

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 761 Fraudulent Activities Associated with Payment Systems

**SPONSOR(S):** Criminal Justice Subcommittee; Young and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 912

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	White	White
2) Appropriations Committee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

The Department of Agriculture and Consumer Services (DACS) is responsible for inspecting measuring devices, i.e., fuel pumps, which are used in this state to sell fuel at wholesale and retail. In executing this responsibility, DACS also inspects the pumps for devices, commonly referred to as “skimmers,” which steal payment card information from customers paying for their gas at the pump.

During recent investigations, DACS has found that skimmed payment card information is being used as part of elaborate fraud schemes to purchase hundreds of gallons of gas that is pumped into unapproved, hidden gas tanks in vans, SUVs, and trucks. Such gas is then usually resold by the criminals to independent truck drivers at a fraction of its usual cost.

To establish greater protection for consumer payment card information and enhance penalties for crimes involved in the fraud schemes, the bill:

- Requires owners and managers of retail fuel pumps in this state to affix or install one or more security measures on each fuel pump which restrict the unauthorized access of customer payment card information.
- Increases the penalty for the offense of unlawfully conveying and fraudulently obtaining fuel from an unranked third degree felony to a second degree felony ranked as a Level 5 offense on the Offense Severity Ranking Chart (OSRC).
- Reduces the number of counterfeit credit cards or related specified documents required to constitute second degree felony trafficking from 10 to five and ranks this felony as a Level 5 offense on the OSRC.
- Creates a second degree felony ranked as a Level 5 offense on the OSRC for the offense of possessing five or more counterfeit credit cards or related specified documents.

On January 5, 2016, the Criminal Justice Impact Conference determined that this bill will have a positive insignificant fiscal impact on state prison beds (i.e., will increase the number of prison beds needed by less than 10). The bill may also have a positive jail bed impact and minimal fiscal impact on the owners and managers of retail petroleum fuel pumps. Please see “Fiscal Analysis & Economic Impact Statement,” *infra*.

The bill takes effect on October 1, 2016.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Skimming**

As discussed below, the Department of Agriculture and Consumer Services (DACS) is responsible for inspecting measuring devices, i.e., fuel pumps, which are used in this state to sell fuel at wholesale and retail.<sup>1</sup> In executing this responsibility, DACS also inspects the fuel pumps for devices, commonly referred to as “skimmers,” which steal payment card information from customers paying for their gas at the pump.<sup>2</sup>

In addition to being used for typical fraudulent purchases, skimmed payment card information has also been used, according to DACS, as part of elaborate schemes to purchase hundreds of gallons of gas that is pumped into unapproved, hidden gas tanks in vans, SUVs, and trucks. Such gas is then usually resold by the criminals to independent truck drivers at a fraction of its usual cost.<sup>3</sup>

The DACS has been working in cooperation with local, state, and federal law enforcement officials to investigate the criminals operating the above-described schemes.<sup>4</sup> Since March 2015, DACS has found 166 skimmers statewide and estimates that between 100 and 5,000 consumers are victimized by each skimmer with an average of \$1,000 stolen from each victim.<sup>5</sup> Additionally, since 2008, DACS has arrested 47 persons for the theft of fuel using skimmed credit card information.<sup>6</sup>

##### **Regulation of Petroleum Fuel Measuring Devices**

Under s. 525.07(1), F.S., DACS is required to inspect all measuring devices used in selling or distributing petroleum fuel<sup>7</sup> at wholesale and retail. The section further authorizes DACS to establish by rule the tolerances, in excess or deficiency, to be allowed for such measuring devices and requires each person who owns or operates a measuring device to ensure accurate measurement and to place an appropriate security seal on each device so that the metering adjustment cannot be changed without breaking the seal.<sup>8</sup>

If DACS determines that a measuring device is operating outside the tolerances established in rule, DACS is authorized to:

- Give written notice to the operator or owner of the measuring device which provides a reasonable time to repair the measuring device; or
- Condemn or prohibit the further use of the measuring device by using an appropriate security seal to obstruct the mechanism so that it cannot be operated without breaking the seal.<sup>9</sup>

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<sup>1</sup> s. 525.07, F.S.

