

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 and Tourism Committee

BILL: SB 540

INTRODUCER: Senator Smith

SUBJECT: Secondary Metals Recyclers

DATE: January 6, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Hrdlicka	CM	Pre-meeting
2.			CA	
3.			BC	
4.				
5.				
6.				

I. Summary:

SB 540 revises the timeframe that secondary metals recyclers are required to maintain financial transaction records; limits the liability of secondary metals recyclers for the conversion of motor vehicles to scrap metal under specific circumstances; modifies the acceptable forms of payment a secondary metals recycler can receive when purchasing restricted regulated metals and other regulated metals; as well as imposes enhanced ownership verification requirements.

Furthermore, this bill provides that the regulation of regulated metals property is preempted to the state except as otherwise provided. Additionally, this bill states that proof of compliance with the requirements stipulated in part II of ch. 538, F.S., gives rise to an inference that the secondary metals recycler did not know, or have reason to know, that the property was stolen and did not have intent to commit theft or deal in stolen property.

This bill amends ss. 538.18, 538.19, 538.235, 538.26, 812.022, and 319.30, F.S.

This bill creates ss. 538.27 and 538.28, F.S.

II. Present Situation:

Secondary Metals Recycler

Part II of ch. 538, F.S., addresses the regulation of secondary metals recyclers¹ and purchase transactions² involving “regulated metals property.”³ With the economic recession, the value of metals has risen significantly, prompting an increase in metal theft crimes statewide. Law enforcement agencies have testified before county commission boards as to the negative consequences that increased criminal activity relating to the theft of secondary metals and secondary metal products has had on their respective jurisdictions.⁴

Additionally, the unlawful removing of metal from private property and government structures has caused economic loss for both the private and public sectors.⁵ In an issue paper published by the National Conference of State Legislatures it was noted that “stealing copper and other metals from utilities can cause electric outages and [that] expensive repairs impact ratepayers.” “The Department of Energy estimates that a theft of just \$100 in copper wire can cost the utility more than \$5,000 to repair.”⁶ In Miami Dade County alone, “since 2009, the County’s Public Works Department has spent thousands of dollars to repair or replace vandalized light poles.”⁷ Furthermore, with the influx of the number of foreclosures, metal theft has become common in unoccupied properties, which has impeded the ability of property owners, banks, and mortgage holders to sell both residential and commercial properties.⁸

In 2008, the Legislature revised part II of ch. 538, F.S., considerably. The new statutory provisions included increasing the record keeping requirements for purchase transactions by requiring additional seller information to be obtained; providing for enhance penalties for third or subsequent violations of the statute and for providing false verification of ownership or false or altered identification to a secondary metals recycler; prohibiting secondary metals recyclers from entering into cash transactions for over the amount of \$1,000; as well as requiring that all secondary metals recyclers register with the Department of Revenue prior to engaging in business.^{9, 10} In 2009, part II of ch. 538, F.S., was once again amended when s. 538.21, F.S.,

¹ The definition for “secondary metals recyclers” is defined in s. 538.18(8)(a), F.S.

² Section 538.18(6), F.S. (2011) (“Any transaction in which a secondary metals recycler gives consideration for regulated metals property.”).

³ Section 538.18(7) F.S. (2011) (“Any item composed primarily of any nonferrous metals, but shall not include aluminum beverage containers, used beverage containers, or similar beverage containers . . .”).

⁴ See Orange County, Fla. Ordinance 2010-16, pmb1 (Dec. 7, 2010); See also Miami-Dade County, Fla. Ordinance 11-17, pmb1 (April 4, 2011).

⁵ Jacquelyn Pless, *Copper Theft Can Cause Major Outages and Impact Ratepayers: A Hot Issue in 2011* (October 2011), NCSL.org, available at <http://www.ncsl.org/default.aspx?tabid=23720> (last visited December 16, 2011).

⁶ *Id.* (citing U.S. Department of Energy, Office of Electricity Delivery and Energy Reliability, *An Assessment of Copper Wire Thefts from Electric Utilities*, DOE.org, available at <http://www.oe.netl.doe.gov/docs/copper042707.pdf>. (April 2007).

⁷ Miami-Dade County, Fla. Ordinance 11-17, pmb1 (April 4, 2011).

⁸ *Id.*

⁹ Chapter 2008-69, L.O.F. (2008).

