

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 Committee on Criminal Justice

BILL: CS/SB 232

INTRODUCER: Criminal Justice Committee and Senator Garcia

SUBJECT: Exploitation of Vulnerable Persons

DATE: March 14, 2023 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Stokes	CJ	Fav/CS
2.			JU	
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 232 creates s. 817.5695, F.S., which punishes exploitation of a person 65 years of age or older by:

- Obtaining or using, through deception or intimidation, the property of a person 65 years of age or older with the intent to temporarily or permanently:
 - Deprive that person of the use, benefit, or possession of the property; or
 - Benefit someone other than the property owner;
- Obtaining or using, through deception or intimidation, the property of a person 65 years of age or older through the intentional modification, alteration, or fraudulent creation of a plan of distribution or disbursement expressed in a will, trust instrument, or other testamentary device of the person 65 years of age or older; or
- Depriving, with the intent to defraud and by means of bribery or kickbacks, a person 65 years of age or older of his or her intangible right to honest services provided by an individual who has a legal or fiduciary relationship with such person.

If the funds, assets, or property involved in the exploitation are valued at:

- \$50,000 or more, the offender commits a level 7 first degree felony.
- \$10,000 or more, but less than \$50,000, the offender commits a level 6 second degree felony.
- Less than \$10,000, the offender commits a level 4 third degree felony.

It does not constitute a defense to a prosecution for any violation of this section that the accused did not know the age of the victim.

In a prosecution for a violation of s. 817.5695, F.S., the state may move the court to advance a trial on the court's docket and the court must consider the victim's age and health in determining whether to advance the trial.

A person 65 years of age or older who is in imminent danger of being exploited may petition for an injunction for protection under s. 825.1035, F.S.

Prosecution for a felony violation of s. 817.5695, F.S., s. 825.102, F.S. (abuse of an elderly person or disabled adult), or s. 825.103, F.S. (exploitation of an elderly person or disabled adult) must be commenced within five years after the crime is committed, but if fraud or breach of fiduciary duty is a material element of the offense, the offense may be prosecuted within five years after discovery of the offense.

The Legislature's Office of Economic and Demographic Research preliminary estimates that the bill will have a "positive indeterminate" prison bed impact (an unquantifiable increase in prison beds). See Section V. Fiscal Impact Statement.

The bill takes effect October 1, 2023.

II. Present Situation:

Trends Regarding Elder Exploitation

"The National Council on Aging estimates that 1 in 10 Americans over the age of 60 have experienced elder abuse," which can include financial exploitation.¹ According to the most recent report by the Federal Bureau of Investigation (FBI), "[i]n 2021, over 92,000 victims over the age of 60 reported losses of \$1.7 billion to the [Internet Crime Complaint Center or "IC3"].² This represents a 74 percent increase in losses over losses reported in 2020."³ Average loss per victim was \$18,246.⁴

According to the FBI's report, Florida ranked second in the nation in fraud victims over age 60 (9,645) with losses from that fraud reported to be \$224,205,716.⁵

¹ *Elder Justice*, National Association of Attorneys General, available at <https://www.naag.org/issues/elder-justice/> (last visited on Feb. 28, 2023). See *Get the Facts on Elder Abuse* (Feb. 23, 2021), available at <https://www.ncoa.org/article/get-the-facts-on-elder-abuse> (last visited on Feb. 28, 2023).

² The Internet Crime Complaint Center is run by the FBI. *Internet Crime Complaint Center (IC3)*, Federal Bureau of Investigation, available at <https://www.ic3.gov/> (last visited on Feb. 28, 2023).

³ *2021 Elder Fraud Report*, Federal Bureau of Investigation, at p. 3, available at <https://www.justice.gov/file/1523276/download> (last visited on Feb. 28, 2023). This report is further referenced as "2021 Elder Fraud Report."

⁴ *2021 Elder Fraud Report*, *supra*, at p. 4.

