

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/SB 218

INTRODUCER: Criminal Justice Committee and Senator Hutson

SUBJECT: Offenses Involving Electronic Benefits Transfer Cards

DATE: November 3, 2015 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Fav/CS
2.	<u>Clodfelter</u>	<u>Sadberry</u>	<u>ACJ</u>	Recommend: Favorable
3.	<u> </u>	<u> </u>	<u>AP</u>	<u> </u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 218 amends s. 414.39, F.S., which punishes public assistance fraud. Currently this statute, in part, punishes a person who knowingly “traffics” (or knowingly attempts to traffic or knowingly aids another person in trafficking) in a food assistance card, an authorization for the expenditure of food assistance benefits, a certificate of eligibility for medical services, or a Medicaid identification card in any manner not authorized by law.

The bill specifies acts included in the term “traffic.” The bill also punishes a person who possesses two or more electronic benefits transfer cards issued to other persons and sells or attempts to sell one or more of these cards. The first violation is a first degree misdemeanor; a second or subsequent violation is a third degree felony.

The Criminal Justice Impact Conference met on October 28, 2015 and determined the bill has a positive, insignificant prison bed impact.

The bill has an effective date of October 1, 2016.

II. Present Situation:

Public Assistance Fraud

“Public assistance” refers to benefits paid for temporary cash assistance,¹ food assistance,² Medicaid,³ or optional state supplementation program.^{4, 5} The Division of Public Assistance Fraud in the Department of Financial Services (DFS) is authorized to investigate public assistance fraud.⁶

Relevant to the bill, s. 414.39(2), F.S., provides that a person is subject to the criminal penalties provided in s. 414.39(5), F.S., if the person knowingly uses, transfers, acquires, *traffics*, alters, forges, or possesses 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 in any manner not authorized by law.⁷ Subsection (2) also provides that a person is subject to the criminal penalties provided in s. 414.39(5), F.S., if the person knowingly attempts or knowingly aids or abets another person to commit any of the previously-described acts of public assistance fraud.

Section 414.39(5), F.S., provides that:

- If the value of 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 first degree misdemeanor;⁸
- If the value of the public assistance or identification wrongfully received, retained, misappropriated, sought, or used is of an aggregate value of \$200 or more, but less than \$20,000 in any 12 consecutive months, such person commits a third degree felony;⁹

¹ Temporary cash assistance provides cash assistance to families with children to help families become self-supporting.

² Food assistance helps low-income individuals and families buy healthy food.

³ Medicaid provides medical coverage to low-income individuals and families.

⁴ Optional state supplementation provides monthly cash payments to indigent elderly or disabled individuals.

⁵ Section 414.0252(10), F.S.

⁶ Section 414.411, F.S.; “Division of Public Assistance Fraud (Retailer Food Stamp Trafficking),” Department of Financial Services, available at <http://www.myfloridacfo.com/Division/PAF/SLEB/reportRetailFraud.htm> (last viewed on October 28, 2015). “On the State level, the Division partners with the Department of Children and Families, the Agency for Health Care Administration, the Department of Health, and the Office of Early Learning to investigate fraud in programs administered by those entities. On the Federal level[,] the Division partners with the United States Department of Agriculture’s Food and Nutrition Services, the Social Security Administration, and the Department of Health and Human Services.” “Division of Public Assistance Fraud,” Department of Financial Services, available at <http://www.myfloridacfo.com/Division/PAF/> (last viewed on October 28, 2015).

⁷ Federal law also punishes public assistance fraud. *See* 7 U.S.C. sec. 2024. Further, the Florida Department of Children and Families states: “According to [7 C.F.R. sec. 273.16], persons convicted in court of trafficking more than \$500 (aggregate) in food assistance benefits are permanently disqualified from receiving food assistance (lifetime ineligibility). Recipients are permanently disqualified on a third Intentional Program Violation (IPV or “fraud”) or receiving benefits in a transaction involving a controlled substance, firearms, ammunition, or explosives.” 2016 Agency Legislative Bill Analysis (SB 218) (September 17, 2015), Florida Department of Children and Families (on file with the Senate Committee on Criminal Justice).

