

111TH CONGRESS  
1ST SESSION

# S. 1212

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

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IN THE SENATE OF THE UNITED STATES

JUNE 9, 2009

Mr. DURBIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## 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 2009”.

6       **SEC. 2. DEFINITIONS.**

7       In this Act:

8               (1) ACCESS.—The term “access”—

9                       (A) when used as a verb means to use to  
10                      conduct transaction authorization, clearance,

1 and settlement involving the acceptance of cred-  
2 it cards or debit cards from consumers for pay-  
3 ment for goods or services and the receipt of  
4 payment for such goods or services; and

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

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

14 (3) ACQUIRER.—The term “acquirer”—

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

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

24 (4) ADJUDICATION.—The term “adjudication”  
25 has the meaning given that term in section 551 of

1 title 5, United States Code, and does not include  
2 mediation.

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

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

8 (B) includes—

9 (i) section 5 of the Federal Trade  
10 Commission Act (15 U.S.C. 45) to the ex-  
11 tent section 5 applies to unfair methods of  
12 competition; and

13 (ii) State antitrust laws.

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

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

24 (8) CREDIT CARD.—The term “credit card”  
25 means any general-purpose card or other credit de-

1 vice issued or approved for use by a financial institu-  
2 tion for use in allowing the cardholder to obtain  
3 goods or services on credit on terms specified by  
4 that financial institution.

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

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

20 (11) ELECTRONIC PAYMENT SYSTEM  
21 JUDGES.—The term “Electronic Payment System  
22 Judges” means the Electronic Payment System  
23 Judges appointed under section 4(a).

24 (12) FEES.—The term “fees” means any mone-  
25 tary charges, rates, assessments, or other payments

1 imposed by a provider upon a merchant for the mer-  
2 chant to access an electronic payment system.

3 (13) FINANCIAL INSTITUTION.—The term “fi-  
4 nancial institution” has the meaning given that term  
5 in section 603(t) of the Fair Credit Reporting Act  
6 (15 U.S.C. 1681a(t)).

7 (14) ISSUER.—The term “issuer”—

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

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

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

21 (16) MERCHANT.—The term “merchant”  
22 means any person who accepts or who seeks to ac-  
23 cept credit cards or debit cards in payment for goods  
24 or services provided by the person.

1           (17) NEGOTIATING PARTY.—The term “negoti-  
2           ating party” means 1 or more providers of a covered  
3           electronic payment system or 1 or more merchants  
4           who have access to or who are seeking access to that  
5           covered electronic payment system, as the case may  
6           be, and who are in the process of negotiating or who  
7           have executed a voluntarily negotiated access agree-  
8           ment that is still in effect.

9           (18) NORMAL RATE OF RETURN.—The term  
10          “normal rate of return” means the average rate of  
11          return that a firm would receive in an industry when  
12          conditions of perfect competition prevail.

13          (19) PROCEEDING PARTY.—The term “pro-  
14          ceeding party” means collectively all providers of a  
15          covered electronic payment system or collectively all  
16          merchants who have access to or who are seeking ac-  
17          cess to that covered electronic payment system, as  
18          the case may be, during the period in which the  
19          Electronic Payment System Judges are conducting a  
20          proceeding under this Act relating to that covered  
21          electronic payment system.

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

1           (21) PROVIDER.—The term “provider” means  
2 any person who owns, operates, controls, serves as  
3 an issuer for, or serves as an acquirer for a covered  
4 electronic payment system.

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

8           (23) TERMS.—The term “terms” means any  
9 and all rules and conditions that are applicable to  
10 providers of an electronic payment system or to mer-  
11 chants, as the case may be, and that are required  
12 in order for merchants to access that electronic pay-  
13 ment system.

14           (24) VOLUNTARILY NEGOTIATED ACCESS  
15 AGREEMENT.—The term “voluntarily negotiated ac-  
16 cess agreement” means an access agreement volun-  
17 tarily negotiated between 1 or more providers of a  
18 covered electronic payment system and 1 or more  
19 merchants that sets the fees and terms under which  
20 the merchant can access that covered electronic pay-  
21 ment system.

22           (25) WRITTEN DIRECT STATEMENTS.—The  
23 term “written direct statements” means witness  
24 statements, testimony, and exhibits to be presented  
25 in proceedings under this Act, and such other infor-

1       mation that is necessary to establish fees and terms  
2       for access to covered electronic payment systems as  
3       set forth in regulations issued by the Electronic Pay-  
4       ment System Judges under section 5(b)(4).

5       **SEC. 3. ACCESS TO COVERED ELECTRONIC PAYMENT SYS-**  
6                   **TEMS; LIMITED ANTITRUST IMMUNITY FOR**  
7                   **THE NEGOTIATION AND DETERMINATION OF**  
8                   **FEES AND TERMS; STANDARDS FOR ESTAB-**  
9                   **LISHMENT OF FEES AND TERMS.**

10       (a) ACCESS TO COVERED ELECTRONIC PAYMENT  
11       SYSTEMS.—Access by a merchant to any covered elec-  
12       tronic payment system and the fees and terms of such ac-  
13       cess shall be subject to this Act.

14       (b) AUTHORITY AND LIMITED ANTITRUST IMMUNITY  
15       FOR NEGOTIATIONS OF FEES AND TERMS AND PARTICI-  
16       PATION IN PROCEEDINGS.—

17               (1) IN GENERAL.—Notwithstanding any provi-  
18       sion of the antitrust laws—

19                   (A) in negotiating fees and terms and par-  
20       ticipating in any proceedings under subsection  
21       (c), any providers of a covered electronic pay-  
22       ment system and any merchants who have ac-  
23       cess to or who are seeking access to that cov-  
24       ered electronic payment system may jointly ne-  
25       gotiate and agree upon the fees and terms for



1 access to the covered electronic payment sys-  
2 tem, including through the use of common  
3 agents that represent the providers of the cov-  
4 ered electronic payment system or the mer-  
5 chants on a nonexclusive basis; and

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

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

16 (A) any unlawful boycott;

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

19 (C) any unlawful tying arrangement; or

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

24 (c) ESTABLISHMENT OF FEES AND TERMS.—

1 (1) VOLUNTARILY NEGOTIATED ACCESS AGREE-  
2 MENTS.—

3 (A) AGREEMENTS BETWEEN NEGOTIATING  
4 PARTIES.—A voluntarily negotiated access  
5 agreement may be executed at any time be-  
6 tween 1 or more providers of a covered elec-  
7 tronic payment system and 1 or more mer-  
8 chants. With respect to the negotiating parties,  
9 such executed voluntarily negotiated access  
10 agreement shall supersede any fees or terms es-  
11 tablished by the Electronic Payment System  
12 Judges under paragraph (3) relating to that  
13 covered electronic payment system.

