

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 105 Offenses Involving Electronic Benefits Transfer Cards

SPONSOR(S): Smith

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 218

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		White	White
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Currently, s. 414.39(2), F.S., in relevant part, makes it a criminal offense for a person to knowingly use, transfer, acquire, *traffic*, alter, forge, or possess, in any manner not authorized by law, a food assistance identification card or an authorization, including an electronic authorization, for the expenditure of food assistance benefits. The subsection also specifies that it is a crime for a person to attempt to commit, or to aid or abet another person in the commission of, the aforementioned acts. Depending on the value of the public assistance wrongfully received, retained, misappropriated, sought, or used, these criminal offenses range from a first degree misdemeanor to a first degree felony.

Florida law does not currently describe acts that are included in the term “traffic” as used in s. 414.39(2), F.S. The bill adds language providing that the following acts are included in the term “traffics”:

- Buying, selling, stealing, or otherwise effecting an exchange of food assistance benefits for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone. Attempting to do such acts is also included in the term.
- Exchanging firearms, ammunition, explosives, or controlled substances for food assistance benefits.
- Purchasing with food assistance benefits a product with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with food assistance benefits in exchange for cash or consideration other than eligible food.
- Intentionally purchasing products originally purchased with food assistance benefits in exchange for cash or consideration other than eligible food.

The bill also specifically prohibits an individual from possessing two or more electronic benefit access cards issued to other persons and attempting to sell or selling one or more of the cards. This offense is punished under the bill as a third degree felony and requires a violator to complete six months of community service with a nonprofit entity that services the community with food distribution for the needy.

The bill may have a positive prison and jail bed impact (i.e., may increase the need for prison and jail beds). Please see “Fiscal Impact on State Government” and “Fiscal Impact on Local Governments,” *infra*.

The bill takes effect October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Food Assistance Benefits

Food assistance benefits, formerly referred to as food stamps, are provided through the federal Supplemental Nutrition Assistance Program (SNAP).¹ These benefits are disbursed to recipients on a monthly basis primarily through an electronic benefits transfer (EBT) to a debit card that may be accessed using a personal identification number (PIN), although, in some cases, manual benefits vouchers may be used, e.g., when electronic systems are not working.² In Florida, the EBT debit card is referred to as the EBT Access card.³ Benefits that are not used in one month carry over to the following month.⁴

Purchases with food assistance benefits must be made at retailers who have been approved by the United States (U.S.) Department of Agriculture.⁵ Florida law specifically prohibits use or acceptance of food assistance benefits at adult entertainment establishments, casinos, and gambling and gaming facilities.⁶ The benefits:

- May be used to buy breads cereals, fruits, vegetables, meats, fish, poultry, dairy products, and seeds and plants to grow and produce food for a household to eat.
- May not be used to buy beer, wine, liquor, cigarettes, tobacco, pet food, soaps, paper products, household supplies, vitamins, medicines, food that will be eaten in the store, or hot food.⁷

As of July 2015, 45,480,644 persons from 22,419,259 households were receiving food assistance benefits nationwide. Of those totals, 3,650,705 persons from 2,013,221 households were Florida residents (19.4 percent of this state's population).⁸ For federal Fiscal Year 2014, the average monthly benefit per Florida resident was \$129.33 and per Florida household was \$237.45.⁹ A total of \$5.47 billion in food assistance benefits were distributed in Florida during federal Fiscal Year 2014.¹⁰

¹ 7 C.F.R. § 271.1 (2015).

² U.S. Department of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Your Benefits*, <http://www.fns.usda.gov/snap/mobile/benefits/how-to-use-ebt-card.html> (last visited November 1, 2015); Conference call with staff of the Division of Public Assistance Fraud, Department of Financial Services (October 30, 2015).

³ Florida Department of Children and Families, *Welcome to EBT*, <http://www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cash/welcome-ebt> (last visited on November 1, 2015).

⁴ U.S. Department of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program Retail Merchants*, <http://www.fns.usda.gov/snap/mobile/benefits/what-can-i-buy.html> (last visited November 1, 2015).

⁵ U.S. Department of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Your Benefits*, <http://www.fns.usda.gov/snap/retailers-0> (last visited November 1, 2015).

⁶ s. 402.82, F.S.

⁷ Florida Department of Children and Families, *Food Assistance Program Fact Sheet*, <https://www.dcf.state.fl.us/programs/access/docs/fafactsheet.pdf> (last visited November 1, 2015).