⁸ A first degree misdemeanor is punishable by up to one year in county jail and a fine of up to \$1,000. Sections 775.082 and 775.083, F.S.

⁹ A third degree felony is punishable by up to five years in state prison and a fine of up to \$5,000. However, if the third degree felony is not a forcible felony or a third degree felony under chapter 810, F.S., and if total sentence points are 22 points or fewer, the court must sentence the offender to a nonprison sanction unless the court makes written findings that this sanction could present a danger to the public. Sections 775.082 and 775.083, F.S.

- If the value of the public assistance or identification wrongfully received, retained, misappropriated, sought, or used is of an aggregate value of \$20,000 or more, but less than \$100,000 in any 12 consecutive months, such person commits a second degree felony;¹⁰ and
- If the value of the public assistance or identification wrongfully received, retained, misappropriated, sought, or used is of an aggregate value of \$100,000 or more in any 12 consecutive months, such person commits a first degree felony.¹¹

Relevant to the bill, s. 414.39(2), F.S., does not currently describe acts included in the term “traffics.”¹² The Code of Federal Regulation defines “trafficking” as:

- 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;
- The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- 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;
- 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;
- Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
- 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.¹³

SNAP Fraud and Electronic Benefits Transfer Card Fraud

The United States Department of Agriculture (USDA), under federal-state agreements, issues food assistance benefits to low-income individuals and households. These benefits used to be

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

¹¹ A first degree felony is punishable by up to 30 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

¹² According to the Florida Department of Children and Families, “[c]riminal prosecution of public assistance trafficking has met some resistance from prosecutors due in part to the lack of a definition. In SFY 2014-15, 496 recipients were administratively disqualified under trafficking regulations, while only 5 were sent to a State Attorney’s Office for criminal prosecution. (Note: This number does not include local law enforcement efforts.)” 2016 Agency Legislative Bill Analysis (SB 218) (September 17, 2015), Florida Department of Children and Families (on file with the Senate Committee on Criminal Justice).

¹³ 7 C.F.R. sec. 271.2 (Definitions).

issued in the form of paper food coupons that were commonly referred to as “food stamps.” Previously these coupons were issued under the federal Food Stamp Program. This program is now called the Supplemental Nutrition Assistance Program (SNAP). SNAP benefits are “deposited into a cash or food assistance (SNAP) account each month” by the USDA. These benefits are accessed using an Electronic Benefits Transfer (EBT) card.¹⁴ In Florida this card is referred to as an EBT ACCESS card.¹⁵ The Florida Department of Children and Families (DCF) administers the EBT card program.¹⁶

“Households can use food assistance benefits to buy breads, cereals, fruits, vegetables, meats, fish, poultry, dairy and plants and seeds to grow food for ... [a] household to eat. Households cannot use food assistance benefits to buy nonfood items such as pet foods, soaps, paper products, household supplies, grooming items, alcoholic beverages, tobacco, vitamins, medicines, food to eat in the store, or hot foods.”¹⁷ “SNAP benefits ... cannot be used to withdraw cash.”¹⁸

A retailer that would like to accept SNAP benefits (EBT) must be licensed by the USDA’s Food and Nutrition Service to participate. A retailer must either sell three varieties of qualifying foods in four specified staple food groups (with perishable foods in at least two of the categories) or “more than one-half (50%) of the total dollar amount of all retail sales (food, nonfood, gas and services) sold in the store must be from the sale of eligible staple foods.”¹⁹ Florida law specifically prohibits use or acceptance of EBT cards at certain establishments that sell distilled spirits and at bottle clubs, adult entertainment establishments, casinos, and gambling and gaming facilities.²⁰