14 (B) FILING AGREEMENTS WITH THE ELEC-  
15 TRONIC PAYMENT SYSTEM JUDGES.—The nego-  
16 tiating parties shall jointly file with the Elec-  
17 tronic Payment System Judges—

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

21 (ii) any documentation relating to a  
22 voluntarily negotiated access agreement ev-  
23 idencing any consideration being given or  
24 any marketing or promotional agreement  
25 between the negotiating parties; and

1 (iii) any amendment to that volun-  
2 tarily negotiated access agreement or docu-  
3 mentation.

4 (C) TIMING AND AVAILABILITY OF FIL-  
5 INGS.—The negotiating parties to any volun-  
6 tarily negotiated access agreement executed  
7 after the date of enactment of this Act shall  
8 jointly file the voluntarily negotiated access  
9 agreement, and any documentation or amend-  
10 ment described in subparagraph (B), with the  
11 Electronic Payment System Judges not later  
12 than 30 days after the date of execution of the  
13 voluntarily negotiated access agreement or  
14 amendment or the date of the creation of the  
15 documentation, as the case may be. The Elec-  
16 tronic Payment System Judges shall make pub-  
17 licly available any voluntarily negotiated access  
18 agreement, amendment, or accompanying docu-  
19 mentation filed under this paragraph.

20 (2) INITIATION OF PROCEEDINGS.—The pro-  
21 ceedings under this subsection to establish fees and  
22 terms for access to a covered electronic payment sys-  
23 tem shall be initiated in accordance with section 6.

24 (3) PROCEEDINGS.—

1           (A) IN GENERAL.—The Electronic Pay-  
2           ment System Judges shall conduct proceedings  
3           as specified under this Act to establish fees and  
4           terms for access to a covered electronic pay-  
5           ment system. Except as specifically provided in  
6           a voluntarily negotiated access agreement, a  
7           provider of a covered electronic payment system  
8           may not directly or indirectly charge fees or set  
9           terms for access to a covered electronic pay-  
10          ment system that are not in accordance with  
11          the fees and terms established by the Electronic  
12          Payment System Judges pursuant to pro-  
13          ceedings under this Act.

14          (B) PERIOD OF APPLICABILITY.—Except  
15          as provided in section 6, the fees and terms es-  
16          tablished under this paragraph with respect to  
17          a covered electronic payment system shall apply  
18          during the 3-year period beginning on January  
19          1 of the second year following the year in which  
20          the proceedings to establish such fees and terms  
21          are commenced.

22          (C) STANDARD FOR ESTABLISHMENT OF  
23          FEES AND TERMS BY THE ELECTRONIC PAY-  
24          MENT SYSTEM JUDGES.—

1 (i) IN GENERAL.—In establishing fees  
2 and terms for access to a covered elec-  
3 tronic payment system under subpara-  
4 graph (A), the Electronic Payment System  
5 Judges—

6 (I) shall be limited to selecting,  
7 without modification, 1 of the 2 final  
8 offers of fees and terms filed by the  
9 proceeding parties pursuant to section  
10 5(c)(2)(A); and

11 (II) shall select the final offer of  
12 fees and terms that most closely rep-  
13 resent the fees and terms that would  
14 be negotiated in a hypothetical per-  
15 fectly competitive marketplace for ac-  
16 cess to an electronic payment system  
17 between a willing buyer with no mar-  
18 ket power and a willing seller with no  
19 market power.

20 (ii) STANDARDS.—In determining  
21 which final offer of fees and terms to se-  
22 lect, the Electronic Payment System  
23 Judges—

24 (I) shall consider the costs of  
25 transaction authorization, clearance,

1 and settlement that are necessary to  
2 operate and to access an electronic  
3 payment system;

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

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

12 (IV) may select a final offer that  
13 is a schedule of fees and terms that  
14 varies based upon cost-based dif-  
15 ferences in types of credit card and  
16 debit card transactions (which may in-  
17 clude whether a transaction is of a  
18 signature-based, PIN-based, or card-  
19 not-present type);

20 (V) may select a final offer that  
21 is a schedule of fees and terms that  
22 provides alternative fees and terms for  
23 those acquirers or issuers that are  
24 regulated by the National Credit  
25 Union Administration or that, to-

1           gether with affiliates of the acquirer  
2           or issuer, have assets in a total  
3           amount of less than \$1,000,000,000;  
4           and

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

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

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

22                   (ii) shall give significant weight to  
23           fees in a voluntarily negotiated access  
24           agreement that are substantially below the  
25           fees reflective of the market power of the

1 covered electronic payment systems that  
2 existed before the date of enactment of this  
3 Act.

4 **SEC. 4. ELECTRONIC PAYMENT SYSTEM JUDGES.**

5 (a) APPOINTMENT.—The Attorney General and the  
6 Chairman shall jointly appoint 3 full-time Electronic Pay-  
7 ment System Judges, and shall appoint 1 of the 3 Elec-  
8 tronic Payment System Judges as the Chief Electronic  
9 Payment System Judge.

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

13 (c) RULINGS.—The Electronic Payment System  
14 Judges may make any necessary procedural or evidentiary  
15 ruling in a proceeding under this Act and may, before  
16 commencing a proceeding under this Act, make any proce-  
17 dural ruling that will apply to a proceeding under this Act.

18 (d) ADMINISTRATIVE SUPPORT.—The Attorney Gen-  
19 eral and Chairman shall provide the Electronic Payment  
20 System Judges with the necessary administrative services  
21 related to proceedings under this Act.

22 (e) LOCATION.—The offices of the Electronic Pay-  
23 ment System Judges and staff shall be located in the of-  
24 fices of the Department of Justice or the Federal Trade  
25 Commission.