⁸ U.S. Department of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Number of Persons Participating*, <http://www.fns.usda.gov/sites/default/files/pd/29SNAPcurrPP.pdf> (last visited November 1, 2015); U.S. Department of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Number of Households Participating*, <http://www.fns.usda.gov/sites/default/files/pd/30SNAPcurrHH.pdf> (last visited November 1, 2015); Food Research and Action Center, *Supplemental Nutrition Assistance Program: Share of Population Participating* http://frac.org/wp-content/uploads/2011/01/snapdata2015_jul.pdf (last visited November 1, 2015).

⁹ U.S. Department of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Average Monthly Benefit per Person*, [http://www.fns.usda.gov/sites/default/files/pd/18SNAPavg\\$PP.pdf](http://www.fns.usda.gov/sites/default/files/pd/18SNAPavg$PP.pdf) (last visited November 1, 2015); and U.S. Department of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Average Monthly Benefit per Household*, [http://www.fns.usda.gov/sites/default/files/pd/19SNAPavg\\$HH.pdf](http://www.fns.usda.gov/sites/default/files/pd/19SNAPavg$HH.pdf) (last visited November 1, 2015).

¹⁰ U.S. Department of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Benefits*, <http://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap> (last visited November 1, 2015).

Public Assistance Fraud Offenses

Offenses constituting public assistance¹¹ fraud are set forth in s. 414.39, F.S, which, in relevant part, specifies that a person commits a crime if he or she knowingly uses, transfers, acquires, *traffics*, alters, forges, or possesses in any manner not authorized by law:

- A food assistance identification card;
- An authorization, including, but not limited to, an electronic authorization, for the expenditure of food assistance benefits;
- A certificate of eligibility for medical services; or
- A Medicaid identification card.¹²

Additionally, the statute specifies that it is a crime for a person to attempt to commit, or to aid or abet another person in the commission of, the aforementioned acts.¹³

Section 414.39(5), F.S., establishes the criminal penalties that apply to the above-described offenses and specifies that if the public assistance or identification wrongfully received, retained, misappropriated, sought, or used is:

- Less than an aggregate value of \$200 in any 12 consecutive months, such person commits a misdemeanor of the first degree.¹⁴
- Of an aggregate value of \$200 or more, but less than \$20,000 in any 12 consecutive months, such person commits a felony of the third degree.¹⁵
- Of an aggregate value of \$20,000 or more, but less than \$100,000 in any 12 consecutive months, such person commits a felony of the second degree.¹⁶
- Of an aggregate value of \$100,000 or more in any 12 consecutive months, such person commits a felony of the first degree.^{17, 18}

Currently, the term “traffic” is not defined by Florida’s public assistance fraud statute. In February 2013, the U.S. Department of Agriculture adopted the following definition of trafficking for federal purposes of SNAP:

Trafficking means:

(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;

(2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;

(3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount;

¹¹ Section 414.0252(10), F.S., defines “public assistance” to mean “benefits paid on the basis of the temporary cash assistance, food assistance, Medicaid, or optional state supplementation program.”

¹² s. 414.39(2), F.S.

¹³ *Id.*

¹⁴ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

¹⁵ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

¹⁶ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹⁷ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹⁸ Section 414.39(5)(e), F.S., states, “As used in this subsection, the value of a food assistance authorization benefit is the cash or exchange value unlawfully obtained by the fraudulent act committed in violation of this section.”

(4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or

(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

(6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.¹⁹

Investigations of Public Assistance Fraud

The Division of Public Assistance Fraud within the Department of Financial Services (DFS) is authorized to investigate public assistance fraud in Florida.²⁰ These investigations have found a wide variety of methods used to commit such fraud:

- Applicants may make misrepresentations on their benefit applications, e.g., not reporting or under-reporting income.
- Recipients may fail to report a change in circumstances, e.g., failing to report a change in household composition or income.²¹
- Recipients or others in possession of the food assistance benefits may sell the benefits for cash or other consideration usually valued at some amount less than the value of the benefits, to retailers who then misrepresent that the benefits were used to purchase food at the store in order to obtain the full value of the benefit from the federal government or who use the benefits to purchase food to stock the store's shelves. According to a recent news report, store clerks in Jacksonville have used this method of fraud to receive tens of thousands of dollars in profit per month per store.²²
- Recipients may purchase food with their benefits at a low-priced shopping club and resell the food to others for consumption or to retailers who resell the food at a higher price.²³

Effect of Bill

The bill amends s. 414.39(2), F.S., to specify acts that are included in the term "traffics" for purposes of the subsection's prohibitions against trafficking in food assistance benefits. The bill specifies that "traffics" includes:

- Buying, selling, stealing, or otherwise effecting an exchange of food assistance benefits issued and accessed via EBT cards, card numbers and PINs, or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;
- Exchanging firearms, ammunition, explosives, or controlled substances, as defined in s. 893.02, for food assistance benefits;
- Purchasing with food assistance benefits a product with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with food assistance benefits in exchange for cash or consideration other than eligible food;

¹⁹ 7 C.F.R. § 271.2 (2015).

