

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 Commerce Committee

BILL: CS/SB 2700

INTRODUCER: Commerce Committee and Senator Gelber

SUBJECT: Secondhand dealers

DATE: March 25, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Cooper	CM	Fav/CS
2.			FT	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This committee substitute (CS) creates part III of ch. 538, F.S., to define, require registration, and provide regulation of “mail-in secondhand precious metals dealers.”

This CS proposes regulatory requirements of mail-in secondhand precious metals dealers that are similar to those regulatory requirements of precious metals secondhand dealers currently provided for in part I of ch. 538, F.S., except the proposed part III does not require verification of the identity of the seller of precious metals and the submission of a thumbprint by the seller at the time of the transaction.

This CS creates part III of ch. 538, F.S., and the following sections: 538.31, 538.32, 538.33, 538.34, 538.35, 538.36, and 538.37.

II. Present Situation:

Chapter 538, F.S., regulates secondhand dealers and secondary metals recyclers. Specifically part I of ch. 538, F.S., regulates “secondhand dealers,” while part II of ch. 538, F.S., regulates “secondary metals recyclers.”

Secondhand Dealers

A “secondhand dealer” is defined under s. 538.03, F.S., as “any person, corporation, or other business organization or entity which is not a secondary metals recycler subject to part II and which is engaged in the business of purchasing, consigning, or trading secondhand goods.” A “precious metals dealer,” “who normally or regularly engages in the business of buying used precious metals for resale,” is defined as a secondhand dealer under s. 538.03, F.S. However, excluded from the term “precious metals dealer,” are those persons involved in the bulk sale of precious metals from one secondhand or precious metals dealer to another.¹

Exemptions

Section 538.03, F.S., specifically exempts certain categories of businesses from the definition of secondhand dealer or precious metal dealer. Paragraph (2)(n) exempts businesses that contract with other persons or entities to offer its secondhand goods for sale, purchase, consignment, or trade via an internet website, and maintains a shop, store or other business premises for this purpose, if all the following conditions are met:

- The secondhand goods must be available on the website for viewing by the public at no charge;
- The records of the sale, purchase, consignment, or trade must be maintained for at least 2 years;
- The records of the sale, purchase, consignment, or trade, and the description of the secondhand goods as listed on the website, must contain the serial number of each item, if any;
- The secondhand goods listed on the website must be searchable based upon the state or zip code;
- The business must provide the appropriate law enforcement agency with the name or names under which it conducts business on the website;
- The business must allow the appropriate law enforcement agency to inspect its business premises at any time during normal business hours;
- Any payment by the business resulting from such a sale, purchase, consignment, or trade must be made to the person or entity with whom the business contracted to offer the goods and must be made by check or via a money services business licensed under part II of chapter 560; and
- At least 48 hours after the estimated time of contracting to offer the secondhand goods, the business must verify that any item having a serial number is not stolen property by entering the serial number of the item into the Department of Law Enforcement's stolen article database located at the Florida Crime Information Center's public access system website. The business shall record the date and time of such verification on the contract covering the goods.
 - If such verification reveals that an item is stolen property, the business shall immediately remove the item from any website on which it is being offered and notify the appropriate law enforcement agency; or

¹ See s. 538.03(1)(b), F.S.

- The business must provide the appropriate law enforcement agency with an electronic copy of the name, address, phone number, driver's license number, and issuing state of the person with whom the business contracted to offer the goods, as well as an accurate description of the goods, including make, model, serial number, and any other unique identifying marks, numbers, names, or letters that may be on an item, in a format agreed upon by the business and the appropriate law enforcement agency. This information must be provided to the appropriate law enforcement agency within 24 hours after entering into the contract unless other arrangements are made between the business and the law enforcement agency.

Registration

Secondhand dealers may not engage in the business of purchasing, consigning, or trading secondhand goods without first registering with the Department of Revenue (DOR).