1 (f) QUALIFICATIONS OF ELECTRONIC PAYMENT SYS-  
2 TEM JUDGES.—Each Electronic Payment System Judge  
3 shall be an attorney who has at least 7 years of legal expe-  
4 rience. The Chief Electronic Payment System Judge shall  
5 have at least 5 years of experience in adjudications, arbi-  
6 trations, or court trials. At least 1 Electronic Payment  
7 System Judge who is not the Chief Electronic Payment  
8 System Judge shall have significant knowledge of elec-  
9 tronic payment systems. At least one Electronic Payment  
10 System Judge shall have significant knowledge of econom-  
11 ics. An individual may serve as an Electronic Payment  
12 System Judge only if the individual is free of any financial  
13 conflict of interest under the standards established under  
14 subsection (m).

15 (g) STAFF.—The Chief Electronic Payment System  
16 Judge shall hire, at minimum, 3 full-time staff members  
17 to assist the Electronic Payment System Judges in per-  
18 forming the duties of the Electronic Payment System  
19 Judges under this Act.

20 (h) TERMS.—

21 (1) INITIAL APPOINTMENTS.—For the first ap-  
22 pointments of Electronic Payment System Judges  
23 after the date of enactment of this Act—

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

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

5           (C) 1 Electronic Payment System Judge  
6           who is not the Chief Electronic Payment Sys-  
7           tem Judge shall be appointed for a term of 2  
8           years.

9           (2) SUBSEQUENT APPOINTMENT.—After the  
10          appointments under paragraph (1), an Electronic  
11          Payment System Judge shall be appointed for a  
12          term of 6 years.

13          (3) REAPPOINTMENT.—An individual serving as  
14          an Electronic Payment System Judge may be re-  
15          appointed to subsequent terms.

16          (4) START AND END OF TERMS.—The term of  
17          an Electronic Payment System Judge shall begin on  
18          the date on which the term of the predecessor of  
19          that Electronic Payment System Judge ends. If a  
20          successor Electronic Payment System Judge has not  
21          been appointed as of the date on which the term of  
22          office of an Electronic Payment System Judge ends,  
23          the individual serving that term may continue to  
24          serve as an interim Electronic Payment System  
25          Judge until a successor is appointed.

1 (i) VACANCIES OR INCAPACITY.—

2 (1) VACANCIES.—The Attorney General and the  
3 Chairman shall act expeditiously to fill any vacancy  
4 in the position of Electronic Payment System Judge,  
5 and may appoint an interim Electronic Payment  
6 System Judge to serve until an Electronic Payment  
7 System Judge is appointed to fill the vacancy under  
8 this section. An Electronic Payment System Judge  
9 appointed to fill a vacancy occurring before the expi-  
10 ration of the term for which the predecessor of that  
11 individual was appointed shall be appointed for the  
12 remainder of that term.

13 (2) INCAPACITY.—If an Electronic Payment  
14 System Judge is temporarily unable to perform the  
15 duties of an Electronic Payment System Judge, the  
16 Attorney General and Chairman may appoint an in-  
17 terim Electronic Payment System Judge to perform  
18 such duties during the period of such incapacity.

19 (j) COMPENSATION.—

20 (1) JUDGES.—The Chief Electronic Payment  
21 System Judge shall receive compensation at the rate  
22 of basic pay payable for level AL-1 for administra-  
23 tive law judges under section 5372(b) of title 5,  
24 United States Code, and each Electronic Payment  
25 System Judge who is not the Chief Electronic Pay-

1 ment System Judge shall receive compensation at  
2 the rate of basic pay payable for level AL-2 for ad-  
3 ministrative law judges under such section. The  
4 compensation of the Electronic Payment System  
5 Judges shall not be subject to any regulations adopt-  
6 ed by the Office of Personnel Management under its  
7 authority under section 5376(b)(1) of title 5, United  
8 States Code.

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

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

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

19 (C) the rate of pay of 1 staff member shall  
20 be not less than the basic rate of pay payable  
21 for GS-8 of the General Schedule and not more  
22 than the basic rate of pay payable for level 10  
23 of GS-11 of such Schedule.

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

4           (k) INDEPENDENCE OF ELECTRONIC PAYMENT SYS-  
5           TEM JUDGES.—

6           (1) IN MAKING DETERMINATIONS.—

7           (A) IN GENERAL.—Except as provided in  
8           subparagraph (B), the Electronic Payment Sys-  
9           tem Judges—

10                   (i) shall have full independence in es-  
11                   tablishing fees and terms for access to cov-  
12                   ered electronic payment systems and in  
13                   issuing any other ruling under this Act;  
14                   and

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

18           (B) CONSULTATION.—The Electronic Pay-  
19           ment System Judges shall consult with the At-  
20           torney General and the Chairman regarding  
21           any determination or ruling that would require  
22           that any act be performed by the Attorney Gen-  
23           eral or the Chairman, and any such determina-  
24           tion or ruling shall not be binding upon the At-  
25           torney General or the Chairman.

1 (2) PERFORMANCE APPRAISALS.—

2 (A) IN GENERAL.—Notwithstanding any  
3 other provision of law or any regulation of the  
4 Department of Justice or Federal Trade Com-  
5 mission, and subject to subparagraph (B), the  
6 Electronic Payment System Judges shall not  
7 receive performance appraisals.

8 (B) RELATING TO SANCTION OR RE-  
9 MOVAL.—To the extent that the Attorney Gen-  
10 eral and the Chairman adopt regulations under  
11 subsection (m) relating to the sanction or re-  
12 moval of an Electronic Payment System Judge  
13 and such regulations require documentation to  
14 establish the cause of such sanction or removal,  
15 the Electronic Payment System Judge may re-  
16 ceive an appraisal related specifically to the  
17 cause of the sanction or removal.

18 (l) INCONSISTENT DUTIES BARRED.—No Electronic  
19 Payment System Judge may undertake duties that conflict  
20 with the duties and responsibilities of an Electronic Pay-  
21 ment System Judge under this Act.

22 (m) STANDARDS OF CONDUCT.—The Attorney Gen-  
23 eral and the Chairman shall adopt regulations regarding  
24 the standards of conduct, including financial conflict of  
25 interest and restrictions against ex parte communications,

1 which shall govern the Electronic Payment System Judges  
2 and the proceedings under this Act.