⁵ *2021 Elder Fraud Report*, *supra*, at pp. 11 and 12. The FBI states: "This information is based on the total number of complaints from each state, American Territory, and the District of Columbia when the complainant provided state information." *Id.*

The elderly are particularly vulnerable to financial exploitation. The problem of elder financial exploitation is likely to get worse because of “three interrelated sets of factors”: “health-related effects of aging; financial and retirement trends; and demographic trends.”⁶

“Cognitive decline is a key factor ..., even without the presence of disease,” and “[p]hysical decline and dependency are also risk factors for elder financial exploitation.” “[T]he wealth of older generations” also “makes them targets for financial exploitation.”⁷ “Paradoxically, though, the elderly poor are at even greater risk of financial exploitation.”⁸

“Financial and pension trends further compound the problem.” “The shift from defined benefit to defined contribution plans has placed responsibility onto the elderly themselves to manage their retirement savings—ironically, just at a time in their lives when their ability to do so may become impaired.” Further, “[r]etirees are also taking on more student debt (often for their children’s or grandchildren’s benefit).”⁹

Finally, “dramatic increases in the elderly population threaten ... to spur parallel growth in elderly financial exploitation.”¹⁰ According to the 2022 U.S. Census, persons over 65 years of age represent approximately 21 percent of Florida’s population (nearly 4.7 million Floridians).¹¹ Further, the U.S. Department of Health and Human Services has provided the following information regarding that demographic trend nationally:

In 2019, there were 54.1 million people age 65 and older (up from 39.6 million in 2009). The population is projected to reach 80.8 million by 2040 and 94.7 million by 2060. *All but a tiny percentage of them live in non-institutional settings, as do more than 61 million people with disabilities.* Both populations are growing, and older Americans are one of the fastest-growing demographics in the country.¹²

Florida Laws Relating to Elder Exploitation

Exploitation of an Elderly Person or Disabled Adult under s. 825.103, F.S.

Section 825.103, F.S., punishes exploitation of an elderly person or disabled adult.

⁶ Deane, Stephen. *Elder Financial Exploitation* (white paper) (June 2018), at p. i, U.S. Securities and Exchange Commission (SEC), Office of the Investor Advocate, available at <https://www.sec.gov/files/elder-financial-exploitation.pdf> (last visited on Feb. 28, 2023). Views expressed in the white paper are those of the author and do not necessarily reflect the views of the SEC. This white paper is further referenced as “Elder Financial Exploitation.”

⁷ *Elder Financial Exploitation, supra*. According to the American Bankers Association, “people over 50 years old control over 70 percent of the nation’s wealth.” *Protect the Elderly from Financial Exploitation*, American Bankers Association, available at <https://www.aba.com/advocacy/community-programs/consumer-resources/protect-your-money/elderly-financial-abuse> (last visited on Feb. 28, 2023).

⁸ *Elder Financial Exploitation, supra*.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *QuickFacts Florida*, U.S. Census Bureau, available at <https://www.census.gov/quickfacts/fact/table/FL/PST045222#PST045222> (last visited on Feb. 28, 2023).

¹² *Projected Future Growth of Older Population*, U.S. Department of Health and Human Services, Administration for Community Living, available at <https://acl.gov/aging-and-disability-in-america/data-and-research/projected-future-growth-older-population> (last visited on Feb. 28, 2023). Emphasis provided by staff.

For purposes of ch. 825, F.S., an “elderly person” is a person 60 years of age or older¹³ who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person’s own care or protection is impaired.¹⁴

For purposes of ch. 825, F.S., a “disabled person” is a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person’s ability to perform the normal activities of daily living.¹⁵

As is evident from these definitions, ch. 825, F.S., in general, and s. 825.103, F.S., in particular, only address exploitation of a subset of persons 65 years of age or older who are the victims of exploitation.

Under s. 825.103, F.S., exploitation of an elderly person or disabled adult means:

- Knowingly obtaining or using, or endeavoring to obtain or use, an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:
 - Stands in a position of trust and confidence with the elderly person or disabled adult; or
 - Has a business relationship with the elderly person or disabled adult;
- Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent;
- Breach of a fiduciary duty to an elderly person or disabled adult by the person’s guardian, trustee who is an individual, or agent under a power of attorney which results in an unauthorized appropriation, sale, transfer of property, kickback, or receipt of an improper benefit. An unauthorized appropriation occurs when the elderly person or disabled adult does not receive the reasonably equivalent financial value in goods or services, or when the fiduciary violates any of these duties:
 - For agents appointed under ch. 709, F.S.¹⁶:
 - Committing fraud in obtaining their appointments;
 - Obtaining appointments with the purpose and design of benefiting someone other than the principal or beneficiary;
 - Abusing their powers;
 - Wasting, embezzling, or intentionally mismanaging the assets of the principal or beneficiary; or
 - Acting contrary to the principal’s sole benefit or best interest; or

¹³ Lack of knowledge of the victim’s age is not defense to prosecution for any violation under ch. 825, F.S. Section 825.104, F.S.

¹⁴ Section 825.101(4), F.S.

¹⁵ Section 825.101(3), F.S.