An applicant for a secondhand dealer registration must be a natural person who has reached the age of 18 years and if:

- the applicant is a partnership, all the partners must apply.
- the applicant is a joint venture, association, or other entity (except a corporation), all members of such joint venture, association, or other entity must make application for registration as natural persons.
- The applicant is a corporation, the registration must include the name and address of such corporation's registered agent for service of process in the state and a certified copy of a statement from the Secretary of State that the corporation is duly organized in the state.

As part of registering a business, the business applicant must submit a complete set of fingerprints to DOR and DOR must forward the fingerprints to the Florida Department of Law Enforcement (FDLE) for state and federal processing. In addition, the applicant must submit a recent full-face photographic identification card of himself or herself. A dealer is responsible for the cost of fingerprinting and must pay a \$6 fee to register each business location and must pay an annual registration renewal fee of \$6 per location.

The secondhand dealer's registration must be conspicuously displayed at her or his registered locations.

Recordkeeping

Secondhand dealers are responsible for maintaining a record of all sale transactions and for each sale there must be a completed transaction form. A copy of a completed transaction form must be maintained for at least 3 years. Additionally, secondhand dealers must provide local law enforcement with a record of each transaction within 24 hours of the transaction and on a form approved by FDLE. The form may be submitted by electronic transmission if the secondhand dealer is capable of doing so and if the law enforcement agency permits. The form must contain:²

- The time, date, and place of the transaction.

² See s. 538.04(1), F.S.

- A complete and accurate description of the goods acquired, including:
 - Brand name;
 - Model number;
 - Manufacturer's serial number;
 - Size;
 - Color, as apparent to the untrained eye;
 - Precious metal type, weight, and content if known; and
 - Gemstone description, including the number of stones, if applicable.
- In the case of firearms, the type of action, caliber or gauge, number of barrels, barrel length, and finish.
- Any other unique identifying marks, numbers, or letters of the goods.
- A description of the person from whom the goods were acquired, including:
 - Full name, current residential address, workplace, and home and work phone numbers;
 - Height, weight, date of birth, race, gender, hair color, eye color, and any other identifying marks;
 - The right thumbprint, free of smudges and smears, of the person from whom the goods were acquired; and
 - Any other information required by the form approved by FDLE.

The secondhand dealer must take additional security measures and must verify a customer's identification by reviewing a government-issued photographic identification card, such as a driver's license or military identification card and must report information from the identification card to local law enforcement on the aforementioned form.

Any law enforcement having jurisdiction over the secondhand dealer may inspect the secondhand dealer's premises, including records and inventory kept on the premises, during regular business hours.

Prohibited Acts

It is unlawful for a secondhand dealer or any employee thereof to do or allow any of the following acts:

- Knowingly make a transaction with a person who is visibly under the influence of drugs or alcohol, a person under the age of 18 years, or a person using a name other than her or his own name or the registered name of her or his business.
- Have a secondhand store open or engage in or conduct business as a secondhand dealer between the hours of 10 p.m. and 8 a.m. or conduct any transaction at a drive-through window or similar device.
- Fail to pay any sales tax owed to the Department of Revenue or fail to have a sales tax registration number.

A seller must sign a statement verifying that he or she is the rightful owner of the goods or is entitled to sell, consign, or trade the goods, and if that person knowingly gives false verification of ownership or gives a false or altered identification, and receives money from a secondhand dealer for the goods, that person may be subject to criminal penalties. Specifically, if the seller is

paid less than \$300, a felony of the third degree is committed; if the seller is paid \$300 or more, a felony of the second degree is committed.

Holding Periods

Secondhand dealers must hold goods for at least 15 days after a transaction without altering, encumbering, or using those goods; except the original seller of the goods may purchase the goods back before that time. However, a law enforcement officer having probable cause that the goods are stolen may place a 90-day written hold order on the goods. The hold may be extended beyond 90 days by a court finding probable cause that the property is stolen and may require the goods to be held as long as is necessary for the purposes of trial or to safeguard such property. The dealer assumes all responsibility, civil or criminal, relative to the property or evidence in question, including responsibility for the actions of any employee with respect thereto.