¹⁰ In 2008, the number of secondary metals recyclers registered with the Florida Department of Revenue was 278. As of August 2011, that number increased to 769. See, Fla. Dept. of Revenue, *Secondary Dealers and Secondary Metals Recyclers by County* (August 2011), available at http://dor.myflorida.com/dor/taxes/pdf/secondhand_dealers_recyclers.pdf (last visited January 3, 2012).

added a clause whereby all municipal and county ordinances relating to the issuance of hold notices by law enforcement were preempted.¹¹

In light of these changes, county boards of commission have elected to enact more stringent ordinances.¹² Common trends among these ordinances include the following: the creation of a new classification of selected items that are more strictly regulated entitled “restricted regulated metals property”; prohibition of cash payment for any purchase transaction involving a “restricted regulated metals property”; imposition of heightened ownership verification requirements from sellers of “restricted regulated metals property”; as well as requirement that records be maintained for a period of not less than 5 years.¹³

III. Effect of Proposed Changes:

Section 1 amends s. 538.18, F.S., by introducing two new terms, “restricted regulated metals property” and “utility,” for purposes of the secondary metals recycler’s laws. Section 4 of the bill amends s. 538.26(6)(b), F.S., to set forth a list of items that are classified as “restricted regulated metals property.”¹⁴

The term “utility” is defined to mean “a person, firm, corporation, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of gas, electricity, heat, water, oil, sewer service, or telephone, telegraph, radio, or telecommunications services.”

Section 2 amends s. 538.19, F.S., by reducing the time period that a secondary metals recycler is required to maintain information concerning a transaction from 5 to 2 years from the date of purchase. A provision is also added whereby a secondary metals recycler will not be found liable for a seller’s failure to comply with the titling requirements for conversion of a motor vehicle to scrap metal if the secondary metals recycler obtains and maintains a signed statement

¹¹ Chapter 2009-162, L.O.F. (2009) (creating s. 538.21(4), F.S., effective October 1, 2009).

¹² To the committee’s best knowledge, 10 counties have enacted ordinances regulating secondary metals recyclers. They are as follows: Broward, Hillsborough, Lake, Miami-Dade, Orange, Osceola, Sarasota Seminole, Volusia and Washington. On December 13, 2011, Duval County filed Ordinance 2011-766, which would add a new section regulating secondary metals recyclers if approved by the Board of County Commissioners.

¹³ Miami-Dade County, Fla. Ordinance 11-17 (April 4, 2011); Orange County, Fla. Ordinance 2010-16 (Dec. 7, 2010).

¹⁴ Restricted regulated metals property includes the following items: manhole cover; electric light pole or other utility structure and its fixtures, wires, and hardware that are readily identifiable as connected to the utility structure; guard rail; street sign, traffic sign, or traffic sign and its fixtures and hardware; communication, transmission, distribution, and service wire from a utility, including copper or aluminum bus bars, connectors, grounding plates, or grounding wire; funeral marker or funeral vase; historical marker, railroad equipment, including, but not limited to, a tie plate, signal house, control box, switch plate, E-clip, or rail tie junction; any metal item that is observably marked upon reasonable inspection with any form of the name, initials, or logo of a governmental entity, utility company, cemetery, or railroad; copper aluminum or aluminum-copper condensing or evaporator coil, including its tubing or rods, from an air conditioning or heating unit, excluding coils from window air conditioning or heating units and motor vehicle air conditioning or heating units; aluminum or stainless steel container or bottle designed to hold propane for fueling forklifts; stainless steel beer keg; catalytic converter or any nonferrous part of a catalytic converter unless purchased as part of a motor vehicle; metallic wire that has been burned in whole or in part to remove insulation; a brass or bronze commercial valve or fitting, referred to as a “fire department connection and control valve” or an “FDC valve,” which is commonly used on structures for access to water for the purpose of extinguishing fires; brass or bronze commercial portable water backflow preventer valve that is commonly used to prevent backflow of potable water from commercial structures into municipal domestic water service system; shopping cart.

from the seller stating that the seller has surrendered the vehicle's certificate of title to the Department of Highway or otherwise complied with the titling requirements provided by law.

Section 3 amends s. 538.235, F.S., by prohibiting cash transactions for the purchase of "regulated metals property" in excess of \$1,000 and for the purchase of any "restricted regulated metals property." When dealing in these transactions, the acceptable forms of payment are as follows: a check issued and payable to the seller or by electronic payment to the seller's bank account or to the bank account of the seller's employer.

Section 4 amends s. 538.26, F.S., by prohibiting a secondary metals recycler from purchasing any "regulated metals property" from a seller who is required to prove ownership under s. 538.19, F.S. A new subparagraph would also be added to enumerate the items that fall under the classification of "restricted regulated metals property."¹⁵

As such, a secondary metals recycler may not purchase any restricted regulated metals property unless the secondary metals recycler obtains reasonable proof that the seller owns the property or is authorized to sell the property on the owner's behalf. If the seller is the owner of the property, reasonable proof is satisfied by presenting a secondary metals recycler with a receipt or bill of sale showing that the seller is the owner. When the seller is an employee, agent, or contractor of the property owner who is authorized to sell the property, reasonable proof is satisfied with a signed letter on the owner's letterhead, dated no later than 90 days before the sale, authorizing the seller to sell the property.