3 (n) REMOVAL OR SANCTION.—The Attorney General  
4 and the Chairman acting jointly may sanction or remove  
5 an Electronic Payment System Judge for violation of the  
6 standards of conduct adopted under subsection (m), mis-  
7 conduct, neglect of duty, or any disqualifying physical or  
8 mental disability. Any such sanction or removal may be  
9 made only after notice and opportunity for a hearing. The  
10 Attorney General and the Chairman may suspend an Elec-  
11 tronic Payment System Judge during the pendency of  
12 such a hearing. The Attorney General and the Chairman  
13 shall appoint an interim Electronic Payment System  
14 Judge during the period of any suspension under this sub-  
15 section.

16 **SEC. 5. PROCEEDINGS OF ELECTRONIC PAYMENT SYSTEM**  
17 **JUDGES.**

18 (a) PROCEEDINGS.—

19 (1) IN GENERAL.—The Electronic Payment  
20 System Judges shall act in accordance with regula-  
21 tions issued by the Electronic Payment System  
22 Judges, the Attorney General, and the Chairman,  
23 and on the basis of a written record, prior deter-  
24 minations and interpretations of the Electronic Pay-

1 ment System Judges under this Act, and decisions  
2 of the court of appeals of the United States.

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

11 (b) PROCEDURES.—

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

18 (2) MANDATORY NEGOTIATION PERIOD.—

19 (A) IN GENERAL.—Promptly after the  
20 commencement of a proceeding under section  
21 3(c) to establish fees and terms for access to a  
22 covered electronic payment system, the Elec-  
23 tronic Payment System Judges shall initiate a  
24 period for negotiations for the purpose of  
25 achieving a voluntarily negotiated access agree-



1           ment. Nothing in this paragraph shall preclude  
2           the proceeding parties or any members thereof  
3           from conducting negotiations before or after the  
4           mandatory negotiation period for the purpose of  
5           achieving a voluntarily negotiated access agree-  
6           ment.

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

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

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

18                (A) IN GENERAL.—In any further pro-  
19                ceeding ordered by the Electronic Payment Sys-  
20                tem Judges under paragraph (2)(C), there shall  
21                be only 2 proceeding parties, 1 consisting of all  
22                providers of the covered electronic payment sys-  
23                tem and the other consisting of all merchants  
24                that have access to or seek access to the cov-  
25                ered electronic payment system. Each pro-

1 proceeding party shall bear its own costs. A pro-  
2 vider of a covered electronic payment system or  
3 a merchant that has access to or seeks access  
4 to the covered electronic payment system may  
5 choose not to participate in the proceeding as a  
6 member of a proceeding party, but unless such  
7 provider or merchant executes a voluntarily ne-  
8 gotiated access agreement, such provider or  
9 merchant shall be bound by the determination  
10 of the Electronic Payment System Judges with  
11 regard to the fees and terms for access to the  
12 covered electronic payment system.

13 (B) RULE OF CONSTRUCTION.—Nothing in  
14 this paragraph may be construed to prohibit the  
15 proceeding parties or any members thereof in a  
16 proceeding under subparagraph (A) from nego-  
17 tiating and entering into a voluntarily nego-  
18 tiated access agreement at any other time.

19 (4) REGULATIONS.—

20 (A) AUTHORIZATION.—

21 (i) IN GENERAL.—The Electronic  
22 Payment System Judges may issue regula-  
23 tions to carry out the duties of the Elec-  
24 tronic Payment System Judges under this  
25 Act. All regulations issued by the Elec-

1           tronic Payment System Judges are subject  
2           to the approval of the Attorney General  
3           and the Chairman. Not later than 120  
4           days after the date on which all Electronic  
5           Payment System Judges are appointed  
6           under section 4(h)(1), the Electronic Pay-  
7           ment System Judges shall issue regula-  
8           tions to govern proceedings under this sub-  
9           section. In setting these regulations, the  
10          Electronic Payment System Judges shall  
11          consider the regulations issued by the  
12          Copyright Royalty Judges under section  
13          803(b)(6) of title 17, United States Code.

14                 (ii) SCOPE.—The regulations issued  
15                 under clause (i) shall include regulations  
16                 regarding the procedures described in sub-  
17                 paragraph (B).

18                 (B) PROCEDURES.—

19                         (i) WRITTEN DIRECT STATEMENTS.—  
20                         The written direct statements of the pro-  
21                         ceeding parties shall be filed by a date  
22                         specified by the Electronic Payment Sys-  
23                         tem Judges, which may be not earlier than  
24                         4 months, and not later than 5 months,  
25                         after the end of the voluntary negotiation

1 period under paragraph (2). Notwith-  
2 standing the preceding sentence, the Elec-  
3 tronic Payment System Judges may allow  
4 a proceeding party to file an amended writ-  
5 ten direct statement based on new infor-  
6 mation received during the discovery proc-  
7 ess, not later than 15 days after the end  
8 of the discovery period specified in clause  
9 (ii).

10 (ii) DISCOVERY SCHEDULE.—Fol-  
11 lowing the submission to the Electronic  
12 Payment System Judges of written direct  
13 statements by the proceeding parties, the  
14 Electronic Payment System Judges shall  
15 meet with the proceeding parties to set a  
16 schedule for conducting and completing  
17 discovery. Such schedule shall be deter-  
18 mined by the Electronic Payment System  
19 Judges. Discovery in such proceedings  
20 shall be permitted for a period of not  
21 longer than 60 days, except for discovery  
22 ordered by the Electronic Payment System  
23 Judges in connection with the resolution of  
24 motions, orders, and disputes pending at  
25 the end of such period.

1 (iii) INITIAL DISCLOSURES.—

2 (I) IN GENERAL.—In a pro-  
3 ceeding under this Act to determine  
4 fees and terms for access to a covered  
5 electronic payment system, certain  
6 persons shall make initial disclosures  
7 not later than 30 days after the date  
8 of commencement of the proceeding,  
9 in accordance with this clause.