Penalties

Any person who knowingly violates any provision in ch. 538, F.S., commits a misdemeanor of the first degree and may be fined up to \$10,000. If a lawful owner recovers stolen property from a secondhand dealer, and the person who sold or pledged the stolen property to the secondhand dealer is convicted for a violation under ch. 538, F.S., for theft, or for dealing in stolen property, the court must order the defendant to make restitution to the secondhand dealer or the lawful owner, as applicable.

DOR may impose a civil fine of up to \$10,000 for violating any of the registration requirements under s. 538.09, F.S., and if the fine is not paid within 60 days, DOR may bring a civil action to recover the fine. Additionally, DOR may deny any registration, registration of a business may be revoked, restricted, or suspended by DOR if it determines that the applicant or registrant:

- Has violated any provision of this chapter or any rule or order made pursuant to this chapter;
- Has made a material false statement in the application for registration;
- Has been guilty of a fraudulent act in connection with any purchase or sale or has been or is engaged in or is about to engage in any practice, purchase, or sale which is fraudulent or in violation of the law;
- Has made a misrepresentation or false statement to, or concealed any essential or material fact from, any person in making any purchase or sale;
- Is making purchases or sales through any business associate not registered in compliance with the provisions of this chapter;
- Has, within the preceding 10-year period for new registrants who apply for registration on or after October 1, 2006, been convicted of, or has entered a plea of guilty or nolo contendere to, or had adjudication withheld for, a crime against the laws of this state or any other state or of the federal government which relates to registration as a secondhand dealer or which involves theft, larceny, dealing in stolen property, receiving stolen property, burglary, embezzlement, obtaining property by false pretenses, possession of altered property, any felony drug offense, any retail or farm theft, or any fraudulent dealing;

- Has had a final judgment entered against her or him in a civil action upon grounds of fraud, embezzlement, misrepresentation, or deceit; or
- Has failed to pay any sales tax owed to the Department of Revenue.

Florida Deceptive and Unfair Trade Practices Act

Secondhand dealers' business practices may be subject to the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), under ch. 501, part II, F.S., which prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. "Trade or commerce," which includes the conduct of any trade or commerce, is defined as the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. The act provides for remedies such as cease and desist orders, injunctions, remedies by the enforcing authority, and the award of attorney's fees and costs to the prevailing party in civil litigation. A willful violation of the FUDTPA subjects the violator to a civil penalty of not more than \$10,000 for each violation.

Federal Regulation

The Mail Fraud Statute, under 18 U.S.C. § 1341, is the nation's oldest federal consumer protection statute.³ Mail fraud is a criminal scheme where the postal system is used to obtain money or compensation from a victim by offering a product, service, or investment opportunity that does not live up to its claims.⁴ To be prosecuted for mail fraud, a person must intentionally make a misrepresentation in an offer and rely on the U.S. mail to carry out the scheme.⁵ Those who violate the federal mail fraud statute may be subject to fines or up to 20 years in prison, or both.⁶

Federal law provides a measure of protection against unfair or deceptive contract provisions under the Federal Trade Commission Act (FTCA), which makes unlawful any "unfair or deceptive acts or practices in or affecting commerce."⁷ A person who commits an unfair or deceptive act under the FTCA may be liable for up to \$10,000 per violation.⁸

Mail-in Precious Metal Dealers

Poor economic conditions have lead to an increase in the value of gold or other precious metals, which has also prompted those affected from the economic conditions to sell their gold or precious metals.⁹ Some entrepreneurs have started businesses that allow people to conveniently

³ United States Postal Inspection Service, *The Mail Fraud and False Representation Statutes*, available at <http://www.usps.com/websites/depart/inspect/statutes.htm>.

⁴ *Id.*

⁵ *Id.*

⁶ See 18 U.S.C. § 1341.

⁷ See 15 U.S.C. § 45.

