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DATE: April 16, 2001

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE
COUNCIL FOR COMPETITIVE COMMERCE
ANALYSIS**

BILL #: HB 531

RELATING TO: Counterfeit Payment Instruments

SPONSOR(S): Representative Gardiner and others

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) BANKING YEAS 7 NAYS 0
 - (2) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 6 NAYS 0
 - (3) COUNCIL FOR COMPETITIVE COMMERCE
 - (4)
 - (5)
-

I. SUMMARY:

Payment instruments are documents used by Florida financial institutions and by the general public to facilitate the transfer of money. This bill creates two new crimes, the manufacture of or arrangement to manufacture "counterfeit" payment instruments and the possession of counterfeit payment instruments. Both crimes are third degree felonies that carry a maximum penalty of five years in prison.

This bill also specifies that the printing of a payment instrument in the name of a person or entity or with the routing number or account number without permission to manufacture or reproduce the instrument is prima facie evidence of intent to defraud.

This bill provides an exception for law enforcement agencies that produce or display counterfeit payment instruments for investigative or educational purposes.

This bill takes effect on October 1, 2001.

This bill has no significant fiscal impact on state government.

There is one amendment by the Committee on Crime Prevention, Corrections, and Safety traveling with the bill. It creates penalties for scanning or encoding someone else's credit card in order to defraud the credit card issuer. See Section IV for details.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|-----------------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Payment Instruments

A "payment instrument" is defined by Florida law to be a "check, draft, warrant, money order, travelers' check" or any other instrument used to facilitate the transfer of money, regardless of negotiability.¹ The primary entities that deal with payment instruments are financial institutions such as banks, credit unions, and savings and loan associations and payment instrument sellers such as convenience stores that sell money orders, check cashing businesses, foreign currency exchange businesses, and funds transmittal organizations.² Retail stores accept payment instruments in the course of sales, though most do not sell them.

Payment Instrument Fraud

According to the Florida Bankers' Association ("FBA"), "non-credit losses" or losses due to fraudulent payment instrument activity total over \$200 Million in Florida alone. Nationwide fraud amounts to over \$1.2 Billion. Counterfeiters can create fake payment instruments by using readily available technology. According to the FBA, by using a computer program, purchased at any office supply center, and check paper stock, a counterfeiter can purchase a small value cashier's or teller's check or a small value money order, scan the check design into the computer program, and with the signature from the original, print out blank versions of the instrument ready to use. Counterfeiters can also gain knowledge surreptitiously of account and routing numbers with a variety of schemes and then using at home check printing software, print legitimate looking checks using an at home printer.

Current Law

¹ Section 560.103(14), F.S.

² To sell payment instruments a business must be either an exempt financial institution or be registered under the Money Transmitter's Code, found in chapter 560 of the Florida Statutes. Section 560.294, F.S., deals with registration of sellers of payment instruments and funds transmittal, and section 560.303, F.S., deals with registration of check cashiers and foreign currency exchangers. Banks, savings and loan associations, and credit unions are exempt from the Money Transmitter's Code. See section 560.104, F.S., for more detail.

Counterfeiters are prosecuted by State Attorneys under Florida's forgery³ laws, Chapter 831, F.S. Florida's forgery laws address, in part, the initial creation of a forged instrument, possession of certain forged notes or bills and the final utterance or passing of a forged instrument.

Creation of a Forged Instrument: As provided in s. 831.01, F.S., a person must have falsely made, altered, forged or counterfeited the fake payment instrument and in doing so, intended to injure or defraud someone.

Utterance of a Forged Instrument: Section 831.02, F.S., to be convicted of uttering a forgery, a counterfeiter must knowingly "utter" or pass as true, an instrument he or she knows to be forged, with the intent to defraud someone. Under s. 831.09, F.S.,

Both forgery crimes described above are third degree felonies and carry a maximum penalty of five years in prison.⁴

Currently under Florida law, no statute deals with carrying or possessing false, counterfeit, or forged payment instruments. For example, if a person goes to a print shop and has checks printed in the name of a bank, that person cannot be charged with a crime unless he or she actually passes or tenders the check as payment with intent to defraud under s. 831.02, F.S.

The Uniform Commercial Code, s. 673.1041(1), F.S., defines a "negotiable instrument" as ". . . an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order." To qualify as a negotiable instrument, a document must contain the following:

- (a) It must be payable to the bearer or to order at the time it is issued or first comes into possession of a holder;
- (b) It must be payable on demand or at a definite time; and
- (c) It must not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.

The term "check" is defined under s. 673.1041(6), F.S., as ". . . a draft, other than a documentary draft, payable on demand and drawn on a bank or a cashier's check or teller's check.

In State v. Haas, 433 So.2d 1343 (Fla. App 5 Dist. 1983), the defendant delivered, to an undercover agent, 102 blank documents simulated to look like cashier's checks of Barnett Bank. The documents did not bear a date, signature, payee or amount. The defendant in this case was charged with bringing into state forged bank bills under s. 831.11, F.S.

