546, the "Credit Card Fair Fee Act of 2008," on May 15, 2008. Testimony was received from Tom Robinson, CEO, Robinson Oil Corporation; Joshua Floum, General Counsel and Corporate Secretary, Visa, Inc.; Joshua Peirez, Chief Payment System Integrity Officer, MasterCard Worldwide; John Blum, Vice President of Operations, Chartway Federal Credit Union; Steve Cannon, Chairman, Constantine Cannon, LLP; and Edward Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group.

Committee Consideration

On July 16, 2008, the Committee met in open session and ordered the bill, H.R. 5546, favorably reported with an amendment, by a rollcall vote of 19 to 16, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 5546.

1. An amendment by Mr. Sherman to change the definition of "merchant" so that it would mean any person who accepts credit cards or debit cards in payment for goods or services that they provide and employs fewer than 500 employees for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar year. Defeated 9 to 22.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt	X		
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Delahunt			
Mr. Wexler			
Ms. Sánchez		X	
Mr. Cohen			
Mr. Johnson		X	
Ms. Sutton			
Mr. Gutierrez			
Mr. Sherman	X		
Ms. Baldwin			
Mr. Weiner		X	
Mr. Schiff			
Mr. Davis	X		
Ms. Wasserman Schultz	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Ellison	X		
Mr. Smith (Texas)		X	
Mr. Sensenbrenner, Jr.	X		
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot	X		
Mr. Lungren		X	
Mr. Cannon		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney	X		
Mr. Franks	X		
Mr. Gohmert		X	
Mr. Jordan		X	
Total	9	22	

2. Motion to report H.R. 5546 favorably. Passed 19 to 16.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt		X	
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Delahunt			
Mr. Wexler		X	
Ms. Sánchez	X		
Mr. Cohen			
Mr. Johnson		X	
Ms. Sutton		X	
Mr. Gutierrez			
Mr. Sherman			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff		X	
Mr. Davis		X	
Ms. Wasserman Schultz		X	
Mr. Ellison	X		
Mr. Smith (Texas)		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble	X		
Mr. Gallegly		X	
Mr. Goodlatte	X		
Mr. Chabot		X	
Mr. Lungren	X		
Mr. Cannon	X		
Mr. Keller	X		
Mr. Issa	X		
Mr. Pence	X		
Mr. Forbes		X	
Mr. King	X		
Mr. Feeney		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Franks		X	
Mr. Gohmert	X		
Mr. Jordan		X	
Total	19	16	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 5546, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 31, 2008.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5546, the Credit Card Fair Fee Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie, who can be reached at 226–2860.

Sincerely,

PETER R. ORSZAG,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 5546—Credit Card Fair Fee Act of 2008.

SUMMARY

H.R. 5546 would provide limited immunity from antitrust laws to merchants and financial services organizations that negotiate an

agreement setting the terms for using electronic payment systems to process transactions using credit cards. A representative of the Department of Justice (DOJ) would be required to attend all negotiation sessions. The department would be required to make any agreements that result from the negotiations available to the public and to prepare an analysis and report of the results of the negotiations.

Based on information from DOJ, CBO estimates that implementing H.R. 5546 would cost about $6 million in 2009 and $33 million over the 2009–2013 period, assuming appropriation of the necessary amounts. Enacting H.R. 5546 would not affect direct spending or revenues.

H.R. 5546 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt State antitrust laws. CBO estimates that because the preemption would only limit the application of State law, the mandate would impose no costs on State, local, or tribal governments.

H.R. 5546 would impose private-sector mandates, as defined in UMRA, on certain issuers for, acquirers for, and owners and operators of covered electronic payment systems as well as certain merchants using covered electronic payment systems. The bill also would prevent individuals from seeking damages under certain antitrust laws for negotiations authorized under the bill. CBO expects that the direct costs to comply with those mandates would not be significant and would fall below the annual threshold established in UMRA for private-sector mandates ($136 million in 2008, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 5546 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

By Fiscal Year, in Millions of Dollars

	2009	2010	2011	2012	2013	2009–2013
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	7	6	7	7	7	34
Estimated Outlays	6	6	7	7	7	33

BASIS OF ESTIMATE

For this estimate, CBO assumes that the bill would be enacted near the start of fiscal year 2009 and that spending would follow historical patterns for similar activities.

H.R. 5546 would provide limited immunity from antitrust laws to merchants and financial services organizations that enter into voluntary negotiations to set terms for using electronic systems for clearing credit card transactions. The bill would require the Antitrust Division of the Department of Justice to collect information about the parties' schedule for negotiation and any agreements that would result from such negotiations. Further, a representative of the Antitrust Division would be required to attend all negotiation sessions.