Section 5 creates s. 538.27, F.S., and provides that a secondary metals recycler is not liable for any civil claim of replevin¹⁶ or damages resulting from a purchase transaction of regulated metals property where he or she has complied with the provisions embodied in part II of ch. 538, F.S. Additionally, an inference is created that could be used in future criminal prosecutions for theft or dealing in stolen property involving secondary metals recyclers. Specifically, proof that a purchase transaction for "regulated metals property" by a secondary metals recycler complied with part II of ch. 538, F.S., gives rise to an inference that he or she did not know or have reason to believe that the property was stolen and did not have intent to commit theft or deal in stolen property.

Section 7 amends s. 812.022, F.S., by adding a new subparagraph that creates the inference discussed above in section 5.

Section 6 creates s. 548.28, F.S., and provides that the regulation of purchase transactions involving "regulated metals property" is preempted to the state. As such, an ordinance or regulation adopted by a county or municipality relating to the purchase or sale of regulated metals property or the registration or licensure of secondary metals property is void. An exception to preemption is provided to an ordinance or regulation enacted by a county or

¹⁵ *Id.*

¹⁶ *See* s.78.01 (2011) ("Any person whose personal property is wrongfully detained by any other person or officer may have a writ of replevin to recover said personal property and any damages sustained by reason of the wrongful taking or detention as herein provided. Notice of lis pendens to charge third persons with knowledge of plaintiff's claim on the property may be recorded.").

municipality before March 1, 2011, or any subsequent amendment to such ordinance or regulation.

Section 8 amends s. 319.30, F.S., to correct a cross-reference.

Section 9 provides that the act shall take effect July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Inferences

Section 548.27, F.S., creates an inference¹⁷ to be used in future criminal prosecutions. An inference is a procedural device that allows the trier of fact to draw a specific conclusion, which he or she is free to accept or reject, from the existence of another set of facts. Inferences differ from mandatory presumptions, which require that the trier of fact draw a specific conclusion if it finds the existence of another set of underlying facts to be true.

Under the Due Process Clause of the Fourteenth Amendment,¹⁸ the state is required to prove every element of the case beyond a reasonable doubt.¹⁹ Accordingly, in criminal prosecutions, presumptions will be deemed unconstitutional if they are found to shift the burden of proof away from the state. As written, s. 538.27, F.S., specifically refers to the creation of an inference and not a presumption. Because it is understood that an inference does not shift the burden of proof away from the state, s. 548.27, F.S., as written, would likely satisfy constitutional requirements.²⁰

Preemption

Section 548.28, F.S., provides that the regulation of purchase transactions involving “regulated metals property” is preempted to the state. With respect to conflict of laws, a

¹⁷ Note that inference may also be referred to as “permissive inference.”

¹⁸ U.S. Const. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

¹⁹ *In re Winship*, 397 U.S. 358, 364 (1970).

²⁰ *Marcolini v. State*, 673 So. 2d 3, 5 (Fla. 1996).

local government is prohibited from exercising authority in a manner contradictory with the state constitution or state law.²¹ Preemption takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the Legislature.²² As such, express preemption of a field by the Legislature must be accomplished by clear language stating that intent.²³ As created by this bill, s. 548.28, F.S., would likely accomplish that effect.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The term “stainless steel beer kegs” appears in both the definition of “regulated metals property” and “restricted regulated metals property.” Seeing that the bill imposes heightened requirements on purchase transactions involving “restricted regulated metals property,” the application of the provisions in this bill to “stainless beer kegs,” as presently drafted, may be confusing.

VII. Related Issues:

As created by this bill, an exception to preemption is provided for in section 6, subparagraph 2, which states:

[T]his part does not preempt an ordinance or regulation originally enacted by a county or municipality before March 1, 2011, or any subsequent amendment to such ordinance or regulation.

As currently written, the effect of this language would be to immune pre-March 1, 2011 ordinances and any subsequent amendments to such ordinances from preemption. However, it should be noted that an unintended consequence of this language could lead to the existence of pre-March 1, 2011 ordinances²⁴ and subsequent amendments to such

²¹ FLA. CONST. art. VIII, sec. 1; *See also* ch. 166, F.S. (2011).

²² *Phantom of Brevard, Inc. v. Brevard*, 3 So. 3d 309, 314 (Fla. 2008).

²³ *Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 1996).

²⁴ To the committee’s best knowledge, 3 counties have ordinances that would fall below the requirements of part II of ch. 538.F.S., as amended by this bill. They are as follows: Osceola, Washington, and Volusia.

ordinances that fall below the requirements found in part II of ch. 538, F.S., as amended by this bill.

VIII. Additional Information:

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.

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