¹⁶ A person granted authority to act for a principal under a power of attorney. Section 709.2102(1), F.S.

- For guardians and trustees who are individuals and who are appointed under ch. 736, F.S., or ch. 744, F.S.:
 - Committing fraud in obtaining their appointments;
 - Obtaining appointments with the purpose and design of benefiting someone other than the principal or beneficiary;
 - Abusing their powers; or
 - Wasting, embezzling, or intentionally mismanaging the assets of the ward or beneficiary of the trust;
- Misappropriating, misusing, or transferring without authorization money belonging to an elderly person or disabled adult from an account in which the elderly person or disabled adult placed the funds, owned the funds, and was the sole contributor or payee of the funds before the misappropriation, misuse, or unauthorized transfer. This provision only applies to the following types of accounts:
 - Personal accounts;
 - Joint accounts created with the intent that only the elderly person or disabled adult enjoys all rights, interests, and claims to moneys deposited into such account; or
 - Convenience accounts created in accordance with s. 655.80, F.S.;
- Intentionally or negligently failing to effectively use an elderly person's or disabled adult's income and assets for the necessities required for that person's support and maintenance, by a caregiver or a person who stands in a position of trust and confidence with the elderly person or disabled adult; or
- Knowingly obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's or a disabled adult's funds, assets, property, or estate through intentional modification, alteration, or fraudulent creation of a plan of distribution or disbursement expressed in a will, trust agreement, or other testamentary devise of the elderly person or disabled adult without:
 - A court order, from a court having jurisdiction over the elderly person or disabled adult, which authorizes the modification or alteration;
 - A written instrument executed by the elderly person or disabled adult, sworn to and witnessed by two persons who would be competent as witnesses to a will, which authorizes the modification or alteration; or
 - Action of an agent under a valid power of attorney executed by the elderly person or disabled adult which authorizes the modification or alteration.¹⁷

Punishment of any of the previously-described violations is based on the value of the funds, assets, or property involved in the exploitation of the elderly person or disabled adult:

- Level 8¹⁸ first degree felony¹⁹ (value is \$50,000 or more);

¹⁷ Section 825.103(1), F.S.

¹⁸ The Criminal Punishment Code (Code) (ss. 921.002-921.0027, F.S.) is Florida's primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10). Section 921.0022(2), F.S. Points are assigned and accrue based upon the offense severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Section 921.0024, F.S. Sentence points escalate as the severity level escalates. These points are relevant to determining whether the offender scores a prison sentence as the minimum sentence, and if so scored, the length of that sentence. *Id.* The offense severity ranking is either assigned by specifically ranking the offense in the Code offense severity level ranking chart (s. 921.0022(3), F.S) or ranking the offense by "default" based on its felony degree (s. 921.0023, F.S.).

¹⁹ A first degree felony is generally punishable by not more than 30 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

- Level 7 second degree felony²⁰ (value is 10,000 or more, but less than \$50,000); and
- Level 6 third degree felony²¹ (value is less than \$10,000).²²

Statute of Limitations for Violations of s. 825.103, F.S.

Generally, prosecutors have five years to prosecute a violation of s. 825.103, F.S.²³ However, if the period of limitation has expired, a prosecution may be commenced for any offense, a material element of which is fraud, or breach of a fiduciary obligation within one year after discovery of the offense by an aggrieved party or person who has a legal duty to represent an aggrieved party and who is not himself or herself a party.²⁴ The period of limitation may not be extended by more than three years.²⁵

Injunctive Relief

Section 825.1035, F.S., creates a cause of action for an injunction for protection against exploitation²⁶ of a vulnerable adult²⁷ which may be sought in an adversary proceeding by:

- A vulnerable adult in imminent danger of being exploited;
- The guardian of a vulnerable adult in imminent danger of being exploited;
- A person or organization acting on behalf of the vulnerable adult with the consent of the vulnerable adult or his or her guardian;
- An agent under a valid durable power of attorney with the authority specifically granted in the power of attorney; or
- A person who simultaneously files a petition for determination of incapacity and appointment of an emergency temporary guardian with respect to the vulnerable adult.²⁸

In determining whether a petitioner has reasonable cause to believe that the vulnerable adult is, or is in imminent danger of becoming, a victim of exploitation, the court must consider and evaluate all relevant factors, including, but not limited to, any of the following:

- The existence of a verifiable order of protection issued previously or from another jurisdiction.
- Any history of exploitation by the respondent upon the vulnerable adult in the petition or any other vulnerable adult.
- Any history of the vulnerable adult being previously exploited or unduly influenced.
- The capacity of the vulnerable adult to make decisions related to his or her finances and property.

