

# Department of Finance and Administration

## Legislative Impact Statement

**Bill: SB607**

**As Engrossed: 3/14/2013**

**Bill Subtitle: TO CREATE THE ELECTRONIC PAYMENT TRANSACTION PROTECTION ACT; TO PROHIBIT THE COLLECTION OF INTERCHANGE FEES ON CERTAIN TAXES AND FEES; AND TO DECLARE AN EMERGENCY.**

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### **Basic Change :**

Senator J. Hutchinson

The bill as originally submitted creates the Electronic Payment Transaction Protection Act to prohibit the collection of interchange fees on certain state and local taxes and fees. The State Attorney General is responsible to bring necessary actions to enforce this subchapter.

Amendment 3 moves the enforcement requirement to the Chief Fiscal Officer. The enforcement is primarily related to legal actions available as remedy when the person paying an interchange fee imposed of violation of this subchapter may bring an action at law to recover the person's actual damages. This will require an audit of all records related to the transaction as well as a review of all contracts under which this action occurred. Most of this work will be performed outside of Arkansas. The interchange fees charged on a vendor transaction are not associated with a transaction where DFA is collecting a tax payment, and therefore are not subject to DFA control, enforcement or review. The interchange fees are established, charged, or received by a payment card network to compensate an issuer for its involvement in an electronic payment transaction. DFA has no authority to intervene in the assessment or collection of these fees.

Amendment 2 adds boards and commissions to the state and local government agencies not subject to the limitations of the bill.

Amendment 1 added a new subsection to the bill to clarify that the fees charged by vendors for direct tax payments to state or local governments are not subject to the limitations of this bill.

Interchange fees are defined as a fee established, charged, or received by a payment card network to compensate an issuer for its involvement in an electronic payment transaction. An electronic payment transaction is defined as occurring when a person uses a debit card, credit card or other payment code or device, issued or approved through a payment card network. Issuer means a person who issues a debit card or credit card or the agent of a person who issues a debit card or credit card. Taxes or fees to be excluded from the imposition of an interchange fee are defined as either: "A tax or fee levied by a state or local government that is calculated as a percentage of the electronic payment transaction amount and listed separately on a payment invoice or other demand for payment" or, "A tax levied under the Motor Fuel Tax Law, § 26-55-201 et seq., or the Special Motor Fuels Law, § 26-501-101 et seq."

### **Revenue Impact :**

This bill should not have any direct revenue impact on state revenue.

### **Taxpayer Impact :**

May require taxpayers to make costly computer system changes to separately identify the various components of each transaction to insure that interchange fees are not charged on any portion of a credit card transaction where the tax amount paid is identified separately on the receipt. Most vendors are currently sending only a total transaction amount to the credit card processor.

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### **Resources Required :**

Amendment 3, will require DFA as the enforcement agency, to create a new legal and audit function to oversee and administer the claims made by vendors when they allege that interchange fees are being assessed on a the taxes paid part of a transaction. The following are estimated as additional staff needed for this function. Due to the complexity of these transactions, and since this enforcement is outside of the normal business functions performed by DFA, this will be a new operating group.

Estimated Needs:

The following staff will be required, 5 Staff Attorneys, 1 Attorney Supervisor, 18 Financial Auditors, 18 Computer Audit Specialist, 1 Auditor Manager, 2 Auditor Supervisors, 2 Computer Audit Specialist Supervisor, 4 Administrative Assistants. Fixed cost for staff will be Salary and Matching, Equipment, Travel, and Mileage, and Legal and Professional fees.

Estimated Cost:	FY 2014	FY 2015
	\$4,505,000	\$4,565,000

The enforcement activities will not generate any revenue for the State of Arkansas.

### **Time Required :**

Amendment 3 will require at least 1 year after passage to hire and train staff.

### **Procedural Changes :**

**Amendment 3**, will require DFA as the enforcement agency, to create a new legal and audit function to oversee and administer the claims made by vendors when they allege that interchange fees are being assessed on a the taxes paid part of a transaction. The enforcement is primarily related to legal actions available as remedy when the person paying an interchange fee imposed of violation of this subchapter may bring an action at law to recover the person's actual damages. This will require an audit of all records related to the transaction as well as a review of all contracts under which this action occurred.

This will require merchants to exclude the named taxes or taxes calculated as a part of a transaction from the imposition of Interchange Fees when the transaction is paid with a credit card.

### **Other Comments :**

Amendment 3 the interchange fees are established, charged, or received by a payment card network to compensate an issuer for its involvement in an electronic payment transaction. DFA has no authority to intervene in the assessment or collection of these fees. It would be virtually impossible to evaluate possible violations due to the multiple different record keeping and computer systems used to create and submit data on credit card transactions.

### **Legal Analysis :**

SB607, as engrossed on March 14, 2013, prohibits the collection of interchange fees on certain state and local taxes and fees; however, it clarifies that the fees charged or received by payment card networks, payment card issuers, or other vendors for authorizing an electronic payment transaction to pay state and local taxes, fees, child support, costs, fines, or any other payment to state and local

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government agencies, boards, and commissions are not prohibited by the bill. The bill contains an emergency clause.

Interchange fees are fees paid between banks for the acceptance of debit, credit, and prepaid card-based transactions. Usually it is a fee that a retailer's bank (the "acquiring bank") pays a customer's bank (the "issuing bank"), however there are instances where the interchange fee is paid from the issuer to the acquirer, often called reverse interchange. In a credit or debit card transaction, the card-issuing bank in a payment transaction deducts the interchange fee from the amount it pays the acquiring bank that handles the debit or credit card transaction for a retailer. The acquiring bank, then pays the retailer the amount due to the retailer on a sale minus both the interchange fee and an additional, usually smaller, fee for the acquiring bank. These fees are contractually set by payment card networks (entities that essentially provide the infrastructure to facilitate payment by card) and are the largest component of the various fees that most retailers pay for the privilege of accepting cards for payment, representing 70% to 90% of these fees by some estimates.

Before 2010 and the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act at Pub. L. 111-203, interchange fees were not capped, retailers could only use one payment card network, could not offer a discount for use of a payment method other than card, and could not require a minimum amount before a card could be used for payment. With enactment of Pub. L. 111-203 (specifically through the Durbin Amendment to the law), several things were accomplished on behalf of retailers, but most importantly, interchange fees are now required to be reasonable, which the Federal Reserve currently defines generally as less than 21 cents per transaction plus .05% of the value of the total transaction (which appears to have been interpreted to mean the total amount of the transaction including any state and local taxes included in the transaction).

The bill requires the Chief Fiscal Officer (CFO) to bring all necessary actions to enforce its provisions. This requirement extends beyond the statutory authority granted to DFA's director as CFO under existing law. Even if state law were amended to grant the Director the additional authority required (which would require amending state law to permit investigations under the act), the bill sets forth no investigative authority or enforcement mechanisms. Furthermore, from a practical standpoint, it would be almost impossible to evaluate possible violations because the bill involves at least two sets of banking transactions in addition to retail transactions and any auditor would have to reconcile all banking records for every sale made by a retailer to the retailers receipts and would then have to reconcile all of these records in comparison to the various contracts that might exist between the payment card networks, card issuers, and the retailers. Most importantly, however, the law is subject to constitutional supremacy, contract and commerce clause challenges because it: conflicts with Pub. L. 111-203 and Federal Reserve Rules, interferes with existing contracts governing interchange fees, and interferes with interstate commerce.