10 (II) ISSUERS, ACQUIRERS, AND  
11 OWNERS.—Any person who is 1 of the  
12 10 largest issuers for a covered elec-  
13 tronic payment system in terms of  
14 number of cards issued, any person  
15 who is 1 of the 10 largest acquirers  
16 for a covered electronic payment sys-  
17 tem based on dollar amount of trans-  
18 actions made by merchants they serve,  
19 and any person who owns or controls  
20 the relevant covered electronic pay-  
21 ment system and establishes the terms  
22 and conditions through which issuers  
23 and acquirers participate in the cov-  
24 ered electronic payment system, shall  
25 produce to the Electronic Payment

1 System Judges and to both pro-  
2 ceedings parties—

3 (aa) an itemized list of the  
4 costs necessary to operate the  
5 covered electronic payment sys-  
6 tem that were incurred by the  
7 person during the most recent  
8 full calendar year before the initi-  
9 ation of the proceeding; and

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

15 (III) MERCHANTS.—Any person  
16 who is 1 of the 10 largest merchants  
17 using the relevant covered electronic  
18 payment system, determined based on  
19 dollar amount of transactions made  
20 with the covered electronic payment  
21 system, shall produce to the Elec-  
22 tronic Payment System Judges and to  
23 both proceeding parties—

24 (aa) an itemized list of the  
25 costs necessary to access the elec-

1           tronic payment system during the  
2           most recent full calendar year  
3           prior to the initiation of the pro-  
4           ceeding; and

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

10           (IV) DISAGREEMENT.—Any dis-  
11           agreement regarding whether a person  
12           is required to make an initial disclo-  
13           sure under this clause, or the contents  
14           of such a disclosure, shall be resolved  
15           by the Electronic Payment System  
16           Judges.

17           (iv) DEPOSITIONS.—

18                   (I) IN GENERAL.—In a pro-  
19           ceeding under this Act to determine  
20           fees and terms for access to a covered  
21           electronic payment system, each pro-  
22           ceeding party shall be permitted to  
23           take depositions of every witness iden-  
24           tified by the other proceeding party.  
25           Except as provided in subclause (III),

1 each proceeding party also shall be  
2 permitted to take 5 additional deposi-  
3 tions in the entire proceeding.

4 (II) ORGANIZATIONAL ENTI-  
5 TIES.—A deposition notice or sub-  
6 poena may name as the deponent a  
7 person who is an individual or a per-  
8 son who is not an individual. Such  
9 deposition notice or subpoena shall de-  
10 scribe with reasonable particularity  
11 the matters on which examination is  
12 requested. If the deposition notice or  
13 subpoena names a person who is not  
14 an individual, the deponent person so  
15 named shall designate 1 or more offi-  
16 cers, directors, or managing agents, or  
17 other individual persons who consent  
18 to testify on behalf of the deponent  
19 person, and may set forth, for each  
20 individual person designated, the mat-  
21 ters on which the individual person  
22 will testify. A subpoena shall advise a  
23 nonparty deponent person of the duty  
24 of the deponent person to make such  
25 a designation. An individual person



1 designated under this subclause shall  
2 testify as to matters known or reason-  
3 ably available to the deponent person.

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

13 (v) WRITTEN DISCOVERY.—In a pro-  
14 ceeding under this Act to determine fees  
15 and terms for access to a covered elec-  
16 tronic payment system, each proceeding  
17 party shall be permitted to serve written  
18 discovery requests on 10 persons. These  
19 written discovery requests may include re-  
20 quests for production or inspection, a total  
21 of no more than 10 requests for admission  
22 in the entire proceeding, and a total of no  
23 more than 25 interrogatories in the entire  
24 proceeding. The Electronic Payment Sys-  
25 tem Judges may increase the permitted

1 number of requests for admission or inter-  
2 rogatories for good cause in exceptional  
3 circumstances, and shall resolve any dis-  
4 putes among persons within either pro-  
5 ceeding party regarding the allocation of  
6 the requests for admission or interro-  
7 gatories permitted under this clause.

8 (vi) SUBPOENAS.—Upon the request  
9 of a party to a proceeding to determine  
10 fees and terms for access to a covered elec-  
11 tronic payment system, the Electronic Pay-  
12 ment System Judges may issue a subpoena  
13 commanding a person to appear and give  
14 testimony, or to produce and permit in-  
15 spection of documents or tangible things, if  
16 the resolution of the proceeding by the  
17 Electronic Payment System Judges may be  
18 substantially impaired by the absence of  
19 such testimony or production of documents  
20 or tangible things. A subpoena under this  
21 clause shall specify with reasonable par-  
22 ticularity the materials to be produced or  
23 the scope and nature of the required testi-  
24 mony. Nothing in this clause shall preclude  
25 the Electronic Payment System Judges

1 from requesting the production by a person  
2 of information or materials relevant to the  
3 resolution by the Electronic Payment Sys-  
4 tem Judges of a material issue of fact.

5 (vii) OBJECTIONS TO DISCOVERY RE-  
6 QUESTS.—

7 (I) IN GENERAL.—Any objection  
8 to a request or subpoena under clause  
9 (v) or (vi) shall be resolved by a mo-  
10 tion or request to compel production  
11 made to the Electronic Payment Sys-  
12 tem Judges in accordance with regula-  
13 tions adopted by the Electronic Pay-  
14 ment System Judges. Each motion or  
15 request to compel discovery shall be  
16 determined by the Electronic Payment  
17 System Judges, or by an Electronic  
18 Payment System Judge when per-  
19 mitted under subsection (a)(2). Upon  
20 such motion or request to compel dis-  
21 covery, the Electronic Payment Sys-  
22 tem Judges may order discovery  
23 under regulations established under  
24 this paragraph.

1 (II) CONSIDERATIONS.—In deter-  
2 mining whether discovery will be  
3 granted under this clause, the Elec-  
4 tronic Payment System Judges may  
5 consider—

6 (aa) whether the burden or  
7 expense of producing the re-  
8 quested information or materials  
9 outweighs the likely benefit, tak-  
10 ing into account the needs and  
11 resources of the proceeding par-  
12 ties, the importance of the issues  
13 at stake, and the probative value  
14 of the requested information or  
15 materials in resolving such  
16 issues;

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

24 (cc) whether the proceeding  
25 party seeking discovery has had

1 ample opportunity by discovery in  
2 the proceeding or by other means  
3 to obtain the information sought.

4 (viii) VOLUNTARILY NEGOTIATED AC-  
5 CESS AGREEMENTS.—In proceedings to de-  
6 termine fees and terms for access to a cov-  
7 ered electronic payment system, the Elec-  
8 tronic Payment System Judges shall make  
9 available to the proceeding parties all docu-  
10 ments filed under section 3(c)(1).

11 (ix) SETTLEMENT CONFERENCE.—  
12 The Electronic Payment System Judges  
13 shall order a settlement conference between  
14 the proceeding parties to facilitate the  
15 presentation of offers of settlement be-  
16 tween the parties. The settlement con-  
17 ference shall be held during the 21-day pe-  
18 riod beginning on the date on which the  
19 discovery period ends and shall take place  
20 outside the presence of the Electronic Pay-  
21 ment System Judges.