²⁰ A second degree felony is punishable by not more than 15 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

²¹ A third degree felony is generally punishable by not more than five years in state prison and a fine not exceeding \$5,000. Sections 775.082 and 775.083, F.S. *But see* ss. 775.082(10) and 921.00241, F.S. (prison diversion).

²² Sections 825.103(3)(a)-(c) and 921.0022(3)(f)-(h), F.S. Chapter 825, F.S., is not intended to impose criminal liability on a person who makes a good faith effort to assist an elderly person or disabled adult in the management of the funds, assets, or property of the elderly person or disabled adult, which effort fails through no fault of the person. Section 825.105, F.S.

²³ Section 775.15(10), F.S.

²⁴ Section 775.15(12)(a), F.S.

²⁵ *Id.*

²⁶ Exploitation means exploitation of an elderly person or disabled adult under s. 825.103(1), F.S. Section 825.101(6), F.S.

²⁷ *See* discussion of the definition of “vulnerable adult,” *supra*.

²⁸ Section 825.1035(2), F.S.

- Susceptibility of the vulnerable adult to undue influence.
- Any criminal history of the respondent or previous probable cause findings by the adult protective services program, if known.²⁹

Mandatory Reporting of Elder Exploitation

Section 415.103, F.S., requires any person who knows, or has reasonable cause to suspect, that a vulnerable adult has been exploited to immediately report such knowledge or suspicion to the central abuse hotline operated by the Department of Children and Family Services.³⁰ For purposes of both ch. 415, F.S., and ch. 825, F.S., a “vulnerable adult” is a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.³¹

Although the reporting is mandatory for any person, the law specifically mentions reporting by specified professionals, employees, or entities such as:

- Medical personnel engaged in the admission, examination, care, or treatment of vulnerable adults;
- Professional adult care, residential, or institutional staff;
- A bank, savings and loan, or credit union officer, trustee, or employee; or
- Dealer, investment adviser, or associated person under ch. 517, F.S.³²

It is a second degree misdemeanor³³ for a person to knowingly and willfully fail to report a case of known or suspected exploitation of a vulnerable adult or prevent another person from doing so.³⁴

Disqualifications and Forfeitures Relating to the Commission of Elder Exploitation

Section 733.303, F.S., in part, establishes that a person is not qualified to act as a personal representative if the person has been convicted in any state or foreign jurisdiction of exploitation of an elderly person or a disabled adult, as those terms are defined in s. 825.101, F.S.

Section 732.8031, F.S., in part, specifies when benefits or interests of a deceased elderly person or disabled adult are forfeited by certain persons who are convicted in any state or foreign jurisdiction of exploitation of an elderly person or a disabled adult, as those terms are defined in s. 825.101, F.S.:

- A surviving person convicted of such exploitation for conduct against the decedent or another person on whose death such beneficiary’s interest depends is not entitled to any benefits under the will of the decedent or the Florida Probate Code.

²⁹ Section 825.1035(6), F.S.

³⁰ See *Abuse Hotline*, Florida Department of Children and Families, available at <https://www.myflfamilies.com/service-programs/abuse-hotline/report-online.shtml> (last visited on Feb. 28, 2023).

³¹ Sections 415.102(28) and 825.101(16), F.S.

³² Section 415.1034(1), F.S.

³³ A second degree misdemeanor is punishable by not more than 60 days in county jail and a fine not exceeding \$500. Sections 775.082 and 775.083, F.S.

³⁴ Section 415.111(1), F.S.

- A joint tenant convicted in any state or foreign jurisdiction of abuse, neglect, exploitation, or aggravated manslaughter of such exploitation against another joint tenant decedent thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's sole property.
- A named beneficiary of a bond, life insurance policy, or other contractual arrangement convicted of such exploitation for conduct against the owner or principal obligee of the bond, life insurance policy, or other contractual arrangement or the person upon whose life such policy was issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and the bond, policy, or other contractual arrangement becomes payable as though the abuser, neglecter, exploiter, or killer had predeceased the decedent.³⁵

Duties of Securities Dealer and Investment Adviser to Protect Elderly from Exploitation

Section 517.34, F.S., imposes certain duties on a dealer or investment adviser to protect a specified adult from financial exploitation. A "specified adult" is a natural person 65 years of age or older, or a vulnerable adult as defined in s. 415.102, F.S.³⁶ "Financial exploitation" means the wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of a specified adult; or any act or omission by a person, including through the use of a power of attorney, guardianship, or conservatorship of a specified adult, to:

- Obtain control over the specified adult's money, assets, or property through deception, intimidation, or undue influence to deprive him or her of the ownership, use, benefit, or possession of the money, assets, or property; or
- Convert the specified adult's money, assets, or property to deprive him or her of the ownership, use, benefit, or possession of the money, assets, or property.³⁷

A securities dealer or investment adviser may delay a disbursement or transaction of funds or securities from an account of a specified adult or an account for which a specified adult is a beneficiary or beneficial owner if certain criteria are met including that the securities dealer or investment adviser reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted in connection with the disbursement or transaction. The delay is for a specified, limited period, and there are requirements relating to training, policy and procedure, notice, and records disclosure that must be met regarding the delay.³⁸

White Collar Crime and Elder Exploitation

Enhanced penalties are available under s. 775.0844, F.S., the White Collar Crime Victim Protection Act. "White collar crime" includes the commission of, or a conspiracy to commit, any felony offense specified in ch. 825, F.S., felony theft offenses under ch. 812, F.S., and various felony theft and fraud offenses.³⁹ A person commits an "aggravated white collar crime" if the person engages in at least two white collar crimes that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents, provided that at least one of such

³⁵ Section 732.8031(1)-(3), F.S.

³⁶ Section 517.34(1)(b), F.S.

³⁷ Section 517.34(1)(a), F.S.

³⁸ Section 517.34(3) and (4), F.S.

³⁹ Section 775.0844(3)(a)2., 4., 5., and 11., and (b)-(d), F.S.

crimes occurred after the effective date of this act.⁴⁰ Any person who commits an aggravated white collar crime and in so doing victimizes 10 or more elderly persons, as defined in s. 825.101, F.S., and thereby obtains or attempts to obtain \$50,000 or more, commits a Level 9 first degree felony.⁴¹

Racketeering and Elder Exploitation

The Florida Racketeer Influenced and Corrupt Organization (RICO) Act is found at ss. 895.01-895.06, F.S. “Racketeering activity” means committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit any exploitation of an elderly person or disabled adult.⁴²

Section 895.03, F.S., provides that it is unlawful for any person:

- Who with criminal intent has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.
- Through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.
- Employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.
- To conspire or endeavor to violate any of the previously-described activity.

Section 895.04(1), F.S., punishes as a first degree felony engaging in activity in violation of s. 895.03, F.S. In addition to criminal penalties under s. 895.04, F.S., s. 895.05, F.S., imposes civil liability for violations of the Florida RICO Act, including forfeiture to the state of all property, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of the act.⁴³

Enhanced Penalties under s. 812.0145, F.S., for Theft When Victim Is 65 Years of Age or Older

Section 812.0145(2), F.S., reclassifies the degree of theft when the victim of the theft is a person 65 years of age or older.⁴⁴ Reclassification is based on the value of the funds, assets, or property involved in the theft:

- Level 7 first degree felony (value is \$50,000 or more);
- Level 5 second degree felony (value is 10,000 or more, but less than \$50,000); or
- Level 3 third degree felony (value is \$300 or more, but less than \$10,000).

⁴⁰ Section 775.0844(4), F.S.

⁴¹ Section 775.0844(5), F.S. A person convicted of an aggravated white collar crime may pay a fine of \$500,000 or double the value of the pecuniary gain or loss, whichever is greater. Further, this person is liable for all court costs and must pay restitution to each victim of the crime. Section 775.0844(7), F.S.

⁴² Section 895.02(8), F.S.

⁴³ Section 895.05(2), F.S.

⁴⁴ The perpetrator must know or have reason to believe that the victim was 65 years of age or older. Section 812.0145(2), F.S.

Additionally, a person who is convicted of theft of more than \$1,000 from a person 65 years of age or older must be ordered by the sentencing judge to make restitution to the victim of such offense and to perform up to 500 hours of community service work. Restitution and community service work are in addition to any fine or sentence which may be imposed and not in lieu thereof.⁴⁵

Criminal Use of Personal Information of Persons 60 Years of Age or Older

Section 817.568, F.S., punishes criminal use of personal identification information (“identity theft”). Any person who willfully and without authorization fraudulently uses personal identification information concerning an individual who is 60 years of age or older without first obtaining the consent of that individual or of his or her legal guardian commits a second degree felony.⁴⁶

Honest Service Fraud

The bill, in part, punishes a person for depriving, endeavoring to deprive, or conspiring with another to deprive, with the intent to defraud and by means of bribery or kickbacks, a person 65 years of age or older of his or her *intangible right to honest services* provided by an individual who has a legal or fiduciary relationship with such person.⁴⁷

