

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Rules

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**BILL:** CS/CS/CS/SB 564

**INTRODUCER:** Rules Committee; Commerce and Tourism Committee; Banking and Insurance Committee; and Senator Hutson

**SUBJECT:** Interchange Fees on Taxes

**DATE:** April 25, 2023

**REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Moody</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Renner</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
3.	<u>Moody</u>	<u>Twogood</u>	<u>RC</u>	<u>Fav/CS</u>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/CS/SB 564 creates, effective October 1, 2024, s. 501.0119, F.S., which prohibits an issuer, a payment card network, an acquirer bank, or a processor from charging an interchange fee on any tax that is separately itemized on a sales invoice, sales slip, or other evidence of sale in any electronic payment transaction if the merchant informs a specified entity of such tax amount as part of the authorization or settlement process for such transaction. The merchant must transmit the tax amount data as part of the authorization or settlement process to avoid being charged interchange fees on the tax amount. Section 501.0119, F.S., does not create liability for a payment card network regarding the accuracy of the tax data reported by the merchant.

A merchant that does not transmit the tax amount data for eligible electronic payment transactions as part of the authorization or settlement process may submit tax documentation to the specified entity no later than 180 days after the date of the electronic payment transaction, and within 30 days, the issuer must credit to the merchant the amount of interchange fees charged on the tax amount of the electronic payment transaction.

An issuer, a payment card network, an acquirer bank, a processor, or other designated entity that has received the tax amount data and that violates these provisions is subject to a civil penalty of \$1,000 per electronic payment transaction, and the issuer must refund the interchange fees charged on any tax amount relative to the electronic payment transaction.

An entity, other than the merchant, involved in the facilitation or processing of an electronic payment transaction may not distribute, exchange, transfer, disseminate, or use the data except to facilitate the transaction or as required by law. A violation of this provision constitutes a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUPTA) which may be enforced only by the enforcing authority and subjects the violator to sanctions and penalties provided under the FDUPTA provisions. If such action is successful, the enforcing authority is entitled to reasonable attorney fees and costs.

The bill defines several terms, including acquirer bank, authorization, clearance, credit card, debit card, electronic payment transaction, interchange fee, issuer, merchant, payment card network, processor, settlement, tax, and tax document.

The bill requires the Office of Economic and Demographic Research (EDR) to submit a report to the President of the Senate and the speaker of the House of Representatives by January 9, 2024, containing certain findings, policy options and impacts. EDR is authorized to contract with specified types of entities that meet certain criteria for the sole purpose of developing some or all of the underlying analysis and findings to be included in the reports.

See Section V. Fiscal Impact Statement.

The bill, except as otherwise provided, is effective upon becoming law.

## **II. Present Situation:**

### **Financial Institutions Code**

The Florida Office of Financial Regulation (OFR) is responsible for all activities of the Financial Services Commission relating to the regulation of banks, credit unions, other financial institutions, finance companies, and the securities industry.<sup>1</sup>

Florida law defines the term “financial institution” as a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust entity, international trust company representative office, qualified limited service affiliate, credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. s. 601 et seq., or Edge Act corporation organized pursuant to s. 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq.<sup>2</sup>

Financial institutions may be either state or federally chartered. OFR’s Division of Financial Institutions provides general supervision over all state financial institutions, their subsidiaries, and service corporations,<sup>3</sup> and is charged with the administration of the financial institutions codes, which apply to all state-authorized or state-chartered financial institutions and to the enforcement of all laws relating to state-authorized or state-chartered financial institutions.

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<sup>1</sup> Section 20.121(3)(a)2., F.S.

<sup>2</sup> Section 655.005(1)(i), F.S.

<sup>3</sup> Section 655.012(1), F.S.

As of June 30, 2020, the Division of Financial Institutions regulates 197 financial institutions:<sup>4</sup>

- 69 banks
- 66 credit unions
- 21 international bank offices
- 15 trust companies
- 16 family trust companies
- 10 qualified limited service affiliates

Payment card networks or card associations, such as Visa and MasterCard, and processors do not meet the definition of financial institution and, therefore, are not currently regulated by the OFR.<sup>5</sup>

### **Electronic Payment Transactions**

In 1958, Bank of America launched the first credit card<sup>6</sup> payment program with revolving credit known as BankAmericard in the U.S.<sup>7</sup> In 1966, the Bank of Delaware launched the first debit card<sup>8</sup> pilot program.<sup>9</sup> Over time credit card and debit cards have become a common way to pay for goods and services. Several key players are involved in processing credit card and debit card transactions, including acquiring banks or contracted processors,<sup>10</sup> payment card networks or bank card associations,<sup>11</sup> and issuers or issuing banks.<sup>12</sup> Processing credit card or debit card transactions requires several steps, including gathering sales information from the merchant,

<sup>4</sup> The OFR, *Fast Facts* (2021 ed.), available at: <https://flofr.gov/sitePages/documents/FastFacts.pdf> (last visited April 3, 2023).

<sup>5</sup> The OFR, *Agency Analysis for SB 564* (2023), p. 2, Mar. 14, 2023 (on file with the Senate Committee on Banking and Insurance).

<sup>6</sup> 15 U.S.C. s. 1602(l) defines “credit card” as any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

<sup>7</sup> Visa, Inc., *What We Do*, available at: [What we do | Unlocking opportunities for everyone | Visa](#) (last visited April 3, 2023).

<sup>8</sup> 15 U.S.C. s. 1693o-2.(c)(2) defines “debit card” as (A) any card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account (regardless of the purpose for which the account is established), whether authorization is based on signature, PIN, or other means; (B) includes a general-use prepaid card, as that term is defined in s. 15 U.S.C. s. 1693l-1(a)(2)(A); and (C) does not include paper checks.

<sup>9</sup> Hyashi, F., Sullivan, R., & Weiner, S., *A Guide to the ATM and Debit Card Industry*, Federal Reserve Bank of Kansas City, 2003, pg. 13, available at: [A Guide to the ATM and Debit Card Industry \(kansascityfed.org\)](#) (last visited April 3, 2023).

<sup>10</sup> An “acquiring bank,” also known as the merchant bank, is a member of a card association that contracts with merchants for the settlement of card transactions. An acquiring bank must sponsor a merchant that accepts as a form of payment card association brand payment cards, and may contract directly with merchants or indirectly through agent banks or other third-party organizations to process card transactions. Office of the Comptroller of the Currency, *Comptroller’s Handbook: Safety and Soundness: Merchant Processing*, Vol. 1, pg. 2, Aug. 2014, available at: [OCC Merchant Processing Handbook](#) (hereinafter cited as “OCC Merchant Processing Handbook”) (last visited April 3, 2023).