Because H.R. 5546 would provide broad authority for merchants and providers of electronic payment services to join together to negotiate rates and terms for access to a payment system, it is unclear how many negotiations may be initiated as a result of the bill. For example, a large number of small groups may form—that is, gas station owners, businesses with fewer than 50 employees, or retail merchants—or a smaller number of fairly large groups may form. Based on information from DOJ regarding the additional workload in the face of such uncertainty, CBO estimates that the agency would require an additional 35 staff positions to attend negotiation sessions for as many as 500 such groups, monitor the information submitted by the participating parties, and meet the bill's reporting requirements. CBO estimates that implementing H.R. 5546 would cost $6 million in 2009 and $33 million over the 2009–2013 period, assuming appropriation of the necessary amounts. The costs would be incurred mostly for salaries and benefits, as well as for start-up costs in the first year to set up information-collection systems.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 5546 contains an intergovernmental mandate, but CBO estimates that the mandate would impose no costs on State, local, or tribal governments. By exempting agreements between merchants and credit card companies from State antitrust laws, the bill would preempt State law. That preemption would be a mandate as defined in UMRA, but the bill would impose no duty on States that would result in additional spending.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 5546 contains private-sector mandates, as defined in UMRA, because the bill would impose requirements on the 10 largest entities in each of the following categories:

- Financial institutions that issue electronic devices such as credit cards and debit cards for use in an electronic payment system, or acquire access to electronic payment systems for merchants to use in accepting credit cards and/or debit cards for payment;
- Owners and operators of electronic payment systems that have been used for at least 20 percent of the combined dollar value of U.S. credit; and
- Merchants using certain electronic payment systems.

Those entities would be required to provide information to the Antitrust Division of the DOJ. According to industry representatives, the costs to comply with those mandates would be small. In addition, the bill would exempt financial services organizations and merchants from certain antitrust statutes when negotiating access rates using the process authorized by the bill. As a result, private entities would be prevented from seeking damages under certain antitrust laws from entities participating in the negotiation process under the bill. Based on information from industry experts, the cost to comply with this mandate would likely be small as no such suits have been filed or are expected to be filed under current law. Therefore, CBO estimates that the aggregate cost of the mandates would fall below the annual threshold established in UMRA for pri-

vate-sector mandates ($136 million in 2008, adjusted annually for inflation).

ESTIMATE PREPARED BY:

Federal Costs: Susan Willie (226–2860)
Impact on State, Local, and Tribal Governments: Elizabeth Cove (225–3220)
Impact on the Private Sector: Jacob Kuipers (226–2940)

ESTIMATE APPROVED BY:

Theresa Gullo
Deputy Assistant Director for Budget Analysis

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5545 will provide an antitrust exemption for merchants so they can negotiate with credit card companies with market power for interchange fee rates.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5446 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Credit Card Fair Fee Act of 2008."

Sec. 2. Limited Antitrust Immunity for the Negotiation and Determination of Rates and Terms for Access to Covered Electronic Payment Systems. Section 2(a) defines the following terms: "Access agreement," "Acquirer," "Antitrust Division," "Antitrust Laws," "Credit card," "Covered electronic payment system," "Debit card," "Electronic payment system," "Financial institution," "Issuer," "Market power," "Merchant," "Negotiating party," "Person," "Provider," "State," "Terms," and "Voluntary negotiated access agreement."

Section 2(b) sets forth the limited antitrust immunity for negotiation of access rates and terms to covered electronic payment systems. The section allows merchants and covered electronic payment systems to jointly negotiate and agree upon rates and terms for access to the system, including through the use of common agents. This section also specifies that the immunity does not apply to a provider of an electronic payment system, or to a merchant, during

any period in which the provider or merchant is engaged in any unlawful boycott.

Section 2(c) provides that the rates and terms of a voluntarily negotiated access agreement must be the same for all merchants, regardless of merchant category or volume of transactions generated, and shall also be the same for all providers, regardless of provider category or volume of transactions generated.

Section 2(d) requires the parties, within 1 month after enactment of this Act, to file with the Antitrust Division a schedule for negotiations. If the parties do not file a schedule, the Antitrust Division must issue a schedule. Some parties are required to make initial disclosures to facilitate negotiations. These disclosures must be made by the ten largest issuers for a covered electronic payment system (in terms of number of cards issued), the ten largest acquirers (in terms of number of merchants served), and a person who operates or controls a covered electronic payment system. The disclosures must include an itemized list of costs necessary to provide the system for the most recent calendar year and any access agreement between that person and one or more merchants. The disclosures must also be made by the ten largest merchants (based on dollar amount of transactions made with the covered electronic payment system). The merchants must disclose an itemized list of the costs necessary to access the system during the most recent calendar year and any access agreement between that person and one or more providers of the system. The Antitrust Division shall resolve any disagreements as to whether a person is required to make an initial disclosure. A representative of the Antitrust Division will attend all negotiation sessions conducted under subsection (a).