Federal laws punishing mail and wire fraud use the term “scheme or artifice to defraud,”⁴⁸ which 18 U.S.C. s. 1346 defines to include “a scheme or artifice to deprive another of the intangible right of honest services.” “Intangible rights” are not defined in federal law. 18 U.S.C. s. 1346, which applies to both public officials and private employees, abrogates the U.S. Supreme Court’s holding in *McNally v. United States*⁴⁹ “that the mail fraud statute was ‘limited in scope’ to *only* the ‘protection of tangible property rights.’”⁵⁰ The statute codifies “the understanding of some of the lower federal courts that the mail and wire fraud statutes extend to conduct that deprives a person or group of the right to have another act in accordance with some externally imposed duty or obligation, regardless of whether the victim so deprived has suffered or would suffer a pecuniary harm.”⁵¹ In a subsequent case, *Skilling v. United States*,⁵² the U.S. Supreme Court limited prosecutions of mail and wire fraud under an honest services theory to “those who, in

⁴⁵ Section 812.0145(1), F.S.

⁴⁶ Section 817.568(6), F.S.

⁴⁷ Emphasis provided by staff. See “Effect of Proposed Changes” section of this analysis for further details.

⁴⁸ See 18 U.S.C. s. 1341 (mail fraud) and 18 U.S.C. s. 1343 (wire fraud).

⁴⁹ 483 U.S. 350 (1987). *Bribery, Kickbacks, and Self-Dealing: A Overview of Honest Services Fraud and Issues for Congress*, R5479 (May 18, 2020), at p. 2, Congressional Research Service, available at <https://sgp.fas.org/crs/misc/R45479.pdf> (last visited on Feb. 28, 2023). This report is further referenced as “CRS Report.”

⁵⁰ CRS Report at p. 2, n. 12, citing *McNally*, 438 U.S. at 360. Emphasis provided by author.

⁵¹ CRS Report at p. 2.

⁵² 561 U.S. 358 (2010).

violation of a fiduciary duty,⁵³ participate in bribery or kickback schemes.”⁵⁴ This “limiting principle” continues to be applied to honest service fraud.⁵⁵

III. Effect of Proposed Changes:

The bill creates s. 817.5695, F.S., which punishes exploitation of a person 65 years of age or older by:

- Obtaining or using,⁵⁶ endeavoring⁵⁷ to obtain or use, or conspiring with another to obtain or use, through deception⁵⁸ or intimidation,⁵⁹ the property⁶⁰ of a person 65 years of age or older with the intent to temporarily or permanently:
 - Deprive that person of the use, benefit, or possession of the property; or
 - Benefit someone other than the property owner;⁶¹
- Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use, through deception or intimidation, the property of a person 65 years of age or older through the intentional modification, alteration, or fraudulent creation of a plan of distribution or disbursement expressed in a will, trust instrument, or other testamentary devise of the person 65 years of age or older; or

⁵³ Some of the fiduciary relationships that support an honest-services fraud prosecution include attorney-client, doctor-patient, and stockbroker-customer. CRS Report at p. 17, n. 147, quoting and citing *United States v. Scanlon*, 753 F. Supp. 23, 25 (D.D.C. 2010) and *United States v. Evans*, No. 2:14-CR-00113, 2015 WL 1808904, at *5 (S.D.W. Va. Apr. 21, 2015).

⁵⁴ CRS Report at p. 2.

⁵⁵ *Id.*

⁵⁶ The bill uses the same definition of “obtains or uses” that is found in the theft chapter. *See* s. 812.012(3), F.S.

⁵⁷ “Endeavor” means to attempt or to try.

⁵⁸ “Deception” means misrepresenting or concealing a material fact relating to: (1) services rendered, disposition of property, or use of property, when such services or property are intended to benefit a person 65 years of age or older; (2) terms of a contract, agreement, trust, will, or testament entered into with a person 65 years of age or older; or (3) an existing or preexisting condition of any property involved in a contract, agreement, trust, will, or testament entered into with a person 65 years of age or older. It also means using any misrepresentation, false pretense, or false promise in order to induce, encourage, or solicit a person 65 years of age or older to enter into a contract, agreement, trust, will, or testament.

⁵⁹ “Intimidation” means the communication by word or act to a person 65 years of age or older that the person will be deprived of food, nutrition, clothing, shelter, supervision, medicine, medical services, money, or financial support or will suffer physical violence.

