

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 105 Public Assistance Fraud  
**SPONSOR(S):** Criminal Justice Subcommittee; Smith  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 218

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 3 N, As CS	White	White
2) Justice Appropriations Subcommittee		McAuliffe	Lloyd
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 “traffic”:

- 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;
- Intentionally reselling a product purchased with food assistance benefits in exchange for cash or consideration other than eligible food; or
- Intentionally purchasing a product originally purchased with food assistance benefits using cash or consideration other than eligible food.

The bill also makes it a third degree felony for an individual to possess two or more electronic benefit transfer (EBT) cards for food assistance benefits which were issued to other persons and to sell or attempt to sell one or more of the cards. The bill specifies that each EBT card possessed, sold, or attempted to be sold in violation of this prohibition constitutes a separate offense for which an offender must complete 40 hours of community service. If determined feasible by the court, such community service must be performed with a nonprofit entity that services the community with food distribution for the needy.

The Criminal Justice Impact Conference (CJIC) met on October 28, 2015, and determined that this bill will have an insignificant prison bed impact on the Department of Corrections (i.e., the bill will increase the number of prison beds needed by 10 or fewer beds). The CJIC met again on January 6, 2016, to determine if amendments adopted subsequently would affect the prior prison bed impact estimate and found that the estimate would not change. See Fiscal Impact Section

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).<sup>1</sup> 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.<sup>2</sup> In Florida, the EBT debit card is referred to as the EBT Access card.<sup>3</sup> Benefits that are not used in one month carry over to the following month.<sup>4</sup>

Purchases with food assistance benefits must be made at retailers that have been approved by the United States (U.S.) Department of Agriculture.<sup>5</sup> Florida law specifically prohibits use or acceptance of food assistance benefits at adult entertainment establishments, casinos, and gambling and gaming facilities.<sup>6</sup> 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.<sup>7</sup>

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).<sup>8</sup> For federal Fiscal Year 2014, the average monthly benefit per Florida resident was \$129.33 and per Florida household was \$237.45.<sup>9</sup> A total of \$5.47 billion in food assistance benefits were distributed in Florida during federal Fiscal Year 2014.<sup>10</sup>

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<sup>1</sup> 7 C.F.R. § 271.1 (2015).

<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> s. 402.82, F.S.

<sup>7</sup> 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).

<sup>8</sup> 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](http://frac.org/wp-content/uploads/2011/01/snapdata2015_jul.pdf) (last visited November 1, 2015).

<sup>9</sup> 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).

<sup>10</sup> 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 assistance<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>
- 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.<sup>15</sup>
- 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.<sup>16</sup>
- Of an aggregate value of \$100,000 or more in any 12 consecutive months, such person commits a felony of the first degree.<sup>17, 18</sup>

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;

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<sup>11</sup> 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.”

<sup>12</sup> s. 414.39(2), F.S.

<sup>13</sup> *Id.*

<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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.<sup>19</sup>

### **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.<sup>20</sup> 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.<sup>21</sup>
- 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.<sup>22</sup>
- 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.<sup>23</sup>

### **Effect of Bill**

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

- 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;
- Intentionally reselling a product purchased with food assistance benefits in exchange for cash or consideration other than eligible food; or
- Intentionally purchasing a product originally purchased with food assistance benefits using cash or consideration other than eligible food.

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

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<sup>19</sup> 7 C.F.R. § 271.2 (2015).

<sup>20</sup> Section 414.411, F.S.

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

<sup>22</sup> 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>.

<sup>23</sup> 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).

The bill also makes it a third degree felony for an individual to possess two or more EBT cards for food assistance benefits which were issued to other persons and to sell or attempt to sell one or more of the cards. The bill specifies that each EBT card possessed, sold, or attempted to be sold in violation of this prohibition constitutes a separate offense for which an offender must complete 40 hours of community service. If determined feasible by the court, such community service must be performed with a nonprofit entity that services the community with food distribution for the needy.

The bill also amends s. 921.0022(3)(a), F.S., to remove the unnecessary inclusion of specified third degree felony violations of s. 414.39(2), F.S., on the Offense Severity Ranking Chart (OSRC) as Level 1 felonies. Under s. 921.0023, F.S., third degree felonies that are not on the OSRC automatically default to a Level 1.

Finally, the bill reenacts ss. 414.41(1)(b), 772.102(1)(a), 895.02(1)(a), and 1002.91(5), F.S., to incorporate amendments by the bill to statutes that are cross-referenced in the reenacted sections.

#### **B. SECTION DIRECTORY:**

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

Section 2. Amends s. 921.0022, F.S., relating to the OSRC.

Section 3. Reenacts s. 414.41(1)(b), F.S., relating to the recovery of payments made due to mistake or fraud.

Section 4. Reenacts s. 772.102(1)(a), F.S., relating to definitions for civil remedies for criminal practices.

Section 5. Reenacts s. 895.02(1)(a), F.S., relating to definitions for racketeering.

Section 6. Reenacts s. 1002.91(5), F.S., relating to investigations of fraud or overpayment.

Section 7. 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 will have an insignificant prison bed impact on the Department of Corrections (i.e., the bill will increase the number of prison beds needed by 10 or fewer beds). Since that CJIC meeting the bill was amended to make the third degree felony created by the bill a separate offense for each EBT card possessed, sold, or attempted to be sold. The original bill made possession & sale of any number of cards a single offense. The CJIC met again on January 6, 2016, to determine if amendments adopted subsequently would affect the prior prison bed impact estimate and found that the estimate would not change.

In Fiscal Year 2014-15, there were five persons found guilty or convicted and 10 where adjudication was withheld for violating FS 414.39 with 1st degree misdemeanors. In Fiscal Year 2014-15, there were 379 offenders sentenced under s. 414.39, F.S. Nine of these offenders were sentenced to prison (mean sentence length 28.9 months). It is unknown how many of these offenders possessed multiple EBT cards and would be affected by this law.

**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 convictions for misdemeanor 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:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On November 4, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment: (a) revises the bill’s title to read “[a]n act relating to public assistance fraud”; (b) deletes from the bill’s description of acts constituting trafficking the provision relating to the exchange of firearms, ammunition, explosives, or controlled substances for food assistance benefits, as such exchange is prohibited by s. 414.39(2)(b)1., F.S.; (c) deletes the requirement to establish the purchaser’s intent at the time of purchase that was set forth in s. 414.39(2)(b)1.c., which is now s. 414.39(2)(b)2., F.S.; (d) deletes the bill’s proscription of attempted trafficking in s. 414.39(2)(b)2., F.S., as attempted acts are already proscribed by s. 414.39(2)(a)2., F.S.; (e) adds that each EBT card possessed, sold, or attempted to be sold in violation of s. 414.39(2)(c)1., F.S., constitutes a separate offense; (f) reduces the amount of community service required to be served for a violation of s. 414.39(2)(c)1., F.S., from six months to 40 hours and specifies that such community service shall be served with a nonprofit entity that provides the community with food services if determined feasible by the court; (g) amends s. 921.0022(3)(a), F.S., to remove the unnecessary inclusion of specified third degree felony violations of s. 414.39(2), F.S., on the OSRC; and (h) reenacts sections of law to incorporate amendments by the bill to statutes that are cross-referenced in the reenacted sections

This bill analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