Section 2(e) requires any parties who reach a voluntarily negotiated access agreement to file with the Antitrust Division a copy of the agreement; the various components of the interchange fee; a description of how access fees that merchants pay are allocated among financial institutions and how they are spent; whether a variation in fees exists among card types; documentation relating to a voluntarily negotiated access agreement evidencing any consideration being given or any marketing or promotional agreements between the parties; a comparison of interchange rates in current use in the 10 foreign countries having the highest volume of credit card transactions with interchange rates charged in the United States under such agreement; and any amendments to the voluntarily negotiated access agreement or documentation. The parties must make this filing within 30 days after the date of execution of a voluntarily negotiated access agreement or amendment or after the creation of the documentation. The Antitrust Division will make this information publicly available.

Section 2(f) requires the Antitrust Division to file a report to the House and Senate Judiciary Committees detailing the negotiations and, if an 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. The report must contain a chronology of negotiations, an assessment of the quality of data provided by the parties in their initial disclosures, an assessment of whether the parties negotiated

in good faith, and recommendations concerning how Congress should respond to the conduct of the negotiations.

Section 2(g) provides that section 2 may not affect liability in any action pending on the date of enactment of this section.

Sec. 3. Opt-Out. Section 3 allows 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 the Act.

Sec. 4. Cardholder Savings. Section 4 provides that any agreements reached under Section 2(c) shall ensure that any savings or benefits received as a result of this bill, whether it be by merchants or financial institutions, shall be passed on to the customers or employees.

Sec. 5. Effective Date. Section 5 provides that the Act shall take effect on the date of enactment.

Additional Views

The mark-up of H.R. 5546, the "Credit Card Fair Fee Act of 2008" was unusual. The bill was reported favorably out of House Judiciary Committee by a vote of 19 ayes to 16 nays. That is not strange. What was peculiar was that ten Democrats and nine Republicans voted for the measure and eight Democrats and eight Republicans voted against it. While such results may not be uncommon in other committees, they are all but unheard of on the House Judiciary Committee.

The Committee's fractured vote reflects the complicated nature of the interchange debate. Every Member has constituents that strongly favor and oppose this legislation. That is to be expected when both MasterCard and Visa have tens of thousands of issuing banks and millions of accepting merchants. The debate has been clouded further by the contrasting, and, at times, completely contradictory claims made by both merchants and banks.

What became clear during the Committee's four and one-half hour consideration of the measure is that many Members, including those that voted against the bill, believe that there is a problem in the way that interchange rates are set in this country. It was equally apparent that most Members, including those that supported the legislation, have questions and concerns about how it will work in practice.

BACKGROUND

In the last 10 years, America has gone through a radical transformation in the way it pays for its goods and services. In 1996 almost 80% of all transactions were made with checks or cash.[1] Today, less than half of the purchases are conducted in those old ways. By 2010, the Nilson Report, an industry newsletter, estimates that consumers will use credit and debit cards for over 70% of all their purchases. The growth in the use of credit and debit cards has occurred in the old fashioned brick and mortar stores, but it has also facilitated a whole new brand of commerce. Without credit cards, e-commerce as we know it today would not exist.

Properly used, credit cards offer many benefits for consumers and businesses alike. For consumers, they offer fraud protection, payment flexibility, the ability to track purchases and rewards miles. For merchants, they offer guaranteed, faster payment and the opportunity to expand business through Internet and phone sales. Further, some studies have shown that consumers who use credit or debit cards at the time of purchase are likely to spend more than they would otherwise.

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[1] Robert J. Samuelson, *The Cashless Society Has Arrived,* Newsweek, June 25, 2007 (*available at* http://www.msnbc.msn.com/id/19263119/site/newsweek/).

These benefits come at a price. Visa and MasterCard, the two largest credit card networks in the country, impose a number of fees on consumers. These include the interest that consumers pay on their purchases, as well as late fees and fees associated with reward programs. However, consumers pay a different fee, called an interchange fee, every time they make a purchase with a credit card. The interchange fee, which is set by Visa and MasterCard, is actually deducted from the funds that a merchant receives on a purchase. So, for example, if a consumer buys $100 worth of goods on his Visa card, the merchant only receives $98.50 from the issuing bank, with the $1.50 constituting the interchange fee.[2] While the merchant pays this cost directly, it is ultimately passed on to consumers in the form of higher prices.