22 (x) DIRECT AND REBUTTAL HEAR-  
23 INGS.—At the conclusion of the 21-day pe-  
24 riod described in clause (ix), the Electronic  
25 Payment System Judges shall determine if

1 further proceedings under this Act are nec-  
2 essary. If the Electronic Payment System  
3 Judges determine further proceedings  
4 under this Act are necessary, the Elec-  
5 tronic Payment System Judges shall  
6 schedule a direct hearing of not more than  
7 30 court days and a rebuttal hearing of  
8 not more than 20 court days during which  
9 both proceeding parties will be allowed to  
10 offer witness testimony and documents.

11 (xi) SPONSORING WITNESSES.—No  
12 evidence, including exhibits, may be sub-  
13 mitted in the written direct statement or  
14 written rebuttal statement of a proceeding  
15 party without a sponsoring witness, except  
16 for—

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

20 (II) evidence of which the Elec-  
21 tronic Payment System Judges have  
22 taken official notice;

23 (III) incorporation by reference  
24 of past records; or

25 (IV) good cause shown.

1           (xii) HEARSAY.—Hearsay may be ad-  
2           mitted in proceedings under this Act to the  
3           extent determined relevant and reliable by  
4           the Electronic Payment System Judges.

5           (xiii) APPLICABILITY OF THE FED-  
6           ERAL RULES OF EVIDENCE.—To the extent  
7           not inconsistent with this subparagraph,  
8           the Federal Rules of Evidence shall apply  
9           to proceedings under this Act.

10           (5) PENALTIES FOR FAILURE TO COMPLY WITH  
11           A DISCOVERY REQUEST.—

12           (A) FAILURE TO COMPLY.—A person has  
13           failed to comply with a discovery request if the  
14           person, or an employee or agent of the person,  
15           fails, without substantial justification, to—

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

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

23           (iii) answer an interrogatory sub-  
24           mitted under paragraph (4)(B)(v);

1 (iv) produce nonprivileged documents  
2 requested under clause (v) or (vi) of para-  
3 graph (4)(B); or

4 (v) admit the genuineness of any doc-  
5 ument or the truth of any matter as re-  
6 quested under paragraph (4)(B)(v), and  
7 the person requesting the admissions  
8 thereafter proves the genuineness of the  
9 document or the truth of the matter.

10 (B) FALSE OR MISLEADING RESPONSES.—

11 For purposes of this Act, any disclosure, an-  
12 swer, or response that is false or substantially  
13 misleading, evasive, or incomplete shall be  
14 deemed a failure to comply with a discovery re-  
15 quest.

16 (C) NEGATIVE INFERENCE IN CURRENT

17 PROCEEDING.—If any person fails to comply  
18 with a discovery request, the Electronic Pay-  
19 ment System Judges may issue an order that  
20 the matters regarding which the order was  
21 made or any other designated facts shall be  
22 taken to be established for the purposes of the  
23 current proceeding in accordance with the claim  
24 of the proceeding party seeking discovery and  
25 obtaining the order.



1 (D) CIVIL PENALTY.—

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

10 (ii) NOTICE AND HEARINGS.—No civil  
11 penalty may be assessed under this sub-  
12 paragraph except under an order of the  
13 Electronic Payment System Judges and  
14 unless the person accused of the violation  
15 was given prior notice and opportunity to  
16 request and participate in a hearing before  
17 the Electronic Payment System Judges  
18 with respect to the violation.

19 (iii) DETERMINING AMOUNT.—In de-  
20 termining the amount of any penalty as-  
21 sessed under this subparagraph, the Elec-  
22 tronic Payment System Judges shall take  
23 into account the nature, circumstances, ex-  
24 tent, and gravity of the violation or viola-  
25 tions and, with respect to the violator, abil-

1           ity to pay, any prior history of such viola-  
2           tions, the degree of culpability, economic  
3           benefit or savings (if any) resulting from  
4           the violation, and such other matters as  
5           justice may require.

6           (iv) REVIEW.—Any person who re-  
7           quested a hearing with respect to a civil  
8           penalty under this subparagraph and who  
9           is aggrieved by an order assessing the civil  
10          penalty may file a petition for judicial re-  
11          view of such order with the United States  
12          Court of Appeals for the District of Co-  
13          lumbia Circuit. Such a petition may be  
14          filed not later than 30 days after the date  
15          on which the order making such assess-  
16          ment was issued. The United States Court  
17          of Appeals for the District of Columbia  
18          Circuit shall have jurisdiction to enter a  
19          judgment affirming, modifying, or setting  
20          aside in whole or in part, an order of the  
21          Electronic Payment System Judges under  
22          this subparagraph, or the court may re-  
23          mand the proceeding to the Electronic  
24          Payment System Judges for such further  
25          action as the court may direct. The Attor-

1           ney General shall represent the Electronic  
2           Payment System Judges before the court.

3           (v) ENFORCEMENT.—If any person  
4           fails to pay an assessment of a civil pen-  
5           alty after the civil penalty has become a  
6           final and unappealable order or after the  
7           appropriate court has entered final judg-  
8           ment, the Electronic Payment System  
9           Judges shall request the Attorney General  
10          to institute a civil action in an appropriate  
11          district court of the United States to col-  
12          lect the penalty, and such court shall have  
13          jurisdiction to hear and decide any such  
14          action. In hearing such action, the court  
15          shall have authority to review the violation  
16          and the assessment of the civil penalty on  
17          the record.

18          (c) DETERMINATION OF ELECTRONIC PAYMENT SYS-  
19          TEM JUDGES.—

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

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

1 (B) 15 days before the date on which the  
2 fees and terms in effect for the relevant covered  
3 electronic payment system expire.

4 (2) DETERMINATION.—

5 (A) FILING OF FINAL OFFER.—Before the  
6 commencement of a direct hearing in a pro-  
7 ceeding under subsection (b)(4)(B)(x), each  
8 proceeding party shall file with the Electronic  
9 Payment System Judges and with the other  
10 proceeding party a final offer of fees and terms  
11 for access to the covered electronic payment  
12 system. A proceeding party may not amend a  
13 final offer submitted under this subparagraph,  
14 except with the express consent of the Elec-  
15 tronic Payment System Judges and the other  
16 proceeding party.