<sup>11</sup> “Payment card network” or “bank card associations” are entities that directly, or through licensed members, processors, or agents, provides the proprietary services, infrastructure, and software that route information and data to conduct debit card or credit card transaction authorization, clearance, and settlement, and that a person uses in order to accept as a form of payment a brand of debit card, credit card or other device that may be used to carry out debit or credit transactions. 15 U.S.C. s. 1693o-2.(c)(11). Examples of the major payment card networks include Visa, Inc. (Visa), MasterCard, Inc. (MasterCard), Discover Global Network (Discover), and American Express (AmEx). See Visa, *What We Do*, available at: [What we do | Unlocking opportunities for everyone | Visa](#) (last visited April 3, 2023); MasterCard, *Who We Are*, available at: [About Mastercard | Who We Are | Who We Serve](#) (last visited April 3, 2012); Discover, *Our Network*, available at: [Our Unique Payments Network | Discover Global Network](#) (last visited April 3, 2023); AmEx, *American Express Network: The Network That Backs You*, available at: [GNW-Home \(americanexpress.com\)](#) (last visited April 3, 2023).

<sup>12</sup> “Issuer” or “issuing bank” is any person or entity who issues a debit card, or credit card, or the agent of such person with respect to such card. 15 U.S.C. s. 1693o-2.(c)(9).

obtaining authorization for the transaction, collecting funds from the issuing bank, and making payment to the merchant.<sup>13</sup>

### ***Network Infrastructure, Technology, and Security***

In 2006, certain major payment card networks established the PCI Security Standards Council (PCI SSC) which created standards that set out technical requirements for their respective compliance programs for payments made worldwide.<sup>14</sup> Participating organizations include merchants, processors, developers, and point of sale vendors.<sup>15</sup> There are 12 requirements for securing cardholder data that is stored, processed or transmitted by participating members, such as encrypting transmission of cardholder data across open public networks, and developing and maintaining secure systems and applications.<sup>16</sup> Payment card networks or processors are responsible for enforcement of such requirements.<sup>17</sup>

### ***Authorization Process***

These secured networks are used to process the authorization of credit card and debit card transactions. Authorization is the process of approving or declining a transaction prior to the transaction being finalized.<sup>18</sup> A merchant may obtain an estimated/initial authorization to place a hold for a transaction amount for transactions in certain types of industries when the actual amount of a transaction is unknown.<sup>19</sup> Typically, authorization for a transaction to be paid by credit card or debit card is requested electronically for the transaction amount from a merchant's point of sale system through the merchant's bank or processor (via the payment card network) to the issuer in a matter of seconds.<sup>20</sup> An illustration of the authorization process is shown below.<sup>21</sup>

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<sup>13</sup> OCC Merchant Processing Handbook at pg. 1.

<sup>14</sup> PCI SSC, *About Us*, available at: [Official PCI Security Standards Council Site - Verify PCI Compliance, Download Data Security and Credit Card Security Standards](#) (hereinafter cited as "PCI SSC Governance Website") (last visited April 3, 2023).

<sup>15</sup> PCI SSC, *The Prioritized Approach to Pursue PCI DSS Compliance*, pg. 2, available at: [PCI DSS Prioritized Approach for PCI DSS 3.2 \(pcisecuritystandards.org\)](#) (last visited April 3, 2023).

<sup>16</sup> *Id.* at pgs. 1, 8-9.

<sup>17</sup> PCI SSC Governance Website.

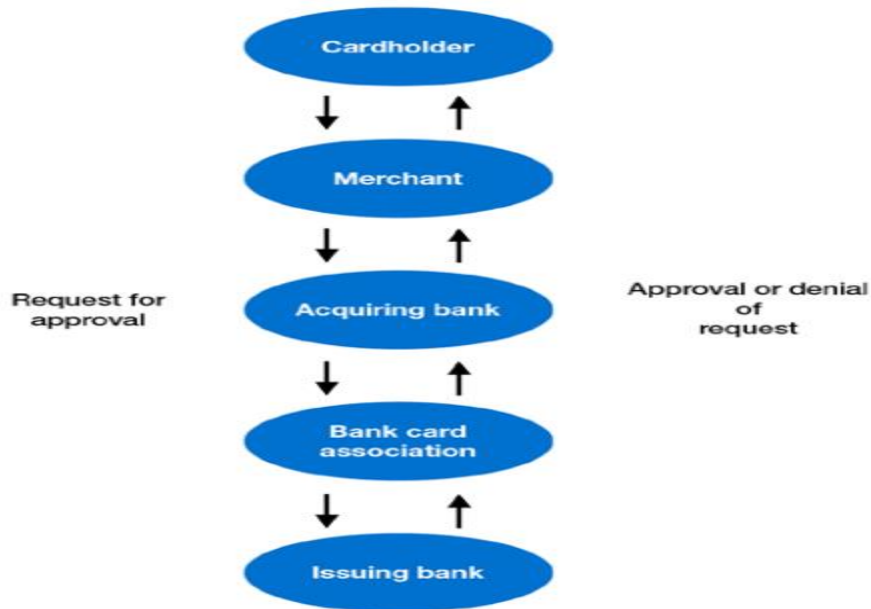
<sup>18</sup> OCC Merchant Processing Handbook at pg. 7.

<sup>19</sup> See, Visa, *Authorization and Reversal Processing Requirements for Merchants*, available at: [Authorization and Reversal Processing Requirements for Merchants \(visa.com\)](#) (last visited April 3, 2023).

<sup>20</sup> OCC Merchant Processing Handbook at pg. 8.

