

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.)

Prepared By: The Professional Staff of the Appropriations Subcommittee on Criminal and Civil Justice

BILL: CS/CS/SB 390

INTRODUCER: Criminal Justice Committee; Judiciary Committee; and Senator Richter

SUBJECT: Fraud

DATE: April 7, 2015

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-------------------|-----------------|------------|------------------|
| 1. | <u>Davis</u> | <u>Cibula</u> | <u>JU</u> | Fav/CS |
| 2. | <u>Erickson</u> | <u>Cannon</u> | <u>CJ</u> | Fav/CS |
| 3. | <u>Clodfelter</u> | <u>Sadberry</u> | <u>ACJ</u> | Favorable |
| 4. | _____ | _____ | <u>FP</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 390 amends and updates multiple provisions in ch. 817, F.S., which defines and provides penalties for crimes involving fraudulent practices. The most significant provisions of the bill:

- Prohibit a person from falsely personating or representing another person in a manner that causes damage to the other person's credit history or rating;
- Authorize a sentencing court to order restitution for costs and fees an identity theft victim incurs in clearing his or her credit history or rating or similar costs and establishes a civil cause of action against the defendant who has harmed the victim;
- Provide a process for an identity theft victim to obtain documentation of an alleged fraudulent transaction from a business entity and make the business entity immune from liability for disclosures made in good faith;
- Replace the term "corporation" with the term "business entity" to ensure that all businesses, regardless of their form, have the same protections against fraud;
- Prohibit the fraudulent transfer or issuance of a membership interest in a limited liability company;
- Increase the criminal penalty for fraudulently obtaining goods or services from a health care provider;
- Make existing laws prohibiting the fraudulent use of an individual's personal identification information also applicable to the fraudulent use of a business' identification information;

- Specify criminal penalties for the fraudulent use of or intent to use the identification information of a dissolved business entity; and
- Specify criminal penalties for knowingly providing false information in a public record to facilitate the commission of another crime.

The Criminal Justice Impact Conference has found that the bill will result in the need for additional prison beds, but the amount cannot be determined.

The bill has an effective date of October 1, 2015.

II. Present Situation:

Chapter 817, F.S., prohibits and punishes various fraudulent acts or practices. In general terms, fraud is the willful act of misrepresenting the truth to someone or concealing an important fact from them for the purpose of inducing that person to act to his or her detriment.¹ Identity fraud, which is also known as identity theft, is a criminal act that occurs when a person illegally obtains someone else's personal information and uses that information to commit fraud or theft.² According to the Federal Trade Commission's most recent Consumer Sentinel Network Data Book, "Florida is the state with the highest per capita rate of reported identity theft complaints...."³

Identity thieves often take names, Social Security numbers (coupled with birth dates, birth and death certificates), bank account and credit card numbers, and passwords⁴ to obtain credit and credit cards, drain money from bank accounts, establish new accounts, apply for loans using the victims' names, and commit other crimes to enrich themselves.⁵ Operating under anonymity and hidden from view, identity thieves often ruin someone's finances and credit long before they are discovered.

Individual or Consumer Identity Theft

An unsuspecting person might not realize that he or she has been the victim of an identity theft until months, or sometimes even years, after the fraud has occurred. The loss of personal identification information⁶ can have devastating effects. Reconstructing the events and obtaining

¹ Black's Law Dictionary 731 (9th ed. 2009).

² The Federal Bureau of Investigation, *Identity Theft Overview*, http://www.fbi.gov/about-us/investigate/cyber/identity_theft/identity-theft-overview (last visited March 3, 2015).

³ Federal Trade Commission, *Consumer Sentinel Network Data Book for January-December 2013* (February 2014), available at <http://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2013/sentinel-cy2013.pdf> (last visited on March 4, 2015).

⁴ *Id.*

⁵ Florida Office of the Attorney General, *About Identity Theft Crimes*, <http://myfloridalegal.com/pages.nsf/Main/932BC47213C29D3385256DBB0048479D?OpenDocument> (last visited March 3, 2015).

⁶ Section 817.568(1)(f), F.S., states that "personal identification information" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

1. Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account

records of the fraud is often a very difficult task. The *Florida Statutes* do not appear to specifically require businesses to give victims of identity theft or law enforcement officers documents related to the alleged fraudulent use of the victim's identity. Accordingly, it can be a difficult task for victims to collect the necessary documents to restore their identity and credit history.