<sup>2</sup> See Florida Department of Agriculture and Consumer Services, *Protecting Consumers at the Pump* (on file with the House Criminal Justice Subcommittee).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Florida Department of Agriculture and Consumer Services, *Commissioner Putnam Highlights "Protection at the Pump" Legislation, Announces Six Skimmers Found in Tampa Bay Area*, <http://www.freshfromflorida.com/News-Events/Press-Releases/2015-Press-Releases/Commissioner-Putnam-Highlights-Protection-at-the-Pump-Legislation-Announces-Six-Skimmers-Found-in-Tampa-Bay-Area> (last visited Jan. 16, 2016).

<sup>6</sup> See Florida Department of Agriculture and Consumer Services, *Protecting Consumers at the Pump* (on file with the House Criminal Justice Subcommittee).

<sup>7</sup> The term “petroleum fuel” is defined to mean “all gasoline, kerosene (except when used as aviation turbine fuel), diesel fuel, benzene, other like products of petroleum under whatever name designated, or an alternative fuel used for illuminating, heating, cooking, or power purposes, sold, offered, or exposed for sale in this state.” s. 525.01(1)(b), F.S. “Alternative fuel” is defined to mean “1. Methanol, denatured ethanol, or other alcohols; 2. Mixtures of gasoline or other fuels with methanol, denatured ethanol, or other alcohols; 3. Hydrogen; 4. Coal-derived liquid fuels; and 5. Fuels, other than alcohol, derived from biological materials.” s.

525.01(1)(c), F.S.

<sup>8</sup> s. 525.07(2) and (3), F.S.

<sup>9</sup> s. 525.07(4), F.S.

The section further specifies that it is unlawful for any person to:

- Operate any measuring device that has been condemned or prohibited from further use by the department without the written consent of the department.
- Install or operate a petroleum fuel measuring device in this state which gives short measure.
- Break, cut, or remove any seal applied by the department to a petroleum fuel measuring device or container, except under specified circumstances involving repair of the device.<sup>10</sup>

A violation of the section's provisions:

- May result in the imposition of administrative fines by DACS and suspension or revocation of the registration issued by DACS to the owner or operator of a measuring device.
- Constitutes a first degree misdemeanor<sup>11</sup> if knowingly committed.<sup>12</sup>

#### *Effect of Bill*

The bill adds a new subsection (10) to s. 525.07, F.S., to require each owner or manager of a retail petroleum fuel measuring device to affix or install at least one of the following security measures onto the fuel measuring device to restrict the unauthorized access of customer payment card<sup>13</sup> information:

- Pressure-sensitive security tape that is placed over the panel opening that leads to the scanning device for the fuel measuring device in a manner that restricts the unauthorized opening of the panel.
- A device or system that renders the fuel measuring device or the scanning device<sup>14</sup> in the fuel measuring device inoperable if there is an unauthorized opening of the panel.
- A device or system that encrypts the customer payment card information in the scanning device.
- Another security measure approved by the DACS.

If DACS determines that an owner or a manager does not have a security measure or has an altered or damaged security measure, the owner or manager shall have five calendar days after written notice from DACS to achieve compliance. After the fifth day of noncompliance, DACS may prohibit further use of the retail petroleum fuel measuring device until compliance is achieved. If a repeat violation occurs, DACS may take the measuring device out of service.

The bill requires DACS to enforce the aforementioned requirements and authorizes DACS to adopt rules to implement the new subsection.

