

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 Criminal Justice Committee

BILL: CS/CS/CS/SB 540

INTRODUCER: Criminal Justice Committee; Community Affairs Committee; Commerce and Tourism Committee; and Senator Smith and others

SUBJECT: Secondhand Dealers and Secondary Metals Recyclers

DATE: January 31, 2012 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|-----------------|-----------|---------------|
| 1. | <u>Juliachs</u> | <u>Hrdlicka</u> | <u>CM</u> | Fav/CS |
| 2. | <u>Toman</u> | <u>Yeatman</u> | <u>CA</u> | Fav/CS |
| 3. | <u>Dugger</u> | <u>Cannon</u> | <u>CJ</u> | Fav/CS |
| 4. | _____ | _____ | <u>BC</u> | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

Please see Section VIII. for Additional Information:

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

I. Summary:

The bill regulates both secondhand dealers and secondary metals recyclers; defines the terms appropriate law enforcement official and personal identification card; requires that secondary metals recyclers maintain and daily transmit an electronic record of all the previous day's purchase transactions to the appropriate law enforcement official; revises the timeframe that secondary metals recyclers are required to maintain purchase transaction records; creates the definition of restricted regulated metals property; limits the liability of secondary metals recyclers for the conversion of motor vehicles to scrap metal, as well as in premise liability cases; modifies the acceptable forms of payment and outlines time restrictions relating to purchase transactions of regulated metals property; expands the application of s. 812.145, F.S., to those who assist with the taking of copper and other nonferrous metals; assigns liability for these offenses; and provides that the regulation of regulated metals property is preempted to the state except with respect to ordinances enacted prior to March 1, 2012.

This bill amends sections 538.03, 538.04, 538.18, 319.30, 538.19, 538.235, 538.25, 538.26, 538.23, and 812.145, Florida Statutes. This bill creates section 538.28, Florida Statutes.

II. Present Situation

Secondhand Dealers and Secondary Metals Recyclers

Chapter 538, F.S., addresses in part I the regulation of secondhand dealers¹ and in part II purchase transactions² by secondary metals recyclers³ that involve “regulated metals property.”⁴ With respect to the latter group, the economic recession has seen the value of metals rise 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.⁵

Additionally, the unlawful removing of metal from private property and government structures has caused economic loss for both the private and public sectors.⁶ 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.”⁷ 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.”⁸ 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.⁹

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 enhanced 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.^{10, 11} In 2009, part II of ch. 538, F.S., was once again amended when s. 538.21, F.S.,

¹ The definition for “secondhand dealer” is defined in s. 538.03(1)(a), F.S.

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

³ The definition for “secondary metals recyclers” is defined in s. 538.18(8)(a), F.S.

⁴ Section 538.18(7) F.S. (“Any item composed primarily of any nonferrous metals, but shall not include aluminum beverage containers, used beverage containers, or similar beverage containers . . .”).

⁵ See Orange County, Fla. Ordinance 2010-16, pmb1 (Dec. 7, 2010); See also Miami-Dade County, Fla. Ordinance 11-17, pmb1 (April 4, 2011).

⁶ 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).

⁷ *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).

⁸ Miami-Dade County, Fla. Ordinance 11-17, pmb1 (April 4, 2011).

⁹ *Id.*

¹⁰ Chapter 2008-69, L.O.F.

¹¹ 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*

added a clause whereby all municipal and county ordinances relating to the issuance of hold notices by law enforcement were preempted.¹²

In light of these changes, county boards of commission have elected to enact more stringent ordinances.¹³ 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 a requirement that records be maintained for a period of not less than 5 years.¹⁴

Theft of Copper or Other Nonferrous Metals

Section 812.145, F.S., provides that a person who knowingly and intentionally takes copper or other nonferrous metals from a utility or communications services provider commits a felony of the first degree, punishable as provided in s. 775.082, F.S., s. 775.083, F.S., or s. 775.084, F.S. The statute does not address liability related to such theft.

III. Effect of Proposed Changes:

Section 1 amends s. 538.03, F.S., by requiring that a secondary metals recycler acting as a secondhand dealer must also conform to the requirements for a secondhand dealer pursuant to part I of ch. 538, F.S. Any person purchasing, consigning, or trading secondhand goods at a flea market must also now conform to the requirements found in this chapter.

In addition, “appropriate law enforcement official” is defined as follows: “the sheriff of the county in which a secondhand dealer is located or, if the secondhand dealer is located within a municipality, both the police chief of the municipality and the sheriff; however, the sheriff or police chief may designate as the appropriate law enforcement official for that county or municipality, as applicable, any law enforcement officer working within that respective county or municipality. This paragraph does not limit the authority or duties of the sheriff.”