Business Identity Theft

The crime of business identity theft is virtually the same as personal identity theft except that a business's identity is stolen. Quite often, the losses are much greater and sometimes involve a more sophisticated network of thieves. Some thieves have also resorted to taking the identity of businesses that are dissolved and using that identity to commit fraud. Because several of the fraud statutes in ch. 817, F.S., apply only to "individuals" and not to business entities, some businesses do not currently enjoy the same protections against fraud that individuals do under the chapter.

Additional Fraud Provisions in Chapter 817

Many of the provisions in ch. 817, F.S., have not been substantially revised since they were enacted decades ago. As a result, some of these statutes do not reflect more modern methods of advertising and manufacturing, the use of public records, the occurrence of electronic transactions over the Internet, and the different forms of business entities that are currently authorized by law.

III. Effect of Proposed Changes:

The bill amends ch. 817, F.S., to allow individuals and businesses greater protections against identity theft. In general terms, these changes affect individuals by allowing them to better identify when identity theft has been committed against them and by removing barriers to restoring their identity and credit after the crime has occurred. Additional forms of restitution are provided which might allow the victims additional methods of recovering their financial losses. For business entities,⁷ the bill provides greater protections against fraud and identity theft. The bill also amends miscellaneous provisions in ch. 817, F.S., to update them to reflect modern terminology, currently authorized business structures, and current business practices.

number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;

2. Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
3. Unique electronic identification number, address, or routing code;
4. Medical records;
5. Telecommunication identifying information or access device; or
6. Other number or information that can be used to access a person's financial resources.

⁷ The bill defines the term "business entity" for purposes of ch. 817, F.S., and replaces current references to "corporation" or "firm" throughout the chapter with "business entity." A business entity is defined to mean any corporation, partnership, limited partnership, company, limited liability company, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

Identity Theft Committed Against Individuals (Section 2)

Obtaining Property by False Personation

Section 817.02, F.S., is amended to expand the crime of obtaining property by false personation to address falsely personating or representing another person in a manner that damages the credit history or credit rating, or otherwise causes harm to the other person. A person who commits this crime is subject to the criminal penalties for larceny.⁸ This new provision does not apply to crimes defined in s. 817.568, F.S., which prohibits fraudulent use of another person's personal identification information.

Additional Restitution for Victims

Section 817.02, F.S., is further amended to allow a court, when sentencing a defendant under this section, to order restitution⁹ for the victim's out-of-pocket costs, including attorney fees and fees associated with certified public accountant services that the victim incurred clearing his or her credit history or credit rating, or costs incurred with a civil or administrative proceeding to satisfy a debt, lien, or other obligation that arises from the defendant's actions. The sentencing court may also issue orders necessary to correct any public record that contains false information given in violation of s. 817.02, F.S. The bill also amends the section to create a civil cause of action against a person who violates this section as provided in s. 772.11, F.S., which creates a civil remedy for a victim of theft or exploitation.

Information Made Available to Identity Theft Victims (Section 3)

Section 817.032, F.S., is created and establishes procedures for victims¹⁰ of identity theft to obtain documentation of fraudulent applications submitted or fraudulent transactions by perpetrators of identity theft.

The Process

Within 30 days after a victim's request, and subject to verification of the victim's identity and identity theft claim, a business entity that has entered into an alleged fraudulent transaction or accepted a fraudulent application must provide a copy of the application and business transaction records, which evidence a transaction of alleged identity theft, to:

- The victim;
- A law enforcement agency or officer specified by the victim in the request; or
- A law enforcement agency investigating the identity theft and authorized by the victim to receive those records.

⁸ Larceny is not currently defined in statute. Acts that were previously referred to as larceny are now prosecuted as theft crimes under s. 812.014, F.S. *See Nooe v. State*, 892 So.2d 1135, 1138 (Fla. 5th DCA 2005) (Section 812.014 "includes a variety of offenses related to unlawful appropriation of property, including larceny, obtaining by false pretenses and misappropriation"). Punishments for theft are generally commensurate with the monetary value of the property stolen.

⁹ The sentencing court may order restitution under this section that is in addition to restitution permitted under s. 775.089, F.S. Under s. 775.089, F.S., a judge is required to order the defendant to make restitution to the victim for damage or loss caused by the defendant's offense and damage or loss that is related to the defendant's criminal episode, unless the court finds clear and compelling reasons not to order the restitution. The restitution may be monetary or nonmonetary.

¹⁰ A victim is defined in this section as a person whose identification or financial information is used or transferred or alleged to be used or transferred without his or her consent with the intent to commit, aid, or abet an identity theft or similar crime.

The aforementioned requirement does not apply to a third party providing a service to effect, administer, facilitate, process, or enforce a financial transaction initiated by an individual.