Fraudulent activity involving SNAP benefits occurs in a number of different ways:

¹⁴ According to the USDA, in FY 2014, SNAP provided over \$5 billion (\$5,472,834,001) in food assistance benefits to a monthly average of 3,526,311 persons in Florida. *Supplemental Nutrition Assistance Program, State Activity Report, Fiscal Year 2014* (June 2015), Food and Nutrition Service, United States Department of Agriculture, available at <http://www.fns.usda.gov/sites/default/files/FY14%20State%20Activity%20Report.pdf> (last viewed on October 28, 2015). The Florida Department of Children and Families states: “EBT cards are produced with the name of the Head of Household – even though several family members may be on the public assistance case. There is no law prohibiting eligible clients from giving their EBT cards to someone for the purposes of obtaining those benefits for them. (Example: A grandmother may give her EBT card to her son or neighbor to get her groceries.) In some situations, an EBT card also can be issued and used by a representative on behalf of the client.” 2016 Agency Legislative Bill Analysis (SB 218) (September 17, 2015), Florida Department of Children and Families (on file with the Senate Committee on Criminal Justice).

¹⁵ “Welcome to EBT,” Florida Department of Children and Families, available at <http://www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cash/welcome-ebt> (last viewed on October 28, 2015).

¹⁶ Section 402.82, F.S.

¹⁷ What is SNAP Fraud?, Food and Nutrition Service, United States Department of Agriculture, available at <http://www.fns.usda.gov/fraud/what-snap-fraud> (last viewed on October 28, 2015).

¹⁸ “Restrictions On Use Of Public Assistance Electronic Benefit Transfer Cards” (May 8, 2015), National Conference of State Legislatures, available at <http://www.ncsl.org/research/human-services/ebt-electronic-benefit-transfer-card-restrictions-for-public-assistance.aspx> (last viewed on October 28, 2015).

¹⁹ “Retail Store Eligibility USDA Supplemental Nutrition Assistance Program,” Food and Nutrition Service, United States Department of Agriculture, available at <http://www.fns.usda.gov/snap/retail-store-eligibility-usda-supplemental-nutrition-assistance-program> (last viewed on October 28, 2015).

²⁰ Section 402.82, F.S.

SNAP fraud is when SNAP benefits are exchanged for cash. This is called trafficking and it is against the law.²¹

SNAP fraud also happens when someone lies on their application to get benefits or to get more benefits than they are supposed to get.

SNAP fraud also happens when a retailer has been disqualified from the program for past abuse and lies on the application to get in the program again.²²

State and federal investigations of SNAP fraud involve fraud that occurs before and after certification of eligibility for SNAP benefits.²³ The DFS's Division of Public Assistance Fraud states that EBT card trafficking, which is a type of fraud involving SNAP benefits, occurs:

when through the use of EBT cards there is an exchange of ... [SNAP] benefits with a retail store for cash. Trafficking also includes the buying or selling of EBT cards by citizens and stores. The advent of social networking has given rise to open selling of EBT cards by advertising them on social networking sites or on public listings such as Craigslist and EBay.^{24 25}

²¹ This act is also known as "cash back." "Owner Of Lakeland Market Sentenced To Federal Prison For Food Stamp Fraud" (April 17, 2015), United States Attorney's Office (Middle District of Florida), available at <http://www.justice.gov/usao-mdfl/pr/owner-lakeland-market-sentenced-federal-prison-food-stamp-fraud> (last viewed on October 28, 2015).

²² "What is SNAP Fraud?", Food and Nutrition Service, United States Department of Agriculture, available at <http://www.fns.usda.gov/fraud/what-snap-fraud> (last viewed on October 28, 2015).

²³ According to the USDA, in FY 2014 fraud dollars determined by pre-certification investigations (Florida) totaled \$23,633,173 and fraud dollars determined by post-certification eligibility (Florida) totaled \$14,605,207. *Supplemental Nutrition Assistance Program, State Activity Report, Fiscal Year 2014* (June 2015), Food and Nutrition Service, United States Department of Agriculture, available at

<http://www.fns.usda.gov/sites/default/files/FY14%20State%20Activity%20Report.pdf> (last viewed on October 28, 2015).

