



THE CHAIRMAN

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

June 19, 2008

The Honorable Lamar Smith  
Ranking Member  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Representative Smith:

Thank you for your letter of June 2, 2008, requesting views on H.R. 5546, the Credit Card Fair Fee Act of 2008, which was introduced on March 6, 2008, by Chairman Conyers and thirteen co-sponsors. In particular, you request views on the advisability of the bill's approach and its potential administrative burden for the Commission.

H.R. 5546 would grant an antitrust exemption to banks and merchants to negotiate jointly the interchange rates and terms for merchants' access to a consumer credit card payment system of a certain size. Further, if the joint negotiation between banks and merchants does not produce an agreement on interchange rates and related terms, the merchants and banks would be subject to an administrative procedure before a three-judge panel to determine the rates and terms for a three-year period. The three-judge panel would be selected and administered by the Department of Justice's Antitrust Division and the Commission according to a detailed process specified in the bill.

Based on the agency's general expertise in competition matters, I can offer a few global comments. As you know, however, under its longstanding agreement with the Antitrust Division, the Commission and the Antitrust Division coordinate their antitrust actions to avoid duplication and maximize the effectiveness of federal antitrust enforcement. The Antitrust Division for many years has handled antitrust oversight of financial services markets, and I defer to the Antitrust Division as to the merits of the proposed legislation.

As a general matter, the Commission has long disfavored exemptions from the antitrust laws. As you know, the Antitrust Modernization Commission ("AMC") reiterated what most scholars have believed for years, that exemptions from the antitrust law should be disfavored, and urged that Congress exercise caution.<sup>1</sup> Accordingly, the AMC recommended that such

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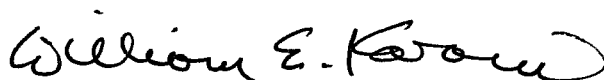
<sup>1</sup> Antitrust Modernization Commission, Report and Recommendations (April 2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf)

statutory immunities be granted “rarely” and only where proponents have made a “clear case” that exempting otherwise unlawful conduct 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.”<sup>2</sup> For many years it has been the Federal Trade Commission's view that proponents of setting aside competitive forces should bear a heavy burden of demonstrating, with factually-supported reasons, the need for a departure from the nation's competitive model.

With respect to administrative burden on the Commission itself, I note particularly that a governmental process for setting prices for private transactions is at odds with the Commission's mission and experience in promoting open market competition. In addition, assigning the administrative responsibilities jointly to two agencies could further complicate this task.

If you or your staff have questions, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

A handwritten signature in black ink that reads "William E. Kovacic". The signature is written in a cursive style with a large, sweeping "W" and "K".

William E. Kovacic  
Chairman