<sup>21</sup> *Id.*

**Figure 1: Authorization Process**



Source: OCC

***Clearing and Settlement Process***

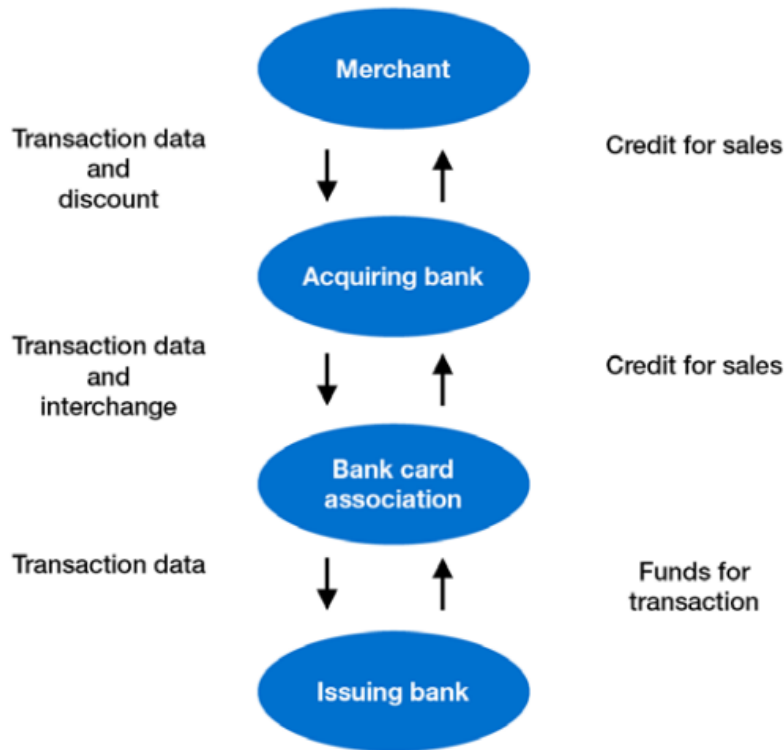
Clearing is the process of transmitting final transaction data from merchants to issuers for posting to the cardholder’s account, and the calculation of certain fees and charges that apply to the issuer and acquirer.<sup>22</sup> The settlement process includes transmitting sales information to the issuing bank for collection and reimbursement of funds to the merchant, and the process of calculating and reporting the net financial position of issuers and acquirers for all transactions that are cleared.<sup>23</sup> An illustration of the clearing and settlement process is shown below.<sup>24</sup>

<sup>22</sup> OCC Merchant Processing Handbook at pg. 9.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

**Figure 2: Clearing and Settlement Process**



Source: OCC

**Transaction Fees**

Merchants are charged network fees,<sup>25</sup> processor fees,<sup>26</sup> and interchange fees for using network infrastructure and technology, and accepting credit card and debit cards as a form of payment for transactions. An “interchange transaction fee” is any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic payment transaction.<sup>27</sup> Payment card networks base the fees on the type or tier of the merchant, and interchange fees includes a flat rate plus a percentage of the transaction value.<sup>28</sup>

<sup>25</sup> 15 U.S.C. s. 1693o-2.(c)(10) defines “network fee” as a fee charged and received by a payment card network with respect to an electronic debit transaction, other than an interchange transaction fee. These fees may also be referred to as “assessment fees.” See Leonard, K., & Bottorff, C., *Credit Card Processing Fees (2023 Guide)*, Forbes Advisor, Aug. 19, 2022, available at: [Credit Card Processing Fees \(2023 Guide\) – Forbes Advisor](#) (hereinafter cited as “Forbes Article”) (last visited April 3, 2023). 15 U.S.C. s. 1693o-2.(c)(5) defines “electronic debit transaction” as a transaction in which a person uses a debit card.

<sup>26</sup> Forbes Article (noting that payment process fees may include monthly fees, per-transaction fees, equipment lease fees and statement fees).

<sup>27</sup> See 15 U.S.C. s. 1693o-2.(c)(8).

<sup>28</sup> See Visa, *The Visa System: Rates, Fees and Rules*, available at: [Visa USA Interchange Reimbursement Fees](#) (last visited April 3, 2023); MasterCard, *MasterCard Interchange Rates and Fees*, available at: [U.S. Region Interchange, 22 April 2022 \(mastercard.us\)](#) (last visited April 3, 2023); O’Keefe, C., *Discover Interchange Rates (2023)*, Merchant Cost Consulting, Jan. 8, 2023, available at: [Discover Interchange Rates \(2023\) | Merchant Cost Consulting](#) (last visited April 3, 2023); Rej, M., *Amex Interchange Rates and Processing Fees*, Merchant Cost Consulting, Sept. 16, 2022, available at: [Amex Interchange Rates and Processing Fees \(2023\) | Merchant Cost Consulting](#) (last visited April 3, 2023).

## Credit Card Transactions

No federal or state regulations were identified that restrict the maximum amount of interchange fees that may be charged to a merchant for credit card transactions. The average interchange fees for credit card transactions with major payment card networks is as follows:

- Visa: 1.4% to 2.5%
- MasterCard: 1.5% to 2.6%
- Discover: 1.55% to 2.5%
- AmEx: 2.3% to 3.5%<sup>29</sup>

## Debit Card Transactions

The Electronic Fund Transfer Act (EFTA)<sup>30</sup> was established with a primary objective of individual consumer's rights regarding the electronic fund and remittance transfer systems.<sup>31</sup> The EFTA provides that an amount of any interchange transaction fee that an issuer<sup>32</sup> may receive or charge with respect to an electronic debit transaction must be "reasonable and proportional to the cost incurred by the issuer" with respect to the transaction.<sup>33</sup> The EFTA provides for certain exemptions from these provisions, such as exemptions for small issuers, including issuers<sup>34</sup> that have less than \$10 billion in assets,<sup>35</sup> and exemptions for government-administered payment programs and reloadable prepaid cards.<sup>36</sup>

The Board of Governors of the Federal Reserve System (Board) may regulate any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction.<sup>37</sup> The Board must consider the following factors when issuing standards and prescribing regulations:

- The nature, type, and occurrence of fraud in electronic debit transactions;
- The extent to which the occurrence of fraud depends on whether authorization in an electronic debit transaction is based on signature, PIN, or other means;
- The available and economical means by which fraud on electronic debit transactions may be reduced;
- The fraud prevention and data security costs expended by each party involved in electronic debit transactions (including consumers, persons who accept debit cards as a form of payment, financial institutions, retailers and payment card networks);
- The costs of fraudulent transactions absorbed by each party involved in such transactions (including consumers, persons who accept debit cards as a form of payment, financial institutions, retailers and payment card networks);

<sup>29</sup> Forbes Article.

<sup>30</sup> 15 U.S.C. s. 1693 et. seq.

<sup>31</sup> 15 U.S.C. s. 1693(b); 12 C.F.R. s. 205.1(b).