Identifying Information

Before the business entity is required to provide the requested application or transaction records, unless the business entity, at its discretion, has a high degree of confidence that it knows the identity of the victim making the records request, the victim must provide to the business entity:

- Certain forms of positive identification of the victim, at the election of the business entity; and
- Proof of a claim of identity theft (a copy of the police report of the claim and an affidavit of fact), at the election of the business entity.

Request Requirements

The victim's request to the business entity must be in writing and mailed or delivered to an address specified by the business entity. If the business entity so requests, the victim must include relevant information about the alleged transaction, including, if known or readily obtainable by the victim, the date of the application or transaction and any other identifying information such as an account number or transaction number. The information required to be provided to the victim must be provided at no charge to the victim.

Authority to Decline a Request

A business entity may decline to provide the information requested by the victim if the business entity, in exercising good faith, determines that:

- This provision of law does not require disclosure of the requested information;
- After reviewing the victim's identification materials and alleged claim, the business entity does not have a high degree of confidence that it knows the true identity of the person requesting the information;
- The request is based upon a misrepresentation of fact by the requestor;
- The information requested is Internet navigational data or similar information involving a person's visit to a website or online service; or
- The disclosure is otherwise prohibited by state or federal law.

Civil Liability, Recordkeeping Requirement, Affirmative Defense

A business entity is shielded from civil liability for disclosing information under this section if the disclosure is made in good faith in accordance with the provisions of this section. A business entity is also shielded from civil liability for a decision to decline to provide information in accordance with an authorized reason for non-disclosure (as specified in the section). This section does not impose any recordkeeping obligations on business entities. If a civil action is brought for the purpose of enforcing a person's right to a business entity's records, it is an affirmative defense, which the defendant must establish by a preponderance of the evidence, for a business entity to file an affidavit or answer which states that the entity has made a reasonably diligent search of its available business records and the records that have been requested do not exist or are not reasonably available.

Identity Theft Committed Against Businesses (Section 16)

Criminal Use of Personal Identification Information

Existing s. 817.568, F.S., sets forth criminal offenses involving the use of another's personal identification information. In particular, subsections (2), (4), and (9), of s. 817.568, F.S., establish several criminal offenses that involve the illegal use of an individual's personal identification information.¹¹ Because s. 817.568(1)(d), F.S., defines an "individual" as "a single human being and does not mean a firm, association of individuals, corporation, partnership, joint venture, sole proprietorship, or any other entity," subsections (2), (4), and (9) *only apply to individuals*, not business entities. Therefore, if a person uses the personal identification information of a business, that person is not subject to the penalties set forth in the statute.

The bill amends s. 817.568, F.S., by replacing references to "individual" with "person." "Person" is defined in s. 817.568(1)(e), F.S., as having the same definition found in s. 1.01(3), F.S., which "includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." Accordingly, the bill makes the criminal penalties in s. 817.568, F.S., applicable to those persons who unlawfully use the personal identification information of a business entity to commit certain fraudulent acts.

As under existing s. 816.568(2), F.S., the felony degree and penalties for the fraudulent use of identification information, which under the bill includes the fraudulent use of a business' identification information, increase with the magnitude of the fraud. At a minimum, the crime is a third degree felony.¹² Whoever fraudulently uses personal identification information commits:

- A second degree felony¹³ if the financial amount involved is equal to or greater than \$5,000 or the thief fraudulently uses the personal identification of 10 to 19 individuals, without their consent. The court must also sentence the defendant to a mandatory minimum sentence of three years. (s. 816.568(2)(b), F.S.)

¹¹ Section 817.568(1)(f), F.S., states that "personal identification information" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

1. Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;
2. Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
3. Unique electronic identification number, address, or routing code;
4. Medical records;
5. Telecommunication identifying information or access device; or
6. Other number or information that can be used to access a person's financial resources.

¹² A third degree felony is punishable by up to five years in state prison, a fine of up to \$5,000, or both. Sections 775.082 and 775.083, F.S. However, if total sentence points scored under the Criminal Punishment Code are 22 points or fewer, the court must impose a nonstate prison sanction, unless the court makes written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.

¹³ A second degree felony is punishable by up to 15 years imprisonment, a fine of up to \$10,000, or both. Sections 775.082 and 775.083, F.S.

- A first degree felony¹⁴ if the financial amount involved is \$50,000 or more or the personal identification of 20 to 29 individuals is used without their consent. The accompanying mandatory minimum sentence is five years. (s. 816.568(2)(c), F.S.)
- A first degree felony if the financial amount involved is \$100,000 or more or the personal identification information of 30 or more people is used without their consent. The mandatory minimum sentence is 10 years. (s. 816.568(2)(c), F.S.)