#### **Unlawful Conveyance of Fuel/Fraudulent Obtainment of Fuel**

Section 316.80(1), F.S., states that it is unlawful for any person to maintain or possess any conveyance or vehicle that is equipped with fuel tanks, bladders, drums, or other containers that do not conform to federal regulations<sup>15</sup> or have not been approved by the United States Department of Transportation for the purpose of hauling, transporting, or conveying fuel over any public highway. A person who violates this prohibition commits a third degree felony<sup>16</sup> and is subject to the revocation of driver license privileges as provided in s. 322.26, F.S.

Additionally, s. 316.80(2), F.S., specifies that it is a third degree felony for any person to violate the above-described offense and to have or attempted to have fraudulently obtained fuel by:

- Presenting a credit card or a credit card account number in violation of Part II of ch. 817, F.S., entitled the "State Credit Card Crime Act";

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<sup>10</sup> s. 525.07(5)-(7), F.S.

<sup>11</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>12</sup> s. 525.16, F.S.

<sup>13</sup> The bill defines "payment card" as meaning "a credit card, charge card, debit card, or any other card that is issued to an authorized card user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant." ss. 525.07(10)(b) and 817.625(1)(c), F.S.

<sup>14</sup> The bill defines "scanning device" as meaning "a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card." ss. 525.07(10)(b) and 817.625(1)(a), F.S.

<sup>15</sup> These regulations are set forth in Title 49 of the Code of Federal Regulations, entitled "Transportation."

<sup>16</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.

- Using unauthorized access to any computer network in violation of s. 815.06;<sup>17</sup> or
- Using a fraudulently scanned or lost or stolen payment access device, whether credit card or contactless device.<sup>18</sup>

The third degree felony offenses established in s. 316.80(1) and (2), F.S., are not currently ranked in the Offense Severity Ranking Chart (OSRC),<sup>19</sup> and, as such, default to Level 1 offenses for purposes of a defendant's sentencing scoresheet.<sup>20</sup>

#### *Effect of Bill*

The bill amends s. 316.80(2), F.S., to make it a second degree felony, rather than third degree felony as in current law, to unlawfully convey and fraudulently obtain fuel. The bill also amends s. 921.0022(3)(e), F.S., to rank this second degree felony as a Level 5 on the OSRC, which is one level higher than the Level 4 default ranking that applies to an unranked second degree felony offense.

#### **State Credit Card Crime Act**

Part II of ch. 817, F.S., entitled the "State Credit Card Crime Act," sets forth various criminal offenses prohibiting the theft, fraudulent use, and trafficking of credit cards<sup>21</sup> and counterfeit credit cards.<sup>22</sup> Relevant to this bill is s. 817.611, F.S., which specifies that it is a second degree felony<sup>23</sup> for any person to traffic in or attempt to traffic in 10 or more counterfeit credit cards, invoices, vouchers, sales drafts, or other representations or manifestations of counterfeit credit cards, or credit card account numbers of another in any six-month period. The term "traffic" means "to sell, transfer, distribute, dispense, or otherwise dispose of a property or to buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property."<sup>24</sup>

This second degree felony offense is not currently ranked on the OSRC, and, as such, defaults to a Level 4 offense for purposes of a defendant's sentencing scoresheet.<sup>25</sup>

#### *Effect of Bill*

The bill amends s. 817.611, F.S., to reduce the number of counterfeit credit cards or related specified documents required to constitute a trafficking offense from 10 to five. It also amends the section to make the possession of, in addition to the trafficking of, such counterfeit credit cards or related specified documents a second degree felony. Finally, the bill amends s. 921.0022(3)(e), F.S., to rank the second degree felony violation of s. 817.611, F.S., as a Level 5 on the OSRC.

## **B. SECTION DIRECTORY:**

<sup>17</sup> Section 815.06, F.S., specifies multiple offenses relating to unauthorized access of computer networks which range from a first degree misdemeanor to a first degree felony, e.g., it is a third degree felony to access a network with the knowledge that such access is unauthorized.

<sup>18</sup> Section 316.80(2), F.S.