⁶⁰ The bill uses the same definition of “property” that is found in the theft chapter. *See* s. 812.012(4), F.S.

⁶¹ “Deception” and “intimidation” are also terms that are used in the definition of “financial exploitation” in s. 517.34, F.S. “Financial exploitation” is defined in part, as the wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of a specified adult; or any act or omission by a person, including through the use of a power of attorney, guardianship, or conservatorship of a specified adult, to obtain control over the specified adult’s money, assets, or property through *deception*, *intimidation*, or undue influence to deprive him or her of the ownership, use, benefit, or possession of the money, assets, or property. Section 517.34(1)(a)1., F.S. A “specified adult” is a person 65 years of age or older or a vulnerable adult as defined in s. 415.102, F.S. Section 517.34(1)(b), F.S. Section 517.34(2), F.S., provides, in part that the “Legislature finds that many persons in this state, because of age or disability, are at increased risk of financial exploitation and loss of their assets, funds, investments, and investment accounts. The Legislature further finds that senior investors in this state are at a statistically higher risk of being targeted for financial exploitation, regardless of diminished capacity or other disability, because of their accumulation of substantial assets and wealth compared to younger age groups.”

- Depriving, endeavoring to deprive, or conspiring with another to deprive, with the intent to defraud and by means of bribery⁶² or kickbacks,⁶³ a person 65 years of age or older of his or her intangible right to honest services⁶⁴ provided by an individual who has a legal or fiduciary relationship⁶⁵ with such person.

The bill specifies the felony degree of violations based on value⁶⁶ of property, etc., involved in the exploitation and amends s. 921.0022, F.S., to rank the felonies in the Code offense severity level ranking chart. If the funds, assets, or property involved in the exploitation are valued at:

- \$50,000 or more, the offender commits a level 7⁶⁷ first degree felony.
- \$10,000 or more, but less than \$50,000, the offender commits a level 6 second degree felony.
- Less than \$10,000, the offender commits a level 4 third degree felony.

The penalties and rankings are identical to those applicable to theft from a person 65 years of age or older under s. 812.0145, F.S.⁶⁸

It does not constitute a defense to a prosecution for any violation of this section that the accused does not know the victim's age.

In a prosecution for a violation of s. 817.5695, F.S., the state may move the court to advance a trial on the court's docket and the court must consider the victim's age and health in determining whether to advance the trial.⁶⁹

A person 65 years of age or older who is in imminent danger of being exploited may petition for an injunction for protection under s. 825.1035, F.S., which currently applies to a vulnerable adult in imminent danger of being "exploited" (i.e., subject to exploitation as defined in s. 825.103(1), F.S.).⁷⁰ A violation of such injunction is handled in the same manner, and such violation has the

⁶² A "bribe" is any money or anything of value which is provided, directly or indirectly, to a person who has a legal or fiduciary relationship with a person 65 years of age or older, for the purpose of improperly obtaining or rewarding favorable treatment from the person who has the legal or fiduciary relationship in connection with his or her work for the person 65 years of age or older.

⁶³ A "kickback" is money, credit, a fee, a commission, a gift, a gratuity or other compensation, or anything of value which is provided to a person in exchange for preferential treatment for the receipt of goods or services.

⁶⁴ The bill uses the same definition of "services" that is found in the theft chapter. *See* s. 812.012(6), F.S. Similar to federal law, the bill does not define "intangible right to honorable services." *See* discussion of honest services fraud in the "Present Situation" section of this analysis.

⁶⁵ "Fiduciary relationship" includes, but is not limited to, a court-appointed or voluntary guardian, trustee, attorney, or conservator. As indicated, this definition is not an exhaustive list.

⁶⁶ The definition of "value" is almost identical to the definition of that term in the theft chapter. *See* s. 812.012(10), F.S., and allows the amounts of value of separate properties involved in exploitation committed pursuant to one scheme or course of conduct, whether the exploitation involves the same person or several persons, to be aggregated in determining the degree of the offense. *See* s. 812.012(10)(c), F.S.

⁶⁷ The rankings of theft from a person 65 years of age or older under s. 812.0145, F.S., are identical to the rankings of offenses under s. 817.5695, F.S., except that the first degree felony in s. 812.0145, F.S., is specifically ranked in level 7 of the Code offense severity level ranking chart (s. 921.0022, F.S.) while the first degree felony in s. 817.5695, F.S., is not ranked in the chart but defaults to a level 7 ranking under s. 921.0023, F.S.

⁶⁸ *See* ss. 812.0145(2) and 921.0022(3)(c), (e), and (g), F.S.

