

New Federal Initiatives Project

**Regulation of Payment Card
Interchange Fees**

By

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Regulation of Payment Card Interchange Fees

Three bills that are currently circulating in Congress seek to regulate interchange fees, which are payments banks make to each other to compensate for the risks and costs associated with credit card transactions. Ultimately, banks pass this fee to the merchant as the major portion of the price for the right to accept each credit card purchase. A November GAO study noted that attempts to lower the interchange fee would entail a mix of costs and benefits and measuring the effects on consumers may be difficult.¹ The question of even whether to regulate interchange fees is controversial.

The Credit Card Interchange Fees Act of 2009, H.R. 2382, was introduced on May 13, 2009.² It seeks to equalize the fees charged between rewards cards and credit cards that do not provide any special benefit to the cardholder for use.³ The desired result is to prevent merchants from having to bear the cost of financing the benefits banks offer to consumers to promote the adoption of particular cards.

The bill would also significantly alter many conditions that credit card networks (eg., Visa, Mastercard) have sought from merchants in exchange for the right to accept their credit cards. As a result, networks would be unable to prevent merchants from taking various actions that steer customers away from using credit cards, and could not maintain certain fees tending to encourage an increase in the promotion of credit card transactions.⁴ The bill would also allow merchants to disclose the terms of its card network agreement to anyone. Essentially, this bill creates an opportunity for merchants to more openly influence consumer decisions regarding credit cards, and prevents credit card networks from imposing practices that tended to align merchants' interests in favor of greater acceptance and a larger number of credit card transactions.

The second bill, the Credit Card Fair Fee Act of 2009, H.R. 2695, would allow merchants to engage in collective bargaining on a large scale with any credit card network accounting for at least 20% of the value of credit and debit payments in the U.S.⁵ This may limit such negotiations to two networks: Visa and MasterCard.⁶ The bill would facilitate the negotiations by creating a narrow antitrust exemption for negotiating the terms of credit card agreements.

The Department of Justice would additionally facilitate and monitor the negotiations, and the law would compel certain disclosures from large players in the credit card industry regarding costs and the content of existing agreements with merchants. Credit card networks, card-issuing banks, and card-accepting banks that participated in the negotiations would be bound to offer to any and all merchants the terms and fees to which they agree in the negotiation.⁷ However, acquirers and issuers would be free to opt out if the National Credit Union Administration regulates them or if these groups have assets under \$1 billion.⁸

Third, the Senate has its own version of the Credit Card Fair Fee Act, which includes most of the terms found in the House version. However, it would cover any credit card network accounting for at least 10% of the value of all U.S. purchases.⁹

As an additional incentive to negotiation, the Senate bill would establish a set of proceedings to occur before three administrative law judges appointed under the Act. The Attorney General and the FTC Chairman would appoint the judges, generally for six-year terms. The first two associate judges would have shortened terms so that appointments could be staggered at a two-year interval. The Attorney General and Chairman would establish regulations for the judges governing conflicts of interest and conduct, and could jointly remove judges, reappoint them, or fill vacancies. The judges must all be attorneys with seven years of legal experience. At least one judge must have significant knowledge of economics and with electronic payment systems, but the expert on payment systems cannot be the chief judge. The chief judge must have five years of experience in litigation, adjudication, or arbitration.¹⁰

The panel of judges would choose one of the final offers made in negotiations between the parties to their proceedings.¹¹ The decision of this panel of judges will serve as binding default terms for three years which must be offered except where a negotiated agreement supersedes it, meaning that any merchant could obtain access to a given card network under the panel's chosen terms.¹² In rendering their decision, the panel would be required to choose the offer of fees and terms that most closely resembles a hypothetical, perfectly competitive marketplace for access to an electronic payment system between two willing parties with no market power.¹³

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¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: RISING INTERCHANGE FEES HAVE INCREASED COSTS FOR MERCHANTS, BUT OPTIONS FOR REDUCING FEES POSE CHALLENGES (2009), available at <http://www.gao.gov/new.items/d1045.pdf>.

² Credit Card Interchange Fees Act of 2009, H.R. 2382, 111th Cong. (May 13, 2009).

³ *Id.* at § 2 (amending the Truth in Lending Act to create a new § 192).

⁴ *Id.* at § 2 (prohibiting card networks from enacting pricing display restrictions, requiring merchants to honor all cards within the network regardless of acceptance fees, impeding merchants from directing consumers towards a preferred form of payment, requiring that a merchant accept credit cards every branch of its business, preventing merchants from establishing ceilings or floors for accepting cards, preventing merchants from directing the routing of card payments, charging merchants for accepting too high a card purchase, and setting minimum transaction requirements subject to penalty fees).

⁵ Credit Card Fair Fee Act of 2009, H.R. 2695, 111th Cong. (June 4, 2009).

⁶ See Ben Woolsey & Matt Schulz, *Credit card statistics, industry facts, debt statistics*, available at <http://www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics-1276.php> (showing Nilson Report data on market shares for Visa and MasterCard apparently in excess of 20%).

⁷ *Id.*

⁸ *Id.*

⁹ Credit Card Fair Fee Act of 2009, S. 1212, 111th Cong. (June 9, 2009). If passed, this would probably bring American Express under the coverage of the Act.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Related Links:

“Will Congress Take Another Swipe at Credit Cards?” by Todd J. Zywicki, *Wall Street Journal*, Jan. 5, 2010:

<http://online.wsj.com/article/SB10001424052748704905704574622722184163510.html>

Interchange Fee Blog Symposium E-Book, by Geoffrey Manne:

http://www.laweconcenter.org/index.php?option=com_content&view=article&id=55:interchange-fee-blog-symposium-document