Harassment by Use of Personal Identification Information

Existing s. 817.568(4), F.S., provides that it is a first degree misdemeanor¹⁵ to willfully and without authorization possess, use, or attempt to use an individual's personal identification information without his or her consent and do so to harass that person. The bill replaces the term "individual" with the term "person." This change expands the application of this subsection to include someone who unlawfully uses the personal identification information of a business entity to harass someone.

Prohibited Use of Counterfeit or Fictitious Personal Identification Information

Existing s. 817.568(9), F.S., provides that it is a third degree felony to willfully and fraudulently create or use, or possess with the intent to fraudulently use, counterfeit or fictitious personal identification information concerning a fictitious individual, or concerning a real individual without that real individual's consent, with the intent to use that information to commit or facilitate a fraud on another person. The bill replaces the term "individual" with the term "person." This change expands the application of this subsection to include a person who unlawfully uses the personal identification information of a business entity.

Using the Personal Identification Information of Deceased Individuals or Dissolved Business Entities

Existing s. 817.568(8), F.S., currently prohibits the fraudulent use of a deceased individual's personal identification information. The bill expands the application of this subsection to include and prohibit the fraudulent use of a dissolved business entity's personal identification information. The severity of the offense, as discussed below, depends on the monetary amount and the number of individuals or business entities involved.

Section 817.568(8)(a) F.S., is amended and creates a third degree felony for a person to willfully and fraudulently use, or possess with the intent to fraudulently use, the personal identification information of a deceased individual or a dissolved business entity. Whoever fraudulently uses the personal identification information of a deceased individual or a dissolved business entity commits:

- A second degree felony, if the monetary amount involved is \$5,000 or more or the person uses the personal identification information of 10 to 19 deceased individuals or dissolved business entities. The mandatory minimum sentence is three years. (s. 817.658(8)(b), F.S.)

¹⁴ A first degree felony is generally punishable by up to 30 years imprisonment, a fine of up to \$10,000, or both. Sections 775.082 and 775.083, F.S.

¹⁵ A first degree misdemeanor is punishable by a term not to exceed 1 year imprisonment, a fine of up to \$1,000, or both. Sections 775.082 and 775.083, F.S.

- A first degree felony (aggravated fraudulent use of the personal identification information of multiple deceased individuals or dissolved business entities), if the monetary amount is \$50,000 or more, or the perpetrator fraudulently uses the personal identification of 20 to 29 deceased individuals or dissolved business entities. The accompanying mandatory minimum sentence is five years of imprisonment. If the monetary amount involved is \$100,000 or more, or the person fraudulently uses the personal identification information of 30 or more deceased individuals or business entities, the mandatory minimum sentence is 10 years. (s. 817.568(8)(c), F.S.)

Replacing the Term “Corporation” with the Term “Business Entity” (Sections 1, 5, 6, 10, and 12)

The bill creates s. 817.011, F.S., which defines a “business entity” for purposes of ch. 817, F.S., to mean “any corporation, partnership, limited partnership, company, limited liability company, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.” The bill also replaces references to a “corporation” with the word “business entity” in:

- Section 817.14, F.S. (procuring assignments of produce upon false representations);
- Section 817.15, F.S. (false entries);
- Section 817.39, F.S. (simulated forms of court or legal process); and
- Section 817.411, F.S. (false information in advertisements, etc.).

As a result of these changes, a broader spectrum of business organizations are now protected by the fraud provisions of those subsections and subject to criminal penalties for violations of these laws.

Unlawful Acts through Electronic Means (Sections 11, 12, and 13)

Existing s. 817.40, F.S., contains the definitions for use in construing the statutes involving false, misleading, and deceptive advertising and sales. The bill amends the definition of “misleading advertising” in s. 817.40(5), F.S., to include statements disseminated in “electronic” form.

Existing s. 817.411, F.S., prohibits false advertisements, announcements, or statements regarding certain items of value being covered by insurance guaranties where there is no insurance or the insurance does not insure against the risks covered. The statute lists a variety of methods used to disseminate this information before the public. The bill amends this section to cover the electronic dissemination of those false claims.

Section 817.412, F.S., currently provides that it is a first degree misdemeanor to sell goods that exceed \$100 and misrepresent them as being new or original when they are used, repossessed, or have been used for a sales demonstration. The bill amends this section to include goods that are misrepresented using an electronic medium.