The Merchants Payment Coalition[3] feels that the interchange fees are unduly high and unchanging, two things that they consider to be indicative of Visa and MasterCard's anticompetitive practices. Second, they challenged Visa and MasterCard's practice of keeping the rules surrounding interchange fees secret from the retailers themselves. They claimed that the only time that they learn of the contents of the interchange rules is when Visa and MasterCard assesses them a fee for violating the rules.

Visa and MasterCard's member banks have formed their own coalition, the Electronic Payments Coalition.[4] They contend that interchange fees are necessary to conduct the complicated transactions that take place when a consumer uses a credit or debit card to purchase a product. The Electronic Payments Coalition thinks that retailers are trying to get the benefits of credit card payment systems (increased sales, guaranteed payment, Internet and telephone sales), without the costs, namely interchange fees. Partially as a result of the House Judiciary Committee's hearings, both Visa

[2] Technically, the difference between what the merchant charges the consumer for the product and what the merchant receives from the issuing bank is called a "merchant discount fee." However, the merchant discount fee is largely based on the interchange fees that are charged between banks in the course of the transaction.

[3] The Merchant Payments Coalition members are the Food Marketing Institute, National Association of Convenience Stores, National Grocers Association, National Retail Federation, National Association of Chain Drug Stores, American Petroleum Institute, Retail Industry Leaders Association, Petroleum Marketers Association of America, Society of Independent Gasoline Marketers of America, National Council of Chain Restaurants, National Association of College Store, National Association of Truck Stop Operators, International Association of Airport Duty Free Stores, National Association of Theater Owners, American Beverage Licensees, Bowling Proprietors Association of America, National Association of Shell Marketers, Interactive Travel Services Association, and the National Restaurant Association, among others.

[4] The Electronic Payments Coalition includes Advanta Corporation; Alabama Bankers Association; America's Community Bankers; American Bankers Association; American Express Company; American Financial Services Association; Bank of America; Barclays Bank; Californian Bankers Association; Capital One Financial Corporation; Card Services For Credit Unions, Inc.; Citi; Colorado Bankers Association; Comdata; Consumer Bankers Association; Delaware Bankers Association; Financial Services Roundtable; Florida Bankers Association; Georgia Bankers Association; Hawaii Bankers Association; Hawaii Financial Services Association; HSBC North America; Independent Community Bankers of America; Iowa Bankers Association; JPMorgan Chase; Maryland Bankers Association; Massachusetts Bankers Association; MasterCard Worldwide; Mid-Atlantic Financial Services Coalition; Minnesota Card Coalition; Mississippi Bankers Association; Montana Bankers Association; National Association of Federal Credit Unions; Nebraska Bankers Association; Nevada Bankers Association; New Hampshire Bankers Association; New Mexico Bankers Association; New York Bankers Association; North Carolina Bankers Association; Ohio Bankers League; Ohio Financial Services Association; Oklahoma Bankers Association; Pennsylvania Bankers Association; PSCU Financial Services; Puerto Rico Bankers Association; South Dakota Bankers Association; Tennessee Bankers Association; Texas Bankers Association; U.S. Bank; Vermont Bankers Association; Visa USA; Washington Bankers Association; Washington Mutual; Wells Fargo; West Virginia Bankers Association; and Wisconsin Bankers Association.

and MasterCard have begun publishing all of their rules on their website.

THE INTERCHANGE FEE

One of the principal complaints against Visa and MasterCard is that the interchange fees that they set are higher than what they would be in a competitive environment. The Association for Convenience & Petroleum Retailing (NACS) estimates that its members paid credit card fees in the amount of $6.6 billion in 2006. By comparison, they claim that their members made $4.77 billion in profit in 2006. Simply put, from NACS' perspective, the banks made more on the sale of goods at convenience stores than the convenience stores did themselves. The Merchant Payment Coalition insists that this is only possible because Visa and MasterCard dominate the market for credit card transactions, which merchants feel compelled to accept. The Merchant Payments Coalition also insists that these fees go to pay for the numerous credit card solicitations that people receive.

By contrast the Electronic Payment Coalition insists that Visa and MasterCard set their interchange fees in a way that is designed to encourage banks to issue their cards and for merchants to accept them. They contend that the interchange fees must be high enough for issuing banks to take on the risks and responsibilities of issuing cards, such as the expenditures for marketing and fraud protection. Similarly, the fees they set cannot be so high that merchants would not want to accept the cards. Simply put, if too few merchants want to accept the cards, then consumers will not demand them and the whole system collapses. The Electronic Payment Coalition argues that the fact that the merchants now feel compelled to accept cards because so many consumers have them is a sign that the system is working.

