

July 14, 2008

**BY HAND DELIVERY**

The Honorable John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
2138 Rayburn House Office Building  
Washington, DC 20515-6216

Re: **H.R. 5546, "Credit Card Fair Fee Act of 2008"**

Dear Mr. Chairman:

We write to express our concern about H.R. 5546, the "Credit Card Fair Fee Act of 2008." This bill creates an antitrust exemption for merchants and issuers to negotiate interchange fees and terms of access to a credit and/or debit card network accounting for at least 20% of U.S. credit and debit card volume. In the event both parties are unable to reach an agreement, the bill creates a panel of Electronic Payment System Judges that will establish the rates and terms.

In short, this legislation may harm consumers, is unprecedented, and is unnecessary because current law provides remedies to address any anticompetitive behavior as alleged by the proponents of this legislation.

**CONSUMER WELFARE MAY BE HARMED BY H.R. 5546**

The antitrust laws were enacted to ensure that competitive markets provide consumers high quality goods and services at the lowest possible prices. The antitrust laws were not enacted to benefit any particular group of merchants, manufacturers, or service providers. They are the foundational rules of fair play in a free market – namely that competitors shall not collude to fix prices, allocate customers, or rig bids.

The markets for electronic payments, including credit, debit, and pre-paid cards are complex two-sided markets that unquestionably benefit consumers and merchants. Regulating such markets may have an adverse unintended impact on the very consumers some believe they

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are helping. Two-sided markets, by their very nature, are a balance between two interests – in this case merchants and consumers. Artificially decreasing the economic burdens on merchants may very well increase them for consumers.

Because of the potential for consumer harm, we oppose this legislation. We do not believe proponents of H.R. 5546 have met the reasonably high bar set by the Antitrust Modernization Commission (AMC) to justify the enactment of an antitrust exemption. The electronic payment system market is working; it is not dysfunctional and exemptions to the antitrust laws should not be granted.

#### **H.R. 5546 IS UNPRECEDENTED IN SCOPE**

Congress traditionally has not waived antitrust laws to benefit one particular economic sector, and the passage of H.R. 5546 would set a precedent that other market players may choose to copy. This legislation, unlike other antitrust exemptions, would permit coercion by every retailer in the nation. This is unprecedented in antitrust law. Most antitrust exemptions either apply to discrete groups that operate outside of the market process (such as labor unions or physician peer review committees), or are part of a broader regulatory regime (such as antitrust exemption for agricultural cooperatives subject to restrictions imposed by the Secretary of Agriculture). This exemption, by contrast, would simply operate as naked market intervention in favor of one set of market players seeking to minimize their overhead costs, likely to the detriment of consumers.

If enacted, H.R. 5546 would surely serve as precedent for future industries that wish to engage in otherwise anticompetitive behavior to obtain an advantage in the market place. For example, shippers might like to lower their transportation costs and seek collectively to bargain with carriers such as UPS and Federal Express.

#### **REMEDIES EXIST TO ADDRESS COMPETITION ISSUES**

We have reviewed the transcript of the May 15, 2008, hearing on H.R. 5546, and were struck by the allegations by several witnesses who were proponents of the bill that the current manner in which interchange rates are set amount to violations of the antitrust laws. As you undoubtedly are aware, litigation is currently pending in federal court between merchants and credit card companies and banks over this very issue. Congress need not fashion such an extraordinary remedy as that envisioned by H.R. 5546 when recourse in the courts is available today under current antitrust law.

#### **CONCLUSION**

While it is understandable that merchants would like to lower their overhead, we sincerely doubt that H.R. 5546 is the right solution. As the AMC noted, “[a]ntitrust exemptions can harm the U.S. economy and, in the long run, reduce the competitiveness of the industries that

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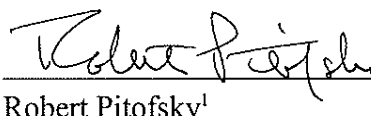
have sought antitrust exemptions. . . . Statutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness of the U.S. economy.”

Because we share the concerns of the AMC about harm to the U.S. economy, future competitiveness, and ultimately consumer welfare, we respectfully submit that H.R. 5546 is the wrong approach to aiding merchants in lowering their overhead.

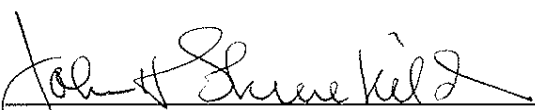
Sincerely,



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cc: The Honorable Lamar S. Smith, Ranking Member

<sup>1</sup> I advise Visa on a variety of antitrust issues. The views reflected in this letter are my own.

<sup>2</sup> I advise MasterCard on a variety of antitrust issues. The views reflected in this letter are my own.