Fraudulently Obtaining Goods or Services from a Health Care Provider (Section 15)

Section 817.50, F.S., currently provides that it is a second degree misdemeanor to willfully and with intent to defraud, obtain or attempt to obtain goods, products, merchandise, or services from

a health care provider in this state. The bill increases the degree of this crime to a third degree felony.

Criminal Use of a Public Record or of Public Records Information (Section 17)

Section 817.569, F.S., currently provides that a person who knowingly uses a public record or knowingly used information obtainable only through that public record to facilitate or further the commission of:

- A first degree misdemeanor, commits a first degree misdemeanor; or
- A felony, commits, third degree felony.

The bill expands the elements of this offense to include knowingly using false information that becomes part of a public record.

Wrongful Use of a City Name and Wrongful Stamping, Marking, of a City Name (Sections 7 and 8)

Existing s. 817.17, F.S., prohibits a manufacturer in the state from marking certain articles or packages for the manufactured articles as though they originated in a certain “city” when they did not. This section does not prohibit the sale of those articles if there is no “manufactory of similar goods in the city.” The statute does not contain a criminal penalty for its violation. The bill amends the statute to provide that a violation of the statute is a second degree misdemeanor.¹⁶ It also amends the statute to prohibit falsely attributing the origin of a product to any “county or other political subdivision of the state.”

Section 817.18, F.S., provides that it is a second degree misdemeanor to knowingly sell or offer for sale, within the state, manufactured articles that have printed, stamped, marked, engraved, or branded upon them or their packaging, the name of any city other than where the articles are manufactured. If there is no “manufactory of similar goods in the city,” then the section does not apply. This section is similarly amended to include the name of any “county or other political subdivision” of the state.

Fraudulent Issue of Stock Certificate of Indicia of Membership Interest (Section 9)

Section 817.19, F.S., provides that it is a third degree felony for an officer, agent, clerk, or servant of a corporation or other person to fraudulently:

- Issue or transfer a certificate of stock of a corporation to a person not entitled to that stock; or
- Sign the certificate with the intent that it will be so issued or transferred.

This section is amended and expanded to include the fraudulent issue or transfer of any indicia of a membership interest in a limited liability company.

¹⁶ A second degree misdemeanor is punishable by a term of imprisonment not to exceed 60 days, a fine not to exceed \$500, or both. Sections 775.082 and 775.083, F.S.

Criminal Punishment Code (Section 18)

The Criminal Punishment Code's offense severity ranking chart is amended to reflect the changes made in the titles of s. 817.569(2), and s. 817.568(2)(b), F.S., under this bill.

Effective Date (Section 19)

The bill takes effect October 1, 2015.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Under CS/CS/SB 390, the requirement that businesses provide victims of identity theft with records involving their theft might have a positive fiscal impact on those who have been the victims of identity theft by assisting victims in recovering economic losses. The restitution provisions in this bill, assuming that the perpetrators of identity theft have any assets, might also allow victims of identity theft to recover expenses incurred in trying to resolve issues involved in the identity theft.

C. Government Sector Impact:

The Criminal Justice Impact Conference estimates that the bill will require an increase in the need for prison beds. However, the amount of the increase cannot be predicted and is therefore unquantifiable.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 817.02, 817.11, 817.14, 817.15, 817.17, 817.18, 817.19, 817.39, 817.40, 817.411, 817.412, 817.481, 817.50, 817.568, 817.569, and 921.0022.

This bill creates the following sections of the Florida Statutes: 817.011 and 817.032.

This bill transfers, renumbers, and amends the following sections of the Florida Statutes: 817.12 and 817.13.

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 by Criminal Justice on March 30, 2015:

- Exempts third-party processors from the requirements to provide transaction information directly to a consumer.
- Requires a police report and an affidavit to be provided to a business entity when processing a request for information.
- Provides that a business entity is not required to disclose information if disclosure is prohibited by state or federal law.
- Provides that a business entity is not civilly liable for a good-faith disclosure or a non-disclosure when statutorily authorized.

CS by Judiciary on February 17, 2015:

The committee substitute makes several changes to the bill, most of which are technical changes that do not affect the meaning of the bill. One substantive change allows a sentencing court the discretion to order restitution for a victim's out-of-pocket costs incurred by his or her certified public accountant in restoring the victim's credit or to rectify other wrongs associated with identity theft. An additional substantive change is a change of the word "consumer" to "person." This change may entitle businesses that are identity theft victims to obtain records of a fraudulent transaction from other businesses.

B. Amendments:

None.