<sup>32</sup> 15 U.S.C. s. 1693o-2.(c)(9) defines "issuer" as any person who issues a debit card, or credit card, or the agent of such person with respect to such card.

<sup>33</sup> 15 U.S.C. s. 1693o-2.(a)(2); 12 C.F.R. s. 235.3(a).

<sup>34</sup> 15 U.S.C. s. 1693o-2.(a)(6)(B) limits the definition of "issuer," for purposes of this provision, to the person holding the asset account that is debited through an electronic debit transaction.

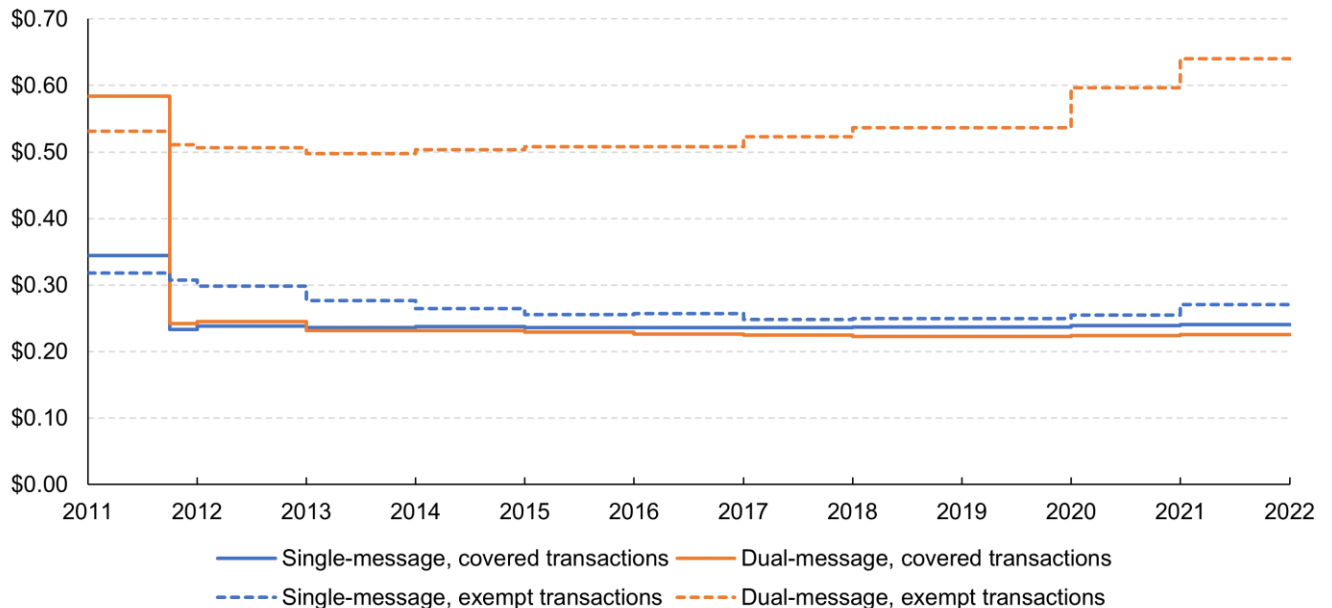
<sup>35</sup> 15 U.S.C. s. 1693o-2.(a)(6)(A).

<sup>36</sup> 12 C.F.R. s. 1693o-2.(a)(7) (providing that exemptions relating to certain transactions when debit and general-use prepaid card are used by a person pursuant to a Federal, State, or local government-administered payment program).

<sup>37</sup> 15 U.S.C. s. 1693o-2.(a)(1).

- The extent to which interchange transaction fees have in the past reduced or increased incentives for parties involved in electronic debit transactions to reduce fraud on such transactions; and
- Such other factors as the Board considers appropriate.<sup>38</sup>

The Board issued regulations which limit the amount of interchange transaction fees that an issuer may receive or charge for any electronic debit transaction to no more than \$0.21 plus 0.05 percent multiplied by the value of the transaction,<sup>39</sup> plus a \$0.01 fraud prevention adjustment.<sup>40</sup> The Federal Reserve has published data on the average debit card interchange fee from 2011 to 2022, which is summarized in the table below.<sup>41</sup>



The Board reports that Visa, MasterCard, and Discover (exempt and covered transactions)<sup>42</sup> have an average debit card interchange fee per transaction of \$0.36, \$0.46, and \$0.44, respectively, with an interchange fee as a percentage of the average debit card transaction value of 0.76%, 0.94%, and 1.35%, respectively.<sup>43</sup>

The EFTA does not annul, alter, or affect the laws of any state<sup>44</sup> relating to, amongst other things, electronic funds transfers<sup>45</sup> except to the extent that the laws are inconsistent with the

<sup>38</sup> 15 U.S.C. s. 1693o-2.(a)(5)(B)(ii).

<sup>39</sup> 12 C.F.R. s. 235.3(b).

<sup>40</sup> 12 C.F.R. s. 235.4(a).

<sup>41</sup> The Board, *Regulation II (Debit Card Interchange Fees and Routing): Average Debit Card Interchange Fee by Payment Card Network*, available at: [Federal Reserve Board - Regulation II - Average Debit Card Interchange Fee by Payment Card Network](https://www.federalreserve.gov/paymentsystems/regulationii/average-debit-card-interchange-fee-by-payment-card-network) (last visited April 3, 2023).

<sup>42</sup> *Id.* (noting that covered transaction are transactions processed by issuers that are subject to the interchange fee standard that do not qualify for an exemption).

<sup>43</sup> *Id.*

<sup>44</sup> 15 U.S.C. s. 1693a.(11) defines “State” as any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

<sup>45</sup> 15 U.S.C. s. 1693a.(7) defines “electronic fund transfer” as any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer



provisions under the EFTA, and then only to the extent of the inconsistency.<sup>46</sup> The Bureau of Consumer Financial Protection may exempt from the provisions of the EFTA any class of electronic fund transfers in state law if the Bureau determines that such law is “substantially similar” to the EFTA and that there is adequate provision of enforcement.<sup>47</sup> No state laws regulating the amount of interchange fees that may be charged to the merchant for electronic debit transactions have been identified.