⁶⁹ This provision is almost identical to s. 825.106, F.S., which authorizes the state to move the court to advance the trial on the court's docket in a criminal action in which an elderly person or disabled adult is the victim. The court must consider the age and the health of the victim in determining whether to advance the trial on the docket.

⁷⁰ *See* s. 825.101(6), F.S.

same penalties, as provided in s. 825.1036, F.S. Conforming changes are made to ss. 825.1035 and 825.1036, F.S., to provide additional guidance that as used in those sections, and in addition to the definitions provided in ch. 825, F.S., exploitation of a vulnerable adult includes a person 65 years of age or older who is or may be subject to exploitation as described in s. 817.5695, F.S.

The bill amends s. 775.15, F.S., to provide that prosecution for a felony violation of s. 817.5695, F.S., s. 825.102, F.S. (abuse of an elderly person or disabled adult), or s. 825.103, F.S. (exploitation of an elderly person or disabled adult) must be commenced within five years after the crime is committed, but if fraud or breach of fiduciary duty is a material element of the offense, the offense may be prosecuted within five years after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is not a party to the offense. This change will provide additional time for prosecution of elder abuse and exploitation.⁷¹

The bill take effect October 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

⁷¹ See “Present Situation” section of this analysis for a discussion of time limitations under s. 775.15, F.S.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. The Legislature's Office of Economic and Demographic Research (EDR) preliminary estimates that the bill will have a "positive indeterminate" prison bed impact (an unquantifiable increase in prison beds).⁷²

The bill creates a level 7 first degree felony, a level 5 second degree felony, and a level 3 third degree felony. The EDR provides the following information relevant to these felonies and its estimate:

In FY 18-19, the incarceration rate for a Level 3, 3rd degree felony was 9.5%, and in FY 19-20 the incarceration rate was 8.8%. In FY 20-21, the incarceration rate for a Level 3, 3rd degree felony was 8.7%, and in FY 21-22 the incarceration rate was 9.6%. In FY 18-19, the incarceration rate for a Level 5, 2nd degree felony was 35.3%, and in FY 19-20 the incarceration rate was 32.6%. In FY 20-21, the incarceration rate for a Level 5, 2nd degree felony was 32.7%, and in FY 21-22 the incarceration rate was 35.7%. In FY 18-19, the incarceration rate for a Level 7, 1st degree felony was 67.1%, and in FY 19-20 the incarceration rate was 66.5%. In FY 20-21, the incarceration rate for a Level 7, 1st degree felony was 65.5%, and in FY 21-22 the incarceration rate was 63.1%.

Per [Department of Corrections or "DOC"] ..., in FY 18-19, there were 21 new commitments to prison for felonies listed under s. 825.103, F.S., and 18 new commitments in FY 19-20. There were 12 in FY 20-21, and 14 in FY 21-22. It is not known how the newly created felonies under s. 817.5695, F.S., will impact prison beds, but commitments are low under the current language for exploitation of the elderly or disabled adults.

Per DOC, in FY 18-19, there were 14 new commitments to prison for felonies listed under s. 825.102, F.S., and 11 new commitments in FY 19-20. There were 9 in FY 20-21, and 20 in FY 21-22. It is not known how many additional commitments would be included with the expansion of the time period to prosecute for s. 825.102, F.S., s. 825.103, F.S., or the newly added s. 817.5695[,] F.S.

Per DOC, there has been one new commitment for a violation of s. 825.1036, F.S., in the last four fiscal years.⁷³

⁷² SB 232 – *Exploitation of Vulnerable Persons*, Office of Economic and Demographic Research (on file with the Senate Committee on Criminal Justice).

⁷³ *Id.*

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.15, 825.135, 825.1036, and 921.0022.

This bill creates section 817.5695 of the Florida Statutes.

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 March 13, 2023:

The committee substitute:

- Punishes obtaining or using, through deception or intimidation, the property of a person 65 years of age or older through the intentional modification, alteration, or fraudulent creation of a plan of distribution or disbursement expressed in a will, trust instrument, or other testamentary device of the person 65 years of age or older.
- Provides that it does not constitute a defense to a prosecution for any violation of this section that the accused does not know the victim's age.
- Provides additional guidance that a person 65 years of age or older who is in imminent danger of being exploited may petition for an injunction for protection under s. 825.1035, F.S.
- Ranks exploitation offenses in level 6 if the value of the loss is \$10,000 or more, but less than \$50,000.
- Ranks exploitation offenses in level 4 if the value of the loss is less than \$10,000.

- B. **Amendments:**

None.