This kind of pricing structure is known as a two-sided market.[5] On one side of the market are consumers, who are price sensitive. The evidence seems to be—based on the number and variety of credit card offerings, including no-fee cards—that there is intense competition on the part of issuing banks to obtain cardholders. On the other side of the market are the merchants, who are somewhat price insensitive. That is, banks can raise interchange fees—and the merchant discount fees—and most merchants will continue to accept the credit cards.

This kind of cross-subsidization of users is not uncommon in two-sided markets. The model that is frequently cited here is newspapers, where the merchants that purchase advertising in a newspaper subsidize the purchase price of the consumers who buy the paper at newsstands. In other words, absent the advertisers' dollars, consumers would have to pay significantly more for a newspaper. However, in the newspaper context, merchants have the option of advertising in either a rival newspaper, on the radio, on TV, or over the Internet. That competition restrains the amount that newspapers can charge merchants for advertisements.

[5] See, e.g., Benjamin Klein, Andres V. Lerner, Kevin M. Murphy, and Lacey L. Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees,* Antitrust L.J. 571 (2006).

Within the context of payment systems, both Visa and MasterCard charge very different interchange fees on some types of merchants than they do on others. These differences may be accounted for by the varying demand for credit cards among industries. For example, grocery stores, which traditionally operated on cash and checks, were slow to adopt credit cards as a payment system. Accordingly, the credit card networks and issuing banks charged a lower interchange rate for purchases at grocery stores as a way to entice those stores to accept the cards. Conversely, online merchants could not exist without credit cards. As a result, they pay much higher interchange fees.[6]

These fees vary by merchant class, size of merchant, whether a card is present or not (higher fraud likelihood), and types of rewards offered. To use but one narrow example, a retailer that has a minimum of 45 million Visa credit card transactions totaling a minimum of $2.9 billion (and that meets certain other requirements) would be assessed an interchange fee of 2.3% + $.10 for an online sale (card not present) with a Visa Signature Preferred (highest rewards) card.[7] That same merchant would be assessed 1.65% + $.10 for a Visa Signature sale, and 1.43% + $.10 for a traditional rewards or no rewards card.

If competition in the two-sided market works in the manner described by the credit card companies, then, theoretically, one would expect their ability to raise prices on merchants to be constrained by the merchants' ability to switch to another form of payment (either another brand of credit card or cash or check). It is an open question, however, whether Visa or MasterCard has ever raised its rates so far on a class of merchants that it has become unprofitable for it to maintain that rate. That is, we do not know whether Visa or MasterCard has ever been compelled to lower its rates for a particular class of merchants because its higher interchange rates caused those merchants to either switch to another brand of credit card or to accept only cash or checks.

Perhaps understandably, Visa and MasterCard have been reluctant to discuss the details of how they set their interchange rates. Further, while they dispute the merchants' claims about how interchange fees are used, Visa and MasterCard have not—and they claim cannot—provided even a general accounting of how the issuing banks use interchange fees. However understandable, this lack of transparency does nothing to dispel Members' concerns that merchants' needs are not adequately considered in setting the fee.

What does seem clear from the record before the Committee is that, on average, Visa and MasterCard's interchange rates bear more than a passing resemblance to each other. They are significantly below the interchange fees charged by American Express and above the rates charged by Discover. Based on their advertising alone, it is clear that both Visa and MasterCard intend for their payment systems to replace the use of cash and checks in the near future. Given consumers' recent spending habits, they may well get their wish.

[6] The difference in fees is also explained, in part, because online transactions—or so-called "no card present" transactions—present a greater risk of fraud for the issuing bank.

[7] Visa U.S.A. Interchange Reimbursement Fees July 2008 (*available at* http://usa.visa.com/download/merchants/visa-usa-july2008-interchange-rates.pdf).

Further, the U.S. Government Accountability Office recently found that the Treasury's Financial Management Service, which handles the majority of the federal government's card transactions, had tried—and failed—to negotiate lower interchange fees with MasterCard and Visa.[8] The same report found that the U.S. Postal Service had "some limited success" in negotiations over interchange fees.[9] Given the size of the entities involved, not to mention the backing of the full faith and credit of the U.S. Government, it is hard to imagine that smaller merchants would enjoy much success in directly negotiating interchange fees with MasterCard and Visa.

While none of this makes for a clear-cut case of collusion between MasterCard and Visa regarding the setting of interchange fees, it has raised significant concerns in our minds about the fairness of the system. Even if MasterCard and Visa's actions were appropriate when they were just getting started, as the recent antitrust cases against Microsoft prove, the kind of behavior that companies can engage in when they are small market players is not necessarily acceptable when their market shares grow to almost 80%.