²⁴ "Division of Public Assistance Fraud (Retailer Food Stamp Trafficking)," Department of Financial Services, available at <http://www.myfloridacfo.com/Division/PAF/SLEB/reportRetailFraud.htm> (last viewed on October 28, 2015). The division further notes that SNAP trafficking is "a cash business that spawns other crimes in the community" and such trafficking supports drugs, prostitution, and illegal gambling. *Id.*

²⁵ The extent of EBT card fraud in Florida cannot be determined based on available data. Data from the USDA does not disaggregate EBT card fraud from SNAP fraud. The Division of Public Assistance Fraud in the Department of Financial Services has provided the following information regarding cases that office has handled:

In calendar year 2014, the Division of Public Assistance Fraud (PAF) completed 1,671 trafficking cases totaling \$2,613,546. The average recovery for a trafficking case is \$1,615.

However, PAF has shifted focus from EBT food stamp trafficking to fraud that is detected through data-matching processes. These are cases where PAF finds inconsistencies between wages being reported to DOR vs. what is reported to DCF - where people are fraudulently receiving benefits based on unreported income or by concealing material facts. The expense to the state is much higher in this type of fraud - so far in calendar year 2015, PAF has closed 265 cases involving eligibility totaling \$1.494 million. The average recovery per case is \$5,636.

In calendar year 2015, PAF completed an additional 15 cases for \$110,113. Trafficking investigations are still ongoing - just on a far smaller scale. When PAF has sufficient evidence the cases are elevated to the level that is appropriate for criminal prosecution. This bill will make the prosecution of trafficking much clearer and PAF will continue to work those cases to the full extent of the law.

According to the USDA, the EBT card creates an “‘audit trail’ from EBT transactions to identify trafficking and other suspicious activities.” Investigators with the USDA’s Food and Nutrition Service “analyze retailer data, conduct undercover investigations, and process cases – including fines and administrative disqualifications- against violating retailers.”²⁶ The USDA “also works with State law enforcement authorities to provide them with SNAP benefits that are used in sting operations, supporting anti-trafficking actions at the local level.”

As previously noted, EBT card fraud may be prosecuted under s. 414.39, F.S. Furthermore, according to the DCF, “EBT cards are also currently covered under the definition of ‘credit cards’ in s. 817.58, F.S.”²⁷ This definition is relevant to s. 817.60, F.S., which punishes theft by taking or retaining possession of a credit card taken; theft of a credit card that has been lost, mislaid, or delivered by mistake; the unauthorized purchase or selling of another person’s credit card; unlawfully obtaining control of a credit card as a security for debt; and dealing in other cardholders’ credit cards.

As previously noted, the DFS’s Division of Public Assistance Fraud is authorized to investigate SNAP fraud. Some of these cases may involve “allegations of clients/recipients trafficking in benefits” that are referred by the DCF to the division.²⁸ EBT card trafficking sting operations may involve multiple agencies such as the USDA and other federal agencies, local law enforcement and the Department of Law Enforcement, Florida or federal prosecutors, and the Department of Financial Services and other state agencies.

III. Effect of Proposed Changes:

The bill amends s. 414.39, F.S., which punishes public assistance fraud. Currently this statute, in part, punishes a person who knowingly “traffics” (or knowingly attempts to traffic or knowingly aids another person in trafficking) in a food assistance card, an authorization for the expenditure of food assistance benefits, a certificate of eligibility for medical services, or a Medicaid identification card in any manner not authorized by law.