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or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone. Such term does not include (A) any check guarantee or authorization service which does not directly result in a debit or credit to a consumer’s account; (B) any transfer of funds, other than those processed by automated clearinghouse, made by a financial institution on behalf of a consumer by means of a service that transfers funds held at either Federal Reserve banks or other depository institutions and which is not designed primarily to transfer funds on behalf of a consumer; (C) any transaction the primary purpose of which is the purchase or sale of securities or commodities through a broker-dealer registered with or regulated by the Securities and Exchange Commission; (D) any automatic transfer from a savings account to a demand deposit account pursuant to an agreement between a consumer and a financial institution for the purpose of covering an overdraft or maintaining an agreed upon minimum balance in the consumer’s demand deposit account; or (E) any transfer of funds which is initiated by a telephone conversation between a consumer and an officer or employee of a financial institution which is not pursuant to a prearranged plan and under which periodic or recurring transfers are not contemplated; as determined under regulation of the Bureau. 15 U.S.C. s. 1693a.(9) defines “financial institution” as a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer.

<sup>46</sup> 15 U.S.C. s. 1693q; 12 C.F.R. s. 205.12(b)(1).

<sup>47</sup> 15 U.S.C. s. 1693r; 12 C.F.R. s. 205.12(c)(1).

## Florida Taxes

### *Sales and Use Tax*

Florida levies a 6 percent sales and use tax on the sale<sup>48</sup> or rental of most tangible personal property,<sup>49</sup> admissions,<sup>50</sup> transient rentals,<sup>51</sup> and a limited number of services. Chapter 212, F.S., contains provisions authorizing the levy and collection of Florida's sales and use tax, as well as the exemptions and credits applicable to certain items or uses under specified circumstances. Sales tax is added to the price of the taxable good or service and collected from the purchaser and paid to the dealer<sup>52</sup> at the time of sale.<sup>53</sup> The tax amount must be separately stated on any charge ticket, sales slip, invoice, or other tangible evidence of sale.<sup>54</sup>

In addition to the state tax, counties may levy a local discretionary surtax, comprised of separate surtaxes.<sup>55</sup> A surtax applies to "all transactions occurring in the county which transactions are subject to the state tax imposed on sales, use, services, rentals, admissions, and other transactions by [ch. 212, F.S.], and communications services as defined in ch. 202."<sup>56</sup> The discretionary sales surtax is based on the tax rate imposed by the county where the taxable goods or services are sold or delivered. Discretionary sales surtax rates currently levied vary by county in a range of 0.5 to 1.5 percent.<sup>57</sup>

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<sup>48</sup> Section 212.02(15), F.S., defines "sale" as (a) any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration; (b) the rental of living quarters or sleeping or housekeeping accommodations in hotels, apartment houses or roominghouses, or tourist or trailer camps, as hereinafter defined in ch. 212, F.S.; (c) the producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting; (d) the furnishing, preparing, or serving for a consideration of any tangible personal property for consumption on or off the premises of the person furnishing, preparing, or serving such tangible personal property which includes the sale of meals or prepared food by an employer to his or her employees; (e) a transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price.

<sup>49</sup> Section 212.05(1)(a)1.a., F.S. Section 212.02(19), F.S., defines "tangible personal property" as personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses, including electric power or energy, boats, motor vehicles and mobile homes as defined in s. 320.01(1) and (2), aircraft as defined in s. 330.27, and all other types of vehicles.

<sup>50</sup> Section 212.04(1)(b), F.S. Section 212.02(1), F.S., defines "admissions" as the net sum of money after deduction of any federal taxes for admitting a person or vehicle or persons to any place of amusement, sport, or recreation or for the privilege of entering or staying in any place of amusement, sport, or recreation, including, but not limited to, theaters, outdoor theaters, shows, exhibits, games, races, or any place where charge is made by way of sale or tickets, gate charges, seat charges, box charges, season pass charges, cover charges, greens fees, participation fees, entrance fees or other fees or receipts of anything of value measured on an admission or entrance or length of stay or seat box accommodations in any place where there is any exhibition, amusement, sport, or recreation, and all dues and fees paid to private clubs and membership clubs providing recreational or physical fitness facilities, including, but not limited to, golf, tennis, swimming, yachting, boating athletic, exercise, and fitness facilities, except physical fitness facilities owned or operated by any hospital licensed under ch. 395, F.S.

<sup>51</sup> Section 212.03(1)(a), F.S.

<sup>52</sup> Section 212.06(2), F.S., defines "dealer" to mean (a) every person who manufactures or produces tangible personal property for sale at retail; for use, consumption, or distribution; or for storage to be used or consumed in the state, (b) every person who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail; for use, consumption, or distribution; or for storage to be used or consumed in this state, (c) every person who sells at retail or who offers for sale at retail, or who has in his or her possession for sale at retail; or for use, consumption, or distribution; or for storage to be used or consumed in this state, tangible personal property defined herein, including a retailer who transacts a substantial number of remote sales or a marketplace provider that has a physical presence in this state or that makes or

Generally, tangible personal property that is sold in an isolated or occasional sale is exempt from the state sales tax.<sup>58</sup> A seller makes an isolated or occasional sale if the sale or series of sales occurs no more than twice during any 12-month period.<sup>59</sup> A seller is required to register as a dealer if he or she completes more than three sales of the same type of item during a 12-month period. The sale of mobile homes, aircrafts, boats, and motor vehicles are expressly excluded from the isolated or occasional state sales and use tax exemption if certain circumstances are met.<sup>60</sup>

According to estimates prepared by CMPSI, Revenue Estimating Conference reports suggest that Florida sales tax revenue for FY 2020-2021 and FY 2021-2022 were \$30.4 billion and \$38.6 billion, respectively.<sup>61</sup> CMSPI estimated the interchange fees on these taxes during the same period to be \$208.5 million and \$288.2 million, respectively.<sup>62</sup>