LITIGATION

Individual retailers and retailing associations, including members of the Merchants Payments Coalition, have sued MasterCard, Visa, and a number of issuing banks under Section 1 of the Sherman Act[10] for setting the interchange fee at levels higher than what a competitive market would allow. These suits have been consolidated in the Federal District Court for the Eastern District of New York. Currently, the suits are in the early phases of discovery.

This is but the latest in a series of antitrust suits against Visa and MasterCard. Earlier efforts to challenge interchange rates on antitrust grounds in U.S. courts have not fared well.[11] However, recent challenges to other credit card practices, have been more successful. For example, in the mid-1990s the Department of Justice successfully sued Visa and MasterCard for their rules that prohibited member banks from issuing a rival card (such as Discover or American Express).[12] More recently, Visa and MasterCard agreed to pay over $3 billion in a settlement with Wal-Mart and other retailers for their practice of tying their debit and credit card offerings.[13] Among other things, the settling retailers claimed that this tying practice resulted in higher interchange fees than they would have incurred in a competitive market.

Visa and MasterCard, relying on cases such as *NaBanco,* are confident that they will successfully defend their interchange fees in the face of this court challenge. However, as the *NaBanco* court

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[8] U.S. GEN. ACCOUNTABILITY OFFICE, CREDIT AND DEBIT CARDS: FEDERAL ENTITIES ARE TAKING ACTIONS TO LIMIT THEIR INTERCHANGE FEES, BUT ADDITIONAL REVENUE COLLECTIONS COST SAVINGS MAY EXIST 25 (2008).
[9] *Id.*
[10] 15 U.S.C. §1.
[11] *See, e.g.,* Nat'l Bancard Corp. (NaBanco) v. Visa U.S.A., Inc., 596 F. Supp. 1231 (S.D. Fla. 1984), *aff'd* 779 F.2d 592 (11th Cir. 1986); and Kendall v. Visa U.S.A., Inc., 2005 WL 2216941 (N.D. Cal. 2005), *aff'd* 518 F.3d 1042 (9th Cir. 2008).
[12] United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 340–42 (SDNY 2001), *aff'd* 344 F.3d. 229 (2d Cir. 2003), *cert. denied,* 543 U.S. 811 (2004).
[13] In re Visa Check/Mastermoney Antitrust Litigation, 297 F.Supp.2d 503, 2004–1 Trade Cases P 74,262 (E.D.N.Y. Dec 19, 2003), *aff'd sub nom.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir. 2005), *cert. denied,* Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc., 544 U.S. 1044 (2005).

noted, "VISA is a joint venture-type enterprise in which the [interchange fee] acts as an internal control mechanism that yields procompetitive efficiencies that its members *could not create acting alone, and helps create a product that its members could not produce singly.*"[14] While that statement may have been true at a time when banking laws prevented banks from functioning as national entities, it is unclear whether the largest Visa and MasterCard issuers, such as Bank of America, Citibank, JP MorganChase, and Capital One could not create their own issuing networks free of the Visa and MasterCard brands.

That said, Congress should be reluctant to intervene in ongoing litigation. However, the relief the merchants are seeking in this legislation could not be ordered by any court. To the extent that Congress provides a remedy through this, or other legislation, it will have to address whether such legislation will be the exclusive prospective remedy for the merchants. Of course, if a court finds that banks violated the antitrust laws in the establishment of interchange fees, then the merchants will be entitled to whatever monetary damages the court deems appropriate.

ISSUES WITH H.R. 5546

Chairman Conyers introduced H.R. 5546, the "Credit Card Fair Fee Act of 2008," on March 6, 2008. As introduced, the proposed legislation grants a limited antitrust exemption to both the banks and the merchants to negotiate jointly the terms and rates that banks charge merchants per consumer transaction. If the parties cannot agree voluntarily to such terms and conditions, then the parties are subject to an administrative procedure before a three-judge panel that will determine the rates and terms for a three year period. The three-judge panel will be selected and administered by the Department of Justice's Antitrust Division and the Federal Trade Commission.

Criticisms of the bill range from the practical, such as how all of the merchants and all of the banks would effectively negotiate an interchange fee agreement, to the philosophical, such as the Antitrust Modernization Commission's admonition that antitrust immunities should be granted rarely. Given that this bill would authorize one of the largest antitrust exemptions in history, these are areas in which Committee oversight could be particularly valuable.

Many of these criticisms were heard at a hearing in the Task Force on Competition Policy and Antitrust Laws on May 15, 2008, at which the following witnesses testified: Mr. Thomas L. Robinson, Vice President of Regulations, National Association of Convenience Stores; Mr. Joshua R. Floum, General Counsel and Corporate Secretary, Visa Inc.; Mr. Joshua Peirez, Chief Payment System Integrity Officer, MasterCard Worldwide; Mr. Steve Cannon, Chairman, Constantine Cannon LLP; Mr. John Blum, Vice President of Operations, Chartway Federal Credit Union; and Mr. Ed Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group.