²⁰ Section 414.411, F.S.

²¹ Requirements for the reporting of changes in circumstances are set forth in 7 C.F.R. 273.12(2015).

²² Jennifer Waugh, *EBT Fraud Steals Millions in Taxpayer Dollars*, News 4 Jax (November 20, 2014), <http://www.news4jax.com/news/ebt-fraud-steals-millions-in-taxpayer-dollars/29640166>.

²³ U.S. Department of Agriculture, Food and Nutrition Service, *What is SNAP Fraud?*, <http://www.fns.usda.gov/fraud/what-snap-fraud> (last visited November 1, 2015); Conference call with staff of the Division of Public Assistance Fraud, Department of Financial Services (October 30, 2015).

- Intentionally purchasing products originally purchased with food assistance benefits in exchange for cash or consideration other than eligible food; or
- Attempting to buy, sell, steal, or otherwise effect an exchange of food assistance benefits issued and accessed via EBT cards, card numbers and PINs, or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

These acts are substantively the same as acts described in the federal definition of “trafficking” in 7 C.F.R. s. 271.2.

The bill also specifically prohibits an individual from possessing two or more EBT cards issued to other persons and attempting to sell or selling one or more of the cards. This offense is punished under the bill as a third degree felony and requires a violator to complete six months of community service with a nonprofit entity that services the community with food distribution for the needy.

B. SECTION DIRECTORY:

Section 1. Amends s. 414.39, F.S., relating to fraud.

Section 2. Provides that the bill takes effect October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference met on October 28, 2015, and determined that this bill, due to its creation of a 3rd felony offense relating to the possession of two or more EBT cards, will have a positive indeterminate prison bed impact on the Department of Corrections (i.e., the bill will increase the number of prison beds needed by an indeterminate number).

The bill may also have a positive prison bed impact if its description of acts that constitute “trafficking” results in greater arrests and convictions for felony public assistance fraud.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

The bill could have a positive jail bed impact on local governments if its description of acts that constitute “trafficking” results in greater arrests and convictions for felony public assistance fraud.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create the need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill's title is "[a]n act relating to offenses involving electronic benefits transfers"; however, the bill's language in s. 414.399(2)(b), F.S., also contemplates the fact that benefits are sometimes manually exchanged. It may be desirable to broaden the bill's title to specify "[a]n act relating to public assistance fraud."

In s. 414.39(2)(b)1.b., F.S., the bill indicates that one method of prohibited trafficking is "[e]xchanging firearms, ammunition, explosives, or controlled substances, as defined in s. 893.02, for food assistance benefits." Such exchange, however, is also prohibited in s. 414.39(2)(b)1.a., F.S., which broadly prohibits the exchange of cash or "consideration" other than eligible food for food assistance benefits. To avoid any construction of the law by a court which would limit the types of "consideration" prohibited to firearms, ammunition, explosives, or controlled substances, based on the rule of statutory construction stating that the more specific statute controls, it may be desirable to delete s. 414.39(2)(b)1.b., F.S., from the bill.

In s. 414.39(2)(b)1.c., F.S., the bill provides that a method of prohibited trafficking is, "[p]urchasing with food assistance benefits a product *with the intent of obtaining cash or consideration other than eligible food by reselling the product*, and subsequently *intentionally* reselling the product purchased with food assistance benefits in exchange for cash or consideration other than eligible food." In many cases, it will be difficult, if not impossible, for investigators to acquire evidence of the purchaser's intent at the time of the purchase. If the bill's intent is to proscribe the reselling of such products then merely proscribing only such intentional resale will accomplish that intent. This is the approach taken by Wisconsin in its statute that adopts a description of trafficking which is similar to that adopted in the Code of Federal Regulations and which states in relevant part, "(dm) 'Traffic food stamp program benefits' means to do any of the following: *** 5. Purchase, for cash or other consideration that is not food, food that was previously purchased from a supplier using food stamp program benefits."²⁴

In s. 414.39(2)(b)2., F.S., the bill provides that a method of prohibited trafficking is "attempting" to do the acts proscribed by s. 414.39(b)1.a., F.S. Attempted trafficking, however, is already proscribed by s. 414.39(2)(b), F.S., in current law, which is redesignated as s. 414.39(2)(a)2., F.S., by the bill. To avoid

²⁴ WI STATUTES ANNOTATED §946.92(1)(dm)5.

conflict and the potential for a court to limit an attempt offenses to those acts proscribed by s. 414.39(2)(b)1.a., F.S., it may be desirable to delete s. 414.39(2)(b)2., F.S., from the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A