³ Section 831.01, F.S., defines forgery as "Whoever falsely makes, alters, forges or counterfeits a public record, or a certificate, return or attestation of any clerk or register of a court, public register, notary public, town clerk or any public officer, in relation to a matter wherein such certificate, return or attestation may be received as a legal proof; or a charter, deed, will, testament, bond, or writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange or promissory note, or an order, acquittance, or discharge for money or other property, or an acceptance of a bill of exchange or promissory note for the payment of money, or any receipt for money, goods or other property, or any passage ticket, pass or other evidence of transportation issued by a common carrier, with intent to injure or defraud any person, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

⁴ Section 775.082(3)(d), F.S.

The Court ruled that these blank cashier's checks did not qualify as checks under the Uniform Commercial Code because they were not signed by the maker and did not contain an unconditional promise to pay to a bearer or order a sum certain in money on demand or at a definite time.

C. EFFECT OF PROPOSED CHANGES:

New crimes are created making the manufacture, arrangement to manufacture, and the possession of a fake or counterfeit payment instrument illegal. Criminalizing these activities will expand the conduct a counterfeiter may be convicted for. Instead of being liable for just the actual creation of the fake document and the passing of the fake document, a counterfeiter will be liable for creating a fake document, arranging to create it, and having it in his or her possession, as well as passing it. The impact on the business sector will be positive by possibly reducing the amount of non-credit losses a financial institution will incur during the year. Private sector impact is positive by possibly reducing the frequency of unauthorized account number use through easier apprehension of counterfeiters. The bill provides for new crimes as follows:

1. Definition of "counterfeiting"

"Counterfeiting" a payment instrument occurs whenever someone manufactures or arranges to manufacture a payment instrument without permission to use a financial institution's routing number, an individual account holder's account number or name, or an organization's account number or name. Counterfeiting also includes manufacturing of any payment instrument with a fictitious name, fictitious routing number, or fictitious account number.

2. Standard for "intent to defraud" defined in the act.

This bill creates a rebuttable presumption that evidence which shows the defendant printed a payment instrument in the name of a person or entity or with the routing number or account number of a person or entity without the permission of the person or entity is evidence *prima facie* (evidence on its face) that the defendant intended to defraud a financial institution.

3. Institution of "manufacturing or arranging to manufacture a counterfeit payment instrument with intent to defraud a financial institution" as a crime.

A person commits this crime when he or she "counterfeits" a payment instrument with the intention of defrauding a financial institution. From the definition of "counterfeit," a person is guilty of this crime by either making or arranging to make a payment instrument. The actual manufacture of the payment instrument itself creates a rebuttable presumption that the alleged counterfeiter created the payment instrument with the required intent to defraud a financial institution. This crime is a third degree felony that will carry a maximum penalty of five years in prison.

4. Institution of "possession of a counterfeit payment instrument" as a crime.

A person will commit this crime solely by having in his or her possession a "counterfeit" payment instrument with the intent to defraud a financial institution. This crime is also a third degree felony that will carry a maximum penalty of five years in prison.

5. Non-applicable to law enforcement.

The act does not apply to law enforcement personnel that manufacture or arrange to manufacture counterfeit payment instruments if they use or display the counterfeit instruments for investigative or educational purposes.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Defines a counterfeit payment instrument; provides that counterfeiting of payment instruments with intent to defraud is unlawful and provides a felony penalty; specifies prima facie evidence of intent to defraud; provides an exception for law enforcement agencies under certain circumstances.

Section 2: Provides an effective date of October 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The financial services industry could see a significant reduction in "non-credit losses" or losses due to fraudulent payment instrument activity that are currently estimated to total over \$200 Million in Florida alone. Nationwide fraud is estimated at over \$1.2 Billion.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority the counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

An amendment was adopted at the March 29, 2001 meeting of the Committee on Crime Prevention, Corrections, and Safety. This amendment creates section 817.265, F.S., to provide penalties for the use of a scanning device or reencoder to defraud. The amendment defines the terms "scanning device," "reencoder," "payment card," and "merchant." The provisions of this amendment establish third degree felony penalties for a person to use a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip of a payment card without the permission of the card's authorized user and with intent to defraud the card user. It also provides a third degree felony penalty for a person to use a reencoder to place information encoded on the magnetic strip of a payment card onto the magnetic strip of a different card without the permission of the authorized user of the card from which the information is being reencoded, and with intent to defraud the authorized user. The amendment establishes second degree felony penalties for subsequent violations. This amendment further provides that violators of this section are subject to the provisions of the Florida Contraband Forfeiture Act, ss. 932.701 – 932.707, F.S.

VII. SIGNATURES:

COMMITTEE ON BANKING:

Prepared by:

Warren A. "Drew" Crawford

Staff Director:

Susan F. Cutchins

AS REVISED BY THE COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:

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