Following the hearing, on June 2, 2008, Ranking Member Smith sent a letter to the Federal Trade Commission and the Department of Justice requesting their views on H.R. 5546. The DOJ responded

[14] NaBanco, 779 F.2d at 605 (emphasis added).

on June 23, 2008, with a letter expressing reservations about the creation of an antitrust exemption for merchants to counter-balance the perceived market power of the banks. The Department also suggested that this bill likely would not benefit consumers because it would result in the loss of airline miles and other card benefits. The Department had significant concerns about the three-judge panel, including an assertion that it violates the appointments clause of the Constitution.

The FTC responded on June 19, 2008. The FTC observed that antitrust exemptions should be disfavored and only granted when there is a clear showing of need. However, the Commission did not opine that the need had not been demonstrated here. With respect to the administrative burden that the bill would place on the FTC, the Commission wrote that "a governmental process for setting prices for private transactions is at odds with the Commission's mission . . . in promoting open market competition." The Commission also noted that splitting the administrative responsibilities between DOJ and FTC could complicate the administration of the three-judge panel.

Chairman Conyers attempted to address these concerns by eliminating the three-judge panel and replacing it with DOJ oversight over the negotiations. The manager's amendment also provided an opt-out from the negotiations for small banks and credit unions and had language that would try to ensure that consumers received the benefits of this legislation. In the main, these were good changes, but they raise as many questions as they answer.

No one knows how these new oversight and reporting requirements will burden DOJ. For example, the bill requires that the merchants and banks file a schedule for negotiations with the Department's Antitrust Division. If they do not file such a schedule, the Antitrust Division is required to formulate a schedule and inform the parties. How the Antitrust Division will identify all of the parties—including the tens of thousands of issuing banks and the millions of merchants involved—much less notify them all is uncertain.

The opt-out provision for small banks and credit unions is new, too. No one knows which small banks will take this opt-out or how that will affect negotiations between the other parties.

Similarly, while the bill requires banks and merchants to negotiate, it says nothing about what happens if the parties cannot reach a voluntary agreement. Given the number of negotiating parties involved, not to mention the stakes of the negotiations, it is more likely than not that the negotiations will not result in any agreement. In such a case, would the prevailing rates at the time of enactment control? No one knows.

Finally, as noted in extensive debate at the mark-up, most Members want to see a majority of any savings in this bill passed on to consumers in the form of lower prices. While the manager's amendment attempts to address this issue, it is entirely unclear how that provision will actually work. There is no visible enforcement mechanism in the provision. While courts tend to frown on implied causes of action, it is safe to assume that trial attorneys will attempt to take advantage of this pass-through language as a

means to sue merchants large and small. At the end of the day, we might see judges setting retail prices if this bill were enacted.

In conclusion, we believe that the merchants have raised some significant concerns about the fairness of the current interchange system. On the other hand, we recognize that this bill is not the only proposed solution—or perhaps even the right solution—to the problem.

The legislative process is long. This bill will not become law this Congress. We hope that future Congresses will examine the issues outlined above. In the meantime, the parties would be well served to sit down and negotiate a solution that does not involve Congressional intervention.

LAMAR SMITH.
BOB GOODLATTE.
DARRELL ISSA.

DISSENTING VIEWS

The debate in Committee indicated that this legislation would not necessarily have a positive impact on the consumer, small businesses or the retail industry at large.

As Members debated the bill, it became apparent to many that, whatever its stated intent, the result is a legislative intervention into how two industries should divide up a one or two percentage points of revenue, an unseemly exercise for a policymaking body in what is still a free market. One person's cost is another person's revenue, and it is understandable that those that have chosen low margin business models, such as gasoline retailers and grocers, would like to lower their costs. The legislation, however, would also provide relief to high margin businesses of all sizes. Even an attempt to rationalize the legislation, such my small business amendment, did not address the fact that many small businesses have no problem passing these costs on to consumers. The fact that a branded gasoline retailer is limited by an oil company to a margin of between 7 and 13 cents per gallon regardless of the price of gasoline, and the fact that the oil company generally negotiates its own deal with the credit card processor or acquiring bank, further limiting cost recovery by the retailer, does not to me provide a basis for government intervention in the setting of the share of costs that retailers pay for the considerable benefits of accepting electronic transactions. As I noted in my opening statement, just the shifting of the credit risk alone is a substantial benefit.