⁸ *Id.*

⁹ See <http://beambot.com/2009/01/22/sell-gold-jewelry-for-cash-online-off-line-make-money/> and http://www.blanchardonline.com/gold_as_investment/gold_rise.php.

sell their gold or precious metals by mailing their jewelry or scrap precious metals to a business for payment.¹⁰ People who sell their jewelry in this manner also escape the stigma associated with selling goods at a pawn shop.¹¹

Most mail-in precious metal dealers solicit customers by advertising through the Internet, television, or other media. The dealers' advertise that they will purchase almost any item containing precious metals or gemstones. A person wishing to sell their goods may contact the dealer over the phone or over the internet to start a business transaction. Usually the person selling his or her goods fills out a short form online that requires information such as a person's name, address, phone number, and email address. The seller mails his or her goods to the dealer, using the dealer's packaging or choosing their own method of delivery, depending on the dealer's business policy. Once the sellers goods are received by the dealer, they are usually weighed, tested for precious metal content (technically referred to as "assayed"), valued by the dealer, and then payment is mailed to the seller in the form of a check or wired to the seller's bank account.

As previously noted, a "secondhand dealer" is defined under s. 538.03, F.S., as "any person, corporation... which is engaged in the business of purchasing, consigning, or trading secondhand goods." A "precious metals dealer," is defined as a secondhand dealer "who normally or regularly engages in the business of buying used precious metals for resale."

The definitions would appear to include these emerging businesses that solicit customers through the Internet, television, or other media and transact business through such media and the mail, as they "engage in the business of buying used precious metals for resale."

According to DOR, in January of 2008, approximately 1,600 secondhand dealers registered with their office, and in March of 2009, that number increased to approximately 2,300.¹² DOR reports that although they have discerned a noticeable increase in the number of registered secondhand dealers, they cannot distinguish whether their registrants include mail-in precious metal dealers.

III. Effect of Proposed Changes:

This CS creates part III of ch. 538, F.S., to define, require registration, and provide regulation of "mail-in secondhand precious metals dealers" (dealers).

Section 538.31, F.S., is created to provide the definitions of "department," "jewelry," "mail-in secondhand precious metals dealer," "precious metals," "seller," and "transaction." In addition, this section provides for two exceptions to the application of the part, which are businesses that are available for walk-in business and businesses that transact with other dealers.

A "mail-in secondhand precious metals dealer" is defined as any person or entity that conducts business within Florida and contracts with other persons or entities to buy precious metals or jewelry through the Internet, the mail, or telemarketing; or conducts business within Florida and

¹⁰ See http://www.streetdirectory.com/travel_guide/print_article.php?articleId=61351.

¹¹ See <http://beambot.com/2009/01/22/sell-gold-jewelry-for-cash-online-off-line-make-money/>.

¹² Information documented in an email and on file with the Commerce Committee (received March 19, 2009).

regularly engages in the business of purchasing jewelry or precious metals through the mail or Internet.

Section 538.32, F.S., is created to require the registration of mail-in secondhand precious metals dealers. These dealers must register with the Department of Revenue, which means that each dealer is subject to a \$6 per location registration fee and \$6 annual renewal of registration fee. Furthermore, these dealers will be subject to a \$54.25 fee per dealer to cover the costs of fingerprinting.

Transaction and recordkeeping requirements are also provided for in this section. A mail-in secondhand precious metals dealer may not pay a seller for his or her goods until the dealer receives all of the following:

- The seller's name, address, telephone number, and email address.
- The seller's driver's license number or other government-issued identification number.
- A sworn statement "under penalty of perjury" that the driver's license number or government-issued identification number is true and correct and that the seller is the owner of the goods being sold and has absolute authority to sell those goods.

The dealer must keep a record of specific information from transactions including, a description of the seller's goods that includes the precious metal type or type of jewelry and any unique identifying marks, numbers, or letters and the date the seller's goods were received by the dealer. Dealers must provide law enforcement with this information within 24 hours after entering into a contract for the sale of these goods, unless otherwise agreed upon between the dealer and the law enforcement agency.