17 (B) SELECTION BETWEEN FINAL OF-  
18 FERS.—After the conclusion of the direct hear-  
19 ing and rebuttal hearing, the Electronic Pay-  
20 ment System Judges shall make their deter-  
21 mination by selecting 1 of the 2 final offers  
22 filed by the proceeding parties. The Electronic  
23 Payment System Judges shall make their selec-  
24 tion in accordance with the standards described  
25 in section 3(e)(3)(C).

1 (C) VOTING AND DISSENTING OPINIONS.—

2 A final determination of the Electronic Pay-  
3 ment System Judges in a proceeding under this  
4 Act shall be made by majority vote. An Elec-  
5 tronic Payment System Judge dissenting from  
6 the majority on any determination under this  
7 Act may issue a dissenting opinion, which shall  
8 be included with the determination.

9 (3) REHEARINGS.—

10 (A) IN GENERAL.—The Electronic Pay-  
11 ment System Judges may, in exceptional cases,  
12 upon motion of a proceeding party, order a re-  
13 hearing, after the determination in the pro-  
14 ceeding is issued under paragraph (2), on such  
15 matters as the Electronic Payment System  
16 Judges determine to be appropriate.

17 (B) TIMING FOR FILING MOTION.—Any  
18 motion for a rehearing under subparagraph (A)  
19 shall be filed not later than 15 days after the  
20 date on which the Electronic Payment System  
21 Judges deliver to the parties in the proceeding  
22 their initial determination concerning fees and  
23 terms.

24 (C) PARTICIPATION BY OPPOSING PARTY  
25 NOT REQUIRED.—In any case in which a re-

1 hearing is ordered under this paragraph, any  
2 opposing proceeding party shall not be required  
3 to participate in the rehearing, except that non-  
4 participation may give rise to the limitations  
5 with respect to judicial review provided for in  
6 subsection (d)(1).

7 (D) NO NEGATIVE INFERENCE.—The Elec-  
8 tronic Payment System Judges may not draw a  
9 negative inference from lack of participation in  
10 a rehearing.

11 (E) CONTINUITY OF FEES AND TERMS.—

12 (i) IN GENERAL.—If the decision of  
13 the Electronic Payment System Judges on  
14 any motion for a rehearing is not rendered  
15 before the expiration of the fees and terms  
16 in effect for the relevant covered electronic  
17 payment system, in the case of a pro-  
18 ceeding to determine successor fees and  
19 terms for fees and terms that expire on a  
20 specified date, the initial determination of  
21 the Electronic Payment System Judges  
22 that is the subject of the rehearing motion  
23 shall be effective as of the day following  
24 the date on which the fees and terms that  
25 were previously in effect expire.

1           (ii) FEE PAYMENTS.—The pendency  
2 of a motion for a rehearing under this  
3 paragraph shall not relieve a person obli-  
4 gated to make fee payments for access to  
5 a covered electronic payment system who  
6 would be affected by the determination on  
7 that motion from paying the fees required  
8 and complying with the terms under the  
9 relevant determination.

10           (iii) OVERPAYMENTS AND UNDERPAY-  
11 MENTS.—Notwithstanding clause (ii), if  
12 fees described in clause (ii) are paid—

13           (I) the recipient of such fees  
14 shall, not later than 60 days after the  
15 date on which the motion for rehear-  
16 ing is resolved or, if the motion is  
17 granted, 60 days after the date on  
18 which the rehearing is concluded, re-  
19 turn any excess fees described in  
20 clause (ii), to the extent necessary to  
21 comply with the final determination  
22 by the Electronic Payment System  
23 Judges of fees and terms for access to  
24 the covered electronic payment sys-  
25 tem; and

1 (II) a person obligated to make  
2 fee payments shall, not later than 60  
3 days after the date on which the mo-  
4 tion for rehearing is resolved or, if the  
5 motion is granted, 60 days after the  
6 date on which the rehearing is con-  
7 cluded, pay the recipient the amount  
8 of any underpayment of fees described  
9 in clause (ii), to the extent necessary  
10 to comply with the final determination  
11 by the Electronic Payment System  
12 Judges of fees and terms for access to  
13 the covered electronic payment sys-  
14 tem.

15 (4) CONTENTS OF DETERMINATION.—A deter-  
16 mination of the Electronic Payment System Judges  
17 shall establish the fees and terms for access to the  
18 relevant covered electronic payment system, shall be  
19 supported by the written record, and shall set forth  
20 the findings of fact relied on by the Electronic Pay-  
21 ment System Judges. The Electronic Payment Sys-  
22 tem Judges shall make publicly available in their en-  
23 tirety all determinations issued under this para-  
24 graph.



1           (5) CONTINUING JURISDICTION.—The Elec-  
2           tronic Payment System Judges may, with the ap-  
3           proval of the Attorney General and the Chairman,  
4           issue an amendment to a written determination to  
5           correct any technical or clerical errors in the deter-  
6           mination in response to unforeseen circumstances  
7           that would frustrate the proper implementation of  
8           such determination. Such amendment shall be set  
9           forth in a written addendum to the determination  
10          that shall be distributed to the proceeding parties  
11          and shall be published in the Federal Register.

12          (6) PROTECTIVE ORDER.—The Electronic Pay-  
13          ment System Judges may issue such orders as may  
14          be appropriate to protect confidential information,  
15          including orders excluding confidential information  
16          from the record of the determination that is pub-  
17          lished or made available to the public, except that  
18          any fees and terms of an access agreement, includ-  
19          ing voluntarily negotiated access agreements filed  
20          under section 3(c)(1), may not be excluded from  
21          publication.

22          (7) PUBLICATION OF DETERMINATION.—Not  
23          later than 60 days after the date on which the Elec-  
24          tronic Payment System Judges issue a determina-  
25          tion under this subsection, the Attorney General and

1 the Chairman shall cause the determination, and  
2 any corrections thereto, to be published in the Fed-  
3 eral Register. The Electronic Payment System  
4 Judges also shall publicize the determination and  
5 any corrections in such other manner as the Attor-  
6 ney General and the Chairman consider appropriate,  
7 including publication on the Internet. The Electronic  
8 Payment System Judges also shall make the deter-  
9 mination, corrections, and the accompanying record  
10 available for public inspection and copying.