Regarding specific issue of anti-trust policy, one of the primary flaws in the legislation is the antitrust exemption it grants to two entire industries to allow for anticompetitive negotiations. I do not believe there is a problem in the payment card acceptance marketplace. But, if there were, the solution would be to rectify it either through enforcement of existing law or reviewing the adequacy of existing competition law. This legislation, however, apparently represents the views that two wrongs do, in fact, make a right. Instead of fixing any underlying competition problem, the bill simply waives competition law requirements so that merchants can negotiate in abusive and collusive ways. This exemption is bad for competition and bad for consumers.

This Committee did not fully explore the ramifications of the antitrust immunity included in H.R. 5546. At no time for the record did we hear from independent antitrust experts, the Administration, or any other disinterested expert on competition law. This, by itself, should have been a "red flag" to my colleagues that something was amiss with the bill. However, interested Members of the Committee need not look far for relevant discussions of the harms that H.R. 5546 will cause to consumers and competition.

One reliable source for information about antitrust proposals is the Antitrust Modernization Commission ("AMC") which was legis-

lation drafted by the former Chairman in his first term. This august body was created by Congress to provide expert guidance as to whether our antitrust laws should be modernized. The AMC was made up of bipartisan antitrust experts, and it provided worthwhile analysis of the state of our antitrust laws and whether such laws needed revision. The AMC issued *unanimous* findings relating to granting exemptions from the antitrust laws. The following quotes leave little doubt about the wisdom of granting wholesale antitrust exemptions, as is proposed in H.R. 5546:

> "While the beneficiaries of an exemption likely appreciate reduced market pressures, consumers (as well as non-exempted firms) and the U.S. economy generally bear the harm from the loss of competitive forces." *Antitrust Modernization Report and Recommendations* at 335.

> "Typically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation. The concentrated benefits provide incentives for interested parties to seek immunities from Congress, but the diffuse costs often have sufficiently minimal impact on individual consumers that they are unlikely to oppose the creation of immunities. Congress therefore is unlikely to hear from those who would be adversely affected by a proposed antitrust exemption." *Id.* at 335.

> "Antitrust exemptions can harm the U.S. economy and, in the long run, reduce the competitiveness of the industries that have sought antitrust exemptions." *Id.* at 335.

> "Statutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy." *Id.* at 335.

> "Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general." (emphasis in original) *Id.* at 335.

The AMC is not alone in its general disdain for antitrust immunities. Indeed, prior to the Committee's consideration of H.R. 5546, the Chairman of the Committee received a letter from four bipartisan antitrust experts. The authors were two former Chairmen of the Federal Trade Commission (one a Democrat and one a Republican) and two former Assistant Attorneys General of the Antitrust Division within the Department of Justice (again, one a Democrat and one a Republican). In the letter, the authors describe the harms of H.R. 5546, including the potential harm to consumers.

The Ranking Member of this Committee also asked for input on H.R. 5546 from the Department of Justice and the Federal Trade Commission. In their respective letters, both agencies expressed significant concerns about H.R. 5546. For example, the Department of Justice expressed "serious concerns" about the legislation be-

cause the proposed antitrust exemption could harm consumers in a variety of ways. The Federal Trade Commission reiterated the concerns raised by the AMC in connection with congressionally granted immunities from antitrust laws.

It would seem that antitrust exemptions are generally not a preferred option for Congress, even if there is market dysfunction. They are especially unwise, however, when other remedies are available as would seem to be the case with merchants and payment card networks. Merchant representatives have stated repeatedly that the large payment card networks will not negotiate with them about the terms and rules for access to those networks. This is not my understanding. In fact, the Committee received emphatic testimony to the contrary. (One merchant witness even admitted that he had never even tried to negotiate with either Visa or MasterCard.) I recognize that others appear to disagree with my view on this. Regardless of one's views of the current marketplace, however, one does not need to support H.R. 5546 to give merchants a "voice" with the networks. Specifically, the merchants are currently in mediation with each of the networks as part of the continuing class action litigation against the networks and banks. Either the mediation or the litigation may provide merchants the relief they seek. Perhaps this Committee should review how that process unfolds before proceeding further with H.R. 5546.

In sum, it appears that there are significant concerns about antitrust immunities from a variety of experts in the field. Equally telling, I am unaware of any antitrust experts that are willing to defend the antitrust exemption in H.R. 5546 on its merits. (It may be worth noting that the Committee did hear from W. Stephen Cannon, who represented the merchant lobbyists supporting H.R. 5546. He did not specifically address the policy behind the antitrust immunity granted in H.R. 5546, nor did he address the apparent discrepancy in his support for H.R. 5546 compared with the *unanimous* findings of the AMC quoted above. Mr. Cannon was a commissioner.) Furthermore, it turns out that the legislation is not even necessary to get both sides into the same room for discussions. I urge my colleagues to oppose this unnecessary and harmful bill.

F. JAMES SENSENBRENNER, JR.