Subsections (4) and (5) also require that the records kept under this section are maintained at least for 2 years and that the records be kept in a form that law enforcement may easily retrieve. Moreover, specific information used to identify a seller must be provided to law enforcement.

Section 538.33, F.S., is created to require a dealer to pay a seller by check or by a money services vendor licensed under part II of ch. 560, F.S.

Section 538.34, F.S., is created to require dealers to allow law enforcement to inspect its records, inventory, and premises during normal business hours.

Section 538.35, F.S., is created to require dealers to hold on to seller's goods for 10 calendar days from the date the dealer remits payment to the seller. During that period, a dealer may not use the goods in any manner. This section also requires that records of the sale, purchase, consignment, or trade of goods must be maintained by the dealer for at least 2 years after the date of the transaction.

Section 538.36, F.S., is created to prohibit certain acts and provide penalties for violations of this part. A dealer who conducts business but does not register with the department or who violates any other provision of this part commits a third degree felony and if the dealer is convicted or found guilty of or pled "no contest" to a violation under this part, may not operate for 1 year as a mail-in secondhand precious metals dealer in Florida.

A seller who purposely misrepresents his identification, his age, or his ownership of goods and receives payment for goods commits a felony of the third degree if the seller is paid less than \$300 and a felony of the second degree if the seller is paid \$300 or more for the goods.

Additionally, this section applies the penalty provisions of s. 538.07, F.S., to any dealer who knowingly violates any provision of this part, which would subject that person to misdemeanor penalties as provided in s. 775.082, F.S., and by a fine not to exceed \$10,000. Section 775.082, F.S., also requires a seller, who is convicted of theft, of violating this section, or dealing in stolen property, to make restitution to the secondhand dealer or the lawful owner of the goods.

Section 538.37, F.S., is created to provide the department with the authority to enforce the provisions under this part.

The CS also provides an effective date of October 1, 2009.

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:

To the extent that businesses specified in the CS are not currently complying with part I of ch. 538, F.S., concerning secondhand dealers, and are therefore not registered with the department, those businesses would be required to register with the department under the proposed part III of the chapter, should this CS become law. Those businesses would, therefore, incur costs associated with the requirements of the proposed part III. Those businesses that violate the provisions of the CS may also be subject to criminal penalties, including fines.

C. Government Sector Impact:

To the extent that law enforcement enforces the provisions of this part and state attorneys prosecute violations of this part, costs associated with such enforcement and prosecution may be incurred by government.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The major difference between the regulatory requirements of precious metals secondhand dealers in part I of ch. 538, F.S., and the regulatory requirements of mail-in secondhand precious metals dealers proposed in this CS is the verification of the identity of the seller of precious metals and the submission of a thumbprint by the seller at the time of the transaction.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

Current law requires mail-in secondhand precious metals dealers to be registered and regulated as secondhand dealers. The bill as filed provided a total exemption for these businesses from regulation as secondhand dealer. The CS provides an alternative regulating framework for mail-in secondhand precious metals dealers as follows:

- Creates part III of ch. 538, F.S., to create requirements for mail-in secondhand precious metal dealers.
- Requires registration with the Department of Revenue (DOR), consistent with current requirements for secondhand dealers.
- Requires sellers to provide identifying information, to include address and driver's license number; and a sworn statement that the identifying information is correct and that the seller is the lawful owner of the goods.
- Requires transaction records to include a description of the goods, unique identifying marks, and the date the seller's goods were received by the dealer.
- Requires the dealer to maintain the records for 2 years.
- Requires the dealer to provide law enforcement with an electronic copy of the seller's identifying information.
- Requires the dealer to submit a description of the seller's goods to law enforcement within 24 hours of entering a sales contract, unless otherwise agreed between law enforcement and the dealer.
- Requires payments to sellers to be by check or via transmission by a licensed money services vendor.
- Requires dealers to allow law enforcement to inspect records, inventory, and premises during normal business hours.
- Requires the dealer to hold purchased materials for 10 days.
- Provides penalties for failing to comply with the requirements of this part.

- Provides rulemaking authority for DOR.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