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facilitates through its marketplace a substantial number of remote sales, (d) any person who has sold at retail; or used, or consumed, or distributed; or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by ch. 212, F.S., has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of such tangible personal property, (e) any person who leases or rents tangible personal property for a consideration permitting the use or possession of such property without transferring title thereto, except as expressly provided for to the contrary, (f) any person who maintains or has within this state, directly or by a subsidiary, an office, distributing house, salesroom, or house, warehouse, or other place of business, (g) every person who solicits business either by direct representatives, indirect representatives, or manufacturer's agents; by distribution of catalogs or other advertising matter; or by any other means whatsoever, and by reason thereof receives orders for tangible personal property from consumers for use, consumption, distribution, and storage for use or consumption in the state, (h) every person who, as a representative, agent, or solicitor of an out-of-state principal or principals, solicits, receives, and accepts orders from consumers in the state for future delivery and whose principal refuses to register as a dealer, (i) the state, county, municipality, and political subdivision, agency, bureau or department, or other state or local government instrumentality, (j) any person who leases, or grants a license to use, occupy, or enter upon, living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, tourist or trailer camps, real property, space or spaces in parking lots or garages for motor vehicles, docking or storage space or spaces for boats in boat docks or marinas, or tie-down or storage space or spaces for aircraft at airports, (k) any person who sells, provides, or performs a service taxable under ch. 212, F.S., (l) any person who solicits, offers, provides, enters into, issues, or delivers any service warranty taxable under ch. 212, F.S., or who received, on behalf of such person, any consideration from a service warranty holder, and (m) a forwarding agent as defined in s. 212.(5)(b)1., F.S. who has applied for and received a Florida Certificate of Forwarding Agent Address. Section 212.02(19), F.S., defines "tangible personal property" as personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses, including electric power or energy, boats, motor vehicles and mobile homes as defined in s. 320.01(1) and (2), aircraft as defined in s. 330.27, F.S., and all other types of vehicles. Section 212.06(5)(b)1., F.S., defines "forwarding agent" as a person or business whose principal business activity is facilitating for compensation the export of property owned by other persons.

<sup>53</sup> Section 212.07(2) and (3), F.S.

<sup>54</sup> *Id.*

<sup>55</sup> Section 212.055, F.S.

<sup>56</sup> Section 212.054(2)(a), F.S.

<sup>57</sup> Office of Economic and Demographic Research, *Florida Tax Handbook, 2022 Local Discretionary Sales Surtax Rates in Florida's Counties, 231-232 (2022)*, available at <http://edr.state.fl.us/content/revenues/reports/tax-handbook/taxhandbook2022.pdf> (last visited April 3, 2023).

<sup>58</sup> Fla. Admin. Code R. 12A01.037(1). See also, s. 212.02(2), defining "business" as activity engaged in by a person with the object of private or public gain, benefit, or advantage.

<sup>59</sup> Fla. Admin. Code R. 12A-1.037(3)(b).

<sup>60</sup> See, s. 212.05(1)(a)1.b., and Fla. Admin. Code R. 12A-1.037(2)(a)1.

<sup>61</sup> Email from French Brown, Attorney at Dean Mead, to Jacqueline Moody, Florida Senate Committee on Banking and Insurance Senior Attorney, *HB 677/SB 564*, (Feb. 24, 2023) (on file with the Senate Committee on Banking and Insurance).

<sup>62</sup> *Id.*

***Tourist Development Tax***<sup>63</sup>

A tourist development tax is a county tax on consideration paid on residential rentals of six months or less.<sup>64</sup> The tax funds tourism-related uses specified in the authorizing statute. The Local Option Tourist Development Act<sup>65</sup> authorizes counties to levy five separate taxes on transient rental transactions. Depending on a county's eligibility to levy such taxes, the maximum tax rate varies from a minimum of 3 percent to a maximum of 6 percent:

- The original TDT may be levied at the rate of 1 or 2 percent.<sup>66</sup>
- An additional 1 percent tax may be levied by counties who have previously levied the original TDT at the 1 or 2 percent rate for at least three years.<sup>67</sup>
- A high tourism impact tax may be levied at an additional 1 percent.<sup>68</sup>
- A professional sports franchise facility tax may be levied up to an additional 1 percent.<sup>69</sup>
- An additional professional sports franchise facility tax no greater than 1 percent may be imposed by a county that has already levied the professional sports franchise facility tax.<sup>70</sup>

Prior to the authorization of the original 1 or 2 percent tourist development tax, the levy must be approved by a countywide referendum,<sup>71</sup> and additional tourist development tax levies must be authorized by a vote of the county's governing authority or by voter approval of a countywide referendum.<sup>72</sup> The original tax may be repealed by a referendum initiated by a petition signed by 15 percent of voters<sup>73</sup> subject to the interest of the holders of any revenue bonds repayment of which is secured by the tax. Once the tax is in place, additional taxes may be levied by a vote of the county commissioners.<sup>74</sup>

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<sup>63</sup> Section 125.0104, F.S.

<sup>64</sup> Section 125.0104(3)(a)1., F.S.

<sup>65</sup> Section 125.0104, F.S.

<sup>66</sup> Section 125.0104(3)(c), F.S. All 67 of Florida's counties are eligible to levy this tax, but only 62 counties have done so, all at a rate of 2 percent. Office of Economic and Demographic Research (EDR), *County Tax Rates: CY 2007-2023*, available at <https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fedr.state.fl.us%2FContent%2Flocal-government%2Fdata%2Fdata-a-to-z%2FLOTTTrates.xls&wdOrigin=BROWSELINK> (last visited April 3, 2023). These counties are estimated to realize \$612 million in revenue from these taxes in the 2022-2023 fiscal year. EDR *2022 Local Government Financial Information Handbook* (December 2022), p. 251, at <http://edr.state.fl.us/Content/local-government/reports/lgfih22.pdf> (last visited April 3, 2023).

<sup>67</sup> Section 125.0104(3)(d), F.S. Fifty-six of the eligible 59 counties levy this tax, with an estimated 2022-2023 state fiscal year collection of \$250 million in revenue. 2022 Local Government Financial Information Handbook at 255.

<sup>68</sup> Section 125.0104(3)(m), F.S. All nine eligible counties levy this tax, with an estimated 2022-2023 state fiscal collection of \$162 million in revenue. 2022 Local Government Financial Information Handbook at 261.

<sup>69</sup> Section 125.0104(3)(l), F.S. Revenue can be used to pay debt service on bonds for the construction or renovation of professional sports franchise facilities, spring training facilities or professional sports franchises, and convention centers and to promote and advertise tourism. Forty-five of the 67 counties levy this additional tax, with an estimated 2022-2023 state fiscal year collection of \$285 million in revenue. 2022 Local Government Financial Information Handbook at 259.

<sup>70</sup> Section 125.0104(3)(n), F.S. Thirty-four counties levy the additional professional sports franchise facility tax, with an estimated 2022-2023 state fiscal year collection of \$17 million in revenue. 2022 Local Government Financial Information Handbook at 265.

<sup>71</sup> Section 125.0104(6), F.S.

<sup>72</sup> Section 125.0104(3)(d), F.S.