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

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

15 (B) may not include any provision in such  
16 terms described in subparagraph (A) that pre-  
17 vents a provider of a covered electronic payment  
18 system from asserting other rights or remedies  
19 provided under this Act.

20 (d) JUDICIAL REVIEW.—

21 (1) APPEAL.—Any determination of the Elec-  
22 tronic Payment System Judges under subsection (c)  
23 may, not later than 30 days after the date of publi-  
24 cation of the determination in the Federal Register,  
25 be appealed, to the United States Court of Appeals

1 for the District of Columbia Circuit, by any ag-  
2 grievied member of a proceeding party under this Act  
3 who would be bound by the determination. Any pro-  
4 ceeding party that did not participate in a rehearing  
5 may not raise any issue that was the subject of that  
6 rehearing at any stage of judicial review of the hear-  
7 ing determination. If no appeal is brought within the  
8 30-day period under this paragraph, the determina-  
9 tion of the Electronic Payment System Judges shall  
10 be final, and shall take effect as described in para-  
11 graph (2).

12 (2) EFFECT OF FEES AND TERMS.—

13 (A) FEE PAYMENTS.—The pendency of an  
14 appeal under this subsection shall not relieve a  
15 person obligated to make fee payments for ac-  
16 cess to a covered electronic payment system  
17 who would be affected by the determination on  
18 appeal from paying the fees required and com-  
19 plying with the terms under the relevant deter-  
20 mination or regulations.

21 (B) OVERPAYMENTS AND UNDERPAY-  
22 MENTS.—Notwithstanding subparagraph (A), if  
23 fees described in subparagraph (A) are paid—

24 (i) the recipient of such fees shall, not  
25 later than 60 days after the date on which

1 the appeal is resolved return any excess  
2 fees described in subparagraph (A) (and  
3 interest thereon, if ordered under para-  
4 graph (3)), to the extent necessary to com-  
5 ply with the final determination of fees and  
6 terms on appeal; and

7 (ii) a person obligated to make fee  
8 payments shall, not later than 60 days  
9 after the date on which the appeal is re-  
10 solved, pay the recipient the amount of any  
11 underpayment of fees described in sub-  
12 paragraph (A) (and interest thereon, if or-  
13 dered under paragraph (3)), to the extent  
14 necessary to comply with the final deter-  
15 mination of fees and terms on appeal.

16 (3) JURISDICTION OF COURT.—If the United  
17 States Court of Appeals for the District of Columbia  
18 Circuit, under section 706 of title 5, United States  
19 Code, modifies or vacates a determination of the  
20 Electronic Payment System Judges, the court may  
21 enter its own determination with respect to the  
22 amount or distribution of fees and costs, and order  
23 the repayment of any excess fees, the payment of  
24 any underpaid fees, and the payment of interest per-  
25 taining respectively thereto, in accordance with its

1 final judgment. The court also may vacate the deter-  
2 mination of the Electronic Payment System Judges  
3 and remand the case to the Electronic Payment Sys-  
4 tem Judges for further proceedings.

5 (e) AUTHORIZATION OF APPROPRIATIONS.—There  
6 are authorized to be appropriated such sums as may be  
7 necessary to carry out this Act.

8 **SEC. 6. INSTITUTION OF PROCEEDINGS BEFORE ELEC-**  
9 **TRONIC PAYMENT SYSTEM JUDGES.**

10 (a) INITIAL PROCEEDINGS.—

11 (1) TIMING.—Proceedings under this Act shall  
12 be commenced as soon as practicable after the date  
13 of enactment of this Act to establish fees and terms  
14 for access to covered electronic payment systems  
15 under section 3(c), which shall be effective during  
16 the period beginning on January 1, 2011, and end-  
17 ing on December 31, 2012. The Electronic Payment  
18 System Judges shall cause notice of commencement  
19 of such proceedings to be published in the Federal  
20 Register.

21 (2) PROCEDURES SPECIFIC TO THE INITIAL  
22 PROCEEDINGS.—

23 (A) DISCOVERY PERIOD.—Notwithstanding  
24 section 5(b)(4)(B)(ii), discovery in the initial  
25 proceedings described in paragraph (1) shall be

1 permitted for a period of 90 days, except for  
2 discovery ordered by the Electronic Payment  
3 System Judges in connection with the resolu-  
4 tion of motions, orders, and disputes pending at  
5 the end of such period.

6 (B) CONSIDERATION OF CHANGES IN FEES  
7 AND TERMS BETWEEN DATE OF ENACTMENT  
8 AND INITIAL DETERMINATION.—In establishing  
9 the fees and terms under section 3(c) for access  
10 to covered electronic payment systems, to be ef-  
11 fective during the period beginning on January  
12 1, 2011, and ending on December 31, 2012, the  
13 Electronic Payment System Judges shall con-  
14 sider changes in fees and terms made by a cov-  
15 ered electronic payments system between the  
16 date of enactment of this Act and such initial  
17 determination. Based upon such consideration,  
18 the Electronic Payment System Judges may ad-  
19 just the fees established for the period begin-  
20 ning on January 1, 2011, and ending on De-  
21 cember 31, 2012, to reflect the economic impact  
22 such changes had on the parties.

23 (b) SUBSEQUENT PROCEEDINGS.—After completion  
24 of the proceedings required under subsection (a), pro-  
25 ceedings under section 3(c) to establish fees and terms for

1 access to covered electronic payment systems shall be com-  
2 menced in 2011, and every 3 years thereafter.

3 **SEC. 7. GENERAL RULE FOR VOLUNTARILY NEGOTIATED**  
4 **ACCESS AGREEMENTS.**

5 (a) IN GENERAL.—Any fees or terms described in  
6 subsection (b) shall remain in effect for such period of  
7 time as would otherwise apply to fees and terms estab-  
8 lished under this Act, except that the Electronic Payment  
9 System Judges shall adjust any such fees to reflect infla-  
10 tion during any additional period the fees remain in effect  
11 beyond that contemplated in the voluntarily negotiated ac-  
12 cess agreement.

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

16 (1) are agreed upon as part of a voluntarily ne-  
17 gotiated access agreement for a period shorter than  
18 would otherwise apply under a determination under  
19 this Act; and

20 (2) are adopted by the Electronic Payment Sys-  
21 tem Judges as part of a determination under this  
22 Act.

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