The bill specifies acts included in the term “traffic.” “Traffic” includes:

- Buying, selling, stealing, or otherwise effecting an exchange of food assistance benefits issued and accessed via electronic benefits transfer (EBT) cards, electronic benefits transfer (EBT) 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;

Bill Analysis and Fiscal Impact Statement (SB 218) (September 23, 2015), Department of Financial Services (on file with the Senate Committee on Criminal Justice).

²⁶ What is SNAP Fraud?”, Food and Nutrition Service, United States Department of Agriculture, available at <http://www.fns.usda.gov/fraud/what-snap-fraud> (last viewed on October 28, 2015).

²⁷ 2016 Agency Legislative Bill Analysis (SB 218) (September 17, 2015), Florida Department of Children and Families (on file with the Senate Committee on Criminal Justice).

²⁸ 2016 Agency Legislative Bill Analysis (SB 218) (September 17, 2015), Florida Department of Children and Families (on file with the Senate Committee on Criminal Justice); “Public Benefits Integrity,” Florida Department of Children and Families, <http://www.myflfamilies.com/service-programs/public-benefits-integrity> (last viewed on October 28, 2015).

- Attempting to buy, sell, steal, or otherwise effect an exchange of food assistance benefits issued and accessed via electronic benefits transfer (EBT) cards, electronic benefits transfer (EBT) 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;
- Exchanging firearms, ammunition, explosives, or controlled substances, as defined in s. 893.02, F.S., for food assistance benefits;
- Purchasing with food assistance benefits a product with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with food assistance benefits in exchange for cash or consideration other than eligible food; or
- Intentionally purchasing products originally purchased with food assistance benefits in exchange for cash or consideration other than eligible food.

The acts described in the bill are substantively similar to the acts described in the federal definition of “trafficking” in 7 C.F.R. sec. 271.2 (Code of Federal Regulations).

The bill also punishes a person who possesses two or more electronic benefits transfer cards issued to other persons and sells or attempts to sell one or more of these cards. The first violation is a first degree misdemeanor; a second or subsequent violation is a third degree felony.

The bill reenacts s. 921.0022(3)(a), F.S. (offense severity ranking chart of Criminal Punishment Code), which currently ranks offenses in s. 414.39(2), F.S., as Level 1 offenses. This reenactment incorporates the amendment to s. 414.39(2), F.S., made by the bill. Therefore, the new third degree felony for EBT card fraud (second or subsequent violation) would be a Level 1 offense.

The effective date of the bill is October 1, 2016.

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/SB 218, an EBT card retailer who commits the new EBT card fraud offense could lose its license to accept SNAP benefits (EBT). A person receiving SNAP benefits (EBT) could be determined ineligible for further SNAP benefits if he or she commits the new EBT card fraud offense.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, met on October 28, 2012 and determined the bill has a positive, insignificant impact on prison beds. Although it is anticipated that defining the term “trafficking” will increase the number of criminal prosecutions, the great majority of cases involve small monetary amounts that would be punishable as misdemeanors or felonies not involving incarceration.

According to the DFS, the bill will not have a fiscal impact on the department.²⁹

The Florida Department of Children and Families did not indicate that the bill will have an impact on the department.³⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 414.39 of the Florida Statutes.

This bill also reenacts section 921.0022(3)(a), F.S., for the purpose of incorporating the amendment made by the bill to section 414.39, F.S., in reference to that statute in section 921.0022(3)(a), F.S.

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

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

CS by Criminal Justice on October 5, 2015:

²⁹ Bill Analysis and Fiscal Impact Statement (SB 218) (September 23, 2015), Department of Financial Services (on file with the Senate Committee on Criminal Justice).

³⁰ 2016 Agency Legislative Bill Analysis (SB 218) (September 17, 2015), Florida Department of Children and Families (on file with the Senate Committee on Criminal Justice).

- Removes mandatory community service for a violation of the new EBT card fraud offense created by the bill.

Provides that a first violation of the new EBT card fraud offense is a first degree misdemeanor; a second or subsequent violation is a third degree felony.

B. Amendments:

None.