<sup>73</sup> Section 125.0104(6)(d), F.S.

<sup>74</sup> Section 125.0104(3)(l), (m), and (n), F.S.

## Florida Deceptive and Unfair Trade Practices Act

### *History and Purpose*

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) became law in 1973.<sup>75</sup> The FDUTPA is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce.<sup>76</sup> The FDUTPA is based on federal law, and s. 501.204(2), F.S., provides that it is the intent of the Legislature that due consideration and great weight must be given to the interpretations of the Federal Trade Commission and the federal courts relating to section 5 of the Federal Trade Commission Act.<sup>77</sup>

The State Attorney or the Department of Legal Affairs (“Department”) may bring actions when it is in the public interest on behalf of consumers or governmental entities.<sup>78</sup> The Office of the State Attorney may enforce violations of the FDUTPA if the violations take place in its jurisdiction.<sup>79</sup> The Department has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days after a written complaint is filed.<sup>80</sup>

### *Remedies under the FDUTPA*

The Department and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments.
- Injunctive relief.
- Actual damages on behalf of consumers and businesses.
- Cease and desist orders.
- Civil penalties of up to \$10,000 per willful violation.<sup>81</sup>

### III. Effect of Proposed Changes:

**Section 1** of the bill, effective October 1, 2024, creates s. 501.0119, F.S., which prohibits an issuer, a payment card network, an acquirer bank, or a processor from charging interchange fees on the tax amount of an electronic payment transaction if the merchant informs the acquirer bank or its designee of such tax amount as part of the authorization or settlement process for the transaction. Section 501.0119, F.S., does not apply to an electronic payment transaction in which the tax amount is not separately stated on the consumer’s payment invoice, sales slip, or other

<sup>75</sup> Ch. 73-124, Laws of Fla.; codified at part II of ch. 501, F.S.

<sup>76</sup> See s. 501.202, F.S. “Trade or commerce” means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. “Trade or commerce” shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity. See s. 501.203(8), F.S.

<sup>77</sup> Section 501.204(2), F.S.

<sup>78</sup> See Sections 501.203(2), 501.206, and 501.207, F.S.

<sup>79</sup> Section 501.203(2), F.S.

<sup>80</sup> *Id.*

<sup>81</sup> Sections 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Section 501.2075, F.S. Enforcing authorities may also request attorney fees and costs of investigation or litigation. Section 501.2105, F.S.

evidence of sale as required under s. 212.07(2), F.S., and does not create liability for a payment card network regarding the accuracy of the tax data reported by the merchant.

A merchant must transmit the tax amount data as part of the authorization or settlement process to avoid being charged interchange fees on the tax amount of an electronic payment transaction. A merchant that does not transmit tax amount data on an eligible transaction as part of the authorization or settlement process may transmit tax documentation for the transactions no later than 180 days after the date of the electronic payment transaction and, within 30 days, the issuer must credit to the merchant the amount of interchange fees charged on the tax amount of the electronic payment transaction. This provision may be relied upon by smaller businesses that may not have the technology to transmit the tax amount data electronically at the time of the authorization process.

An issuer, a payment card network, an acquirer bank, a processor, or other designated entity that has received the tax amount data and violates s. 501.0119, F.S., is subject to a civil penalty of \$1,000 per electronic payment transaction and the issuer must refund to the merchant the amount of interchange fees charged on the tax of an electronic payment transaction.

Except for the merchant, an entity that is involved in facilitating or processing an electronic payment transaction (such as an issuer, payment card network, an acquirer bank or a processor) may not distribute, exchange, transfer, disseminate, or use the electronic payment transaction or as required by law. An entity that violates this provision commits a violation of the FDUTPA which may be enforced only by the enforcing authority (e.g. no individual cause of action) and subjects the violator to the sanctions and penalties under Part II, ch. 501, F.S. If such an action is successful, the enforcing authority is entitled to reasonable attorney fees and costs. "Enforcing authority" is defined as the office of the state attorney if a violation of this part occurs in or affects the judicial circuit under the office's jurisdiction, or means the Department if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the Department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.<sup>82</sup>

The following terms are defined for purposes of the section created under the bill:

- "Acquirer bank" means a member of a payment card network which contracts with a merchant for the settlement of electronic payment transactions. An acquirer bank may contract directly with merchants or indirectly through a processor to process electronic payment transactions.
- "Authorization" means the process through which a merchant requests approval for an electronic payment transaction from the issuer.
- "Clearance" means the process of transmitting final transaction data from a merchant to an issuer for posting to the cardholder's account and the calculation of fees and charges, including interchange fees, which apply to the issuer and merchant.
- "Credit card" means a card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.
- "Debit card" means:

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<sup>82</sup> Section 501.203(2), F.S.

- A card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account, regardless of the purpose for which the account is established, whether authorization is based on signature, personal identification number, or other means;
- Includes a general-use prepaid card<sup>83</sup>; and
- Excludes paper checks.
- “Electronic payment transaction” means a transaction in which a person uses a debit card, credit card, or other payment code or device, issued or approved through a payment card network, to debit a deposit account or use a line of credit, whether authorization is based on a signature, personal identification number, or other means.
- “Interchange fee” means a fee established, charged, or received by a payment card network for the purpose of compensating the issuer for its involvement in an electronic payment transaction.
- “Issuer” means a person, or the person’s agent, issuing a debit card or credit card.
- “Merchant” has the same meaning as the term “dealer” in s. 212.06(2), F.S.
- “Payment card network” means an entity that:
  - Directly or through licensed members, processors, or agents, provides the proprietary services, infrastructure, and software that routes information and data to conduct debit card or credit card transaction authorization, clearance, and settlement; and
  - A merchant or seller uses to accept as a form of payment a brand of debit card, credit card, or other device that may be used to carry out debit or credit transactions.
- “Processor” means an entity that facilitates, services, processes, or manages the debit or credit authorization, billing, transfer, payment procedures, or settlement with respect to any electronic payment transaction.
- “Settlement” means the process of transmitting sales information to the issuing bank for collection and reimbursement of funds to the merchant and calculating and reporting the net transaction amount to the issuer and merchant for an electronic payment transaction that is cleared.
- “Tax” means all taxes and fees levied under ch. 212, F.S., and s. 125.0104, F.S.
- “Tax documentation” means documentation sufficient for the payment card network to determine the total amount of the electronic payment transaction and the tax amount of such transaction. Tax documentation may be related to a single electronic payment transaction or multiple electronic payment transactions aggregated over a period of time. Examples of tax documentation include, but are not limited to, invoices, receipts, journals, ledgers, and tax returns filed with the Department of Revenue or local taxing authorities.