<sup>19</sup> The Offense Severity Ranking Chart ranges from a Level 1 (least severe) to a Level 10 (most severe). A higher level results in a greater number of sentencing points being calculated on a defendant's sentencing scoresheet. The scoresheet determines the lowest permissible sentence that a defendant may receive, unless the trial court is statutorily-authorized to depart from such sentence. ss. 921.0022 and 921.0024, F.S.

<sup>20</sup> If an offense is not listed in the ranking chart, it defaults to a: (a) Level 1 for a third degree felony; (b) Level 4 for a second degree felony; (c) Level 7 for a first degree felony; (d) Level 9 for a first degree felony punishable by life; and (e) Level 10 for a life felony s. 921.0023, F.S.

<sup>21</sup> The term "credit card" is defined to mean, "any instrument or device, whether known as a credit card, credit plate, bank service card, banking card, check guarantee card, electronic benefits transfer (EBT) card, or debit card or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value on credit or for use in an automated banking device to obtain any of the services offered through the device." s. 817.58(4), F.S.

<sup>22</sup> The term "counterfeit credit card" is defined as, "any credit card which is fictitious, altered, or forged; any facsimile or false representation, depiction, or component of a credit card; or any credit card which is stolen, obtained as part of a scheme to defraud, or otherwise unlawfully obtained, and which may or may not be embossed with account information or a company logo." s. 817.58(3), F.S.

<sup>23</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

<sup>24</sup> s. 817.58(10), F.S.

<sup>25</sup> s. 921.0023, F.S.

Section 1. Amending s. 316.80, F.S., relating to unlawful conveyance of fuel and obtaining fuel fraudulently.

Section 2. Amending s. 525.07, F.S., relating to the powers and duties of DACS, inspections, and unlawful acts.

Section 3. Amending s. 817.611, F.S., relating to trafficking in counterfeit credit cards.

Section 4. Amending s. 921.0022, F.S., relating to the OSRC.

Section 5. Providing an effective date of 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 January 5, 2016, and determined that this bill will have a positive insignificant prison bed impact on the Department of Corrections (i.e., the bill will increase the number of prison beds needed by less than 10) due to its: (a) increase in s. 316.80(2), F.S., of the penalties applicable to the offense of unlawfully conveying and fraudulently obtaining fuel from an unranked third degree felony to a second degree felony ranked at a Level 5; (b) reduction in s. 817.611, F.S., of the number of counterfeit credit cards or related specified documents necessary to constitute trafficking; (c) creation in s. 817.611, F.S., of the second degree felony for possession of counterfeit credit cards or related specified documents; and (d) ranking of the currently unranked second degree felonies in s. 817.611, F.S., as Level 5 offenses.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

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

#### **2. Expenditures:**

Due to the bill's addition of a requirement for an owner or manager of a retail petroleum fuel measuring device to install one or more security measures, the bill may have a positive jail bed impact (i.e., may increase the need for jail beds) because a knowing violation of this requirement constitutes a first degree misdemeanor under s. 525.16(2), F.S.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may have a fiscal impact on owners or managers of retail petroleum fuel measuring devices due to its requirement for the installation of one or more security measures on such device. As this requirement may be satisfied by the installation of pressure-sensitive security tape, the fiscal impact is anticipated to be minimal.

### **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 authorizes the DACS to adopt rules to implement s. 525.07(10), F.S., relating to the bill's new requirement for implementation of one or more security measures to protect customer payment card information for each retail petroleum measuring device in this state.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 19, 2016, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment: (a) substitutes the phrase "owner or manager" for "owner or operator" throughout s. 525.07, F.S., to clarify that the section's requirements apply to managers of petroleum fuel measuring devices, i.e., fuel pumps, not mere operators of such pumps; (b) specifies additional means by which owners and managers may comply with the security measure requirement set forth in s. 525.07(10), F.S.; and (c) addresses altered or damaged security measures in s. 525.07(10)(b), F.S.

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