**Section 2** requires the EDR to submit a report to the President of the Senate and the Speaker of the House of Representatives by January 9, 2024, containing findings of policy options and address the impacts of the legislation, such as the technological, financial and economic impacts on merchants, processors, payment card networks, acquiring banks, and issuers. EDR is authorized to contract with a public or private institution of higher learning or a nationally

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<sup>83</sup> 15 U.S.C. s. 16931-1 defines “general-use prepaid card” to mean a card or other payment code or device issued by any person that is (i) redeemable at multiple, unaffiliated merchants or service providers, or automated teller machines; (ii) issued in a requested amount, whether or not that amount may, at the option of the issuer, be increased in value or reloaded if requested by the holder; (iii) purchased or loaded on a prepaid basis; and (iv) honored, upon presentation, by merchants for goods or services, or at automated teller machines.

recognized organization or entity with experience in performing this type of evaluation for the sole purpose of developing some or all of the analysis or findings that are required to be included in the report.

**Section 3** of the bill, except as otherwise expressly provided, is effective upon becoming law.

#### **IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

The dormant commerce clause may bar state regulation even where there is no relevant congressional legislation if the state regulation unduly burdens interstate commerce.<sup>84</sup> However, there is a high threshold for dormant commerce clause violations. The general rule is “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>85</sup> Thus, the bill would only implicate the dormant commerce clause if a court determined that the bill creates undue burdens on interstate commerce that clearly exceed the benefit of allowing merchants to avoid paying interchange fees on the sales tax portion of an electronic payment transaction.

#### **V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

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<sup>84</sup> Library of Congress, *Art.I.S8.C3.7.1 Overview of Dormant Commerce Clause*, Congress.Gov, available at: [Overview of Dormant Commerce Clause | Constitution Annotated | Congress.gov | Library of Congress](#) (last visited Apr. 7, 2023) (citing *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-2091 (2018)).

<sup>85</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit, Michigan*, 362 U.S. 440, 443 (1960)).



**B. Private Sector Impact:**

To the extent that the key players in processing credit card and debit card transactions may be required to upgrade technology and security measures to be able to transmit tax amount data, there is an indeterminate negative fiscal impact on them. To the extent that merchants submit tax amount data to payment card networks, there is an indeterminate positive fiscal impact on merchants and an indeterminate negative fiscal impact on issuing banks because of the reduced interchange fees on tax amounts for electronic payment transactions.

**C. To the extent that any key players are ordered to pay civil penalties or damages, there may be an indeterminate negative fiscal impact. Government Sector Impact:**

To the extent that any specified entities are ordered to pay civil penalties, there may be an indeterminate positive fiscal impact. Enforcement costs of the Attorney General or state attorney may be recoverable through awards of attorney fees and costs, so long as enforcement action is successful.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 501.0119 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS/CS/CS by Rules on April 24, 2023:**

The CS requires the EDR must submit a report to the President of the Senate and the Speaker of the House of Representatives by January 9, 2024, containing findings and authorizes EDR to contract with a specified type of public or private institutions for the purpose of developing some or all of the information required to be contained in the report.

The CS makes the bill's prohibition against applying interchange fees to the tax amount of electronic payment transactions effective October 1, 2024, and makes the following revisions related to that requirement:

- Provides that s. 501.0119, F.S., does not create liability for a payment card network regarding the accuracy of the tax data reported by the merchant;

- Provides that the tax amount of an electronic payment transaction may be transmitted to the merchant as part of the settlement process, in addition to the authorization as provided in the bill, to avoid being charged interchange fees on such amounts;
- Prohibits the specified entities who receive electronic payment transaction data from distributing, exchanging, transferring, disseminating, or using such data except to facilitate or process the electronic payment transaction or as required by law;
- Provides that a violation of this prohibition constitutes a violation of the FDUTPA, must only be enforced by the enforcing authority as defined in s. 501.203(2), and subjects the violator to the sanctions and penalties as provided for in Part II of ch. 501, F.S.;
- Provides that if a FDUPTA action is successful, the enforcing authority is entitled to reasonable attorney fees and costs;
- Modifies the effective date from October 1, 2023, to except as otherwise provided, upon becoming law.

**CS/CS by Commerce and Tourism on April 4, 2023:**

The amendment defines the term “authorization” to mean the process through which a merchant requests approval for an electronic payment transaction from the issuer.

The amendment prohibits certain entities from charging an interchange fee if the merchant informs the specified entity of the tax amount as part of the authorization process, rather than the clearance process.

**CS by Banking and Insurance on March 15, 2023:**

The committee substitute makes the following changes:

- Moves the new section prohibiting the charge of interchange fees on taxes from s. 655.969, F.S., to s. 501.0119, F.S.;
- Provides that the section does not apply to electronic payment transactions in which the tax amount is not separately stated on the consumer’s evidence of sale;
- Specifies that, in addition to a payment card network, an issuer, an acquirer bank, or a processor may not receive or charge the merchant any interchange fees on the tax amount of an electronic payment transaction if certain circumstances are met;
- Requires the merchant to transmit the tax amount data as part of the clearance process to avoid being charged interchange fees on the tax amount of an electronic payment transaction;
- Authorizes a merchant that does not, rather than cannot, transmit the tax amount data as part of the clearance process to submit tax documentation for the electronic payment transaction to the acquirer bank, its designee, or any other entity as provided in the payment card network’s terms and conditions of service, no later than 180 days after the date of the electronic payment transaction;
- Requires the issuer, within 30 days, to credit to the merchant the amount of interchange fees charged on the tax amount of the electronic payment transaction if the merchant provides the tax documentation as provided under the bill;
- Specifies that, in addition to a payment card network, an issuer, an acquirer bank, a processor, or other designated entity that has received the tax amount data and

violates the section is subject to a civil penalty of \$1,000 per electronic payment transaction;

- Specifies that when a violation occurs the issuer is the entity which must refund to the merchant the interchange fee calculated on the tax amount relative to the electronic payment transaction;
- Amends the definition of “settlement;”
- Defines the terms “acquirer bank,” “clearance,” “merchant,” “processor,” and “tax document;” and
- Amends the effective date from July 1, 2023 to October 1, 2023.

B. Amendments:

None.