Section 2 amends s. 538.04, F.S., by revising existing language to conform to modern standards, as well as to the definition of “appropriate law enforcement official” as defined in section 1.

Section 3 amends s. 538.18, F.S., to define the terms “appropriate law enforcement official,” “personal identification card,” “restricted regulated metals,” and “utility.”

“Appropriate law enforcement official” is defined as follows: “the sheriff of the county in which a secondary metals recycler is located or, if the secondary metals recycler is located within a

by County (August 2011), available at http://dor.myflorida.com/dor/taxes/pdf/secondhand_dealers_recyclers.pdf (last visited January 3, 2012).

¹² Chapter 2009-162, L.O.F. (creating s. 538.21(4), F.S., effective October 1, 2009).

¹³ According to the Senate Committee on Commerce and Tourism’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.

¹⁴ Miami-Dade County, Fla. Ordinance 11-17 (April 4, 2011); Orange County, Fla. Ordinance 2010-16 (Dec. 7, 2010).

municipality, the police chief of the municipality in which the secondary metals recycler is located; however, the sheriff or police chief may designate as the appropriate law enforcement official for the county or municipality, as applicable, any law enforcement officer working within that respective county or municipality. This subsection does not limit the authority or duties of the sheriff.”

The definition of “personal identification card” is more specifically defined as “a valid Florida driver license, a Florida identification card issued by the Department of Highway Safety and Motor Vehicles, an equivalent form of identification issued by another state, a passport, or an employment authorization issued by the United States Bureau of Citizenship and Immigration Services that contains an individual’s photograph and current address.”

The bill also defines “restricted regulated metals property.” Specifically, section 7 of the bill amends s. 538.26, F.S., to set forth a list of items that are classified as “restricted regulated metals property.”¹⁵

The term “utility” is defined to mean “a public utility or electric utility as defined in s. 366.02 or 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.”

Finally, the definition of “regulated metals property” is to include stainless steel beer kegs “and items made of ferrous metal obtained from any restricted regulated metals property.”

Section 4 amends s. 319.30, F.S., to correct a cross-reference to the definition of secondary metals recycler.

Section 5 amends s. 538.19, F.S., by requiring that secondary metals recyclers maintain both a paper and electronic record of all purchase transactions. The format for the electronic record must be approved by the Department of Law Enforcement.

¹⁵ 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; brass water meter; storm grate; and brass sprinkler head used in commercial agriculture.

The record for all purchase transactions shall be electronically transmitted to the appropriate law enforcement official no later than 10 a.m. of the business day following the date of the purchase transaction. A person who submits an electronic file to law enforcement is not required to deliver the manuscript documents unless there is an ongoing criminal investigation. In such a case, the secondary metals recycler must make the manuscript documents available within 24 hours from the request. The time period that a secondary metals recycler is required to maintain information concerning purchase transactions is three years.

Additionally, 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 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 6 amends s. 538.235, F.S., by requiring a secondary metals recycler to mail a check for payment to the seller or the seller's employer within three days following a purchase transaction. A check may not be mailed to a post office box. Only in a limited number of cases will the seller be allowed to issue a check to the seller at the time of the purchase transaction.¹⁶

Furthermore, cash transactions for the purchase of "regulated metals property" in excess of \$1,000 and for the purchase of any "restricted regulated metals property" are prohibited. Accordingly, the acceptable forms of payments 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 7 amends s. 538.25, F.S., to state that the Department of Revenue shall only accept secondary metals recycler registration applications from a fixed address. A hotel or motel room, a vehicle, or a post office box are explicitly designated as unacceptable addresses.

Section 8 amends s. 538.26, F.S., by prohibiting the sale of regulated metals property on weekdays before 7 a.m. or after 6 p.m., on Saturdays before 7 a.m. or after 1 p.m., or on Sundays at any place other than the fixed place of business.

This section also prohibits a secondary metals recycler from purchasing regulated metals from a seller who is not using his or her real name; a person younger than 18; or someone under the influence of drugs or alcohol.

¹⁶ The issuance of a check at the time of the purchase transaction is permitted when the seller is one of the following: an organization, corporation, or association registered with the state as a charitable, philanthropic, religious, fraternal, civic, patriotic, social, or school-sponsored organization or association, or is a nonprofit corporation or association; a law enforcement officer acting in an official capacity; a trustee in bankruptcy or an executor, administrator, or receiver who has presented proof of such status to the secondary metals recycler; a public official acting under judicial process or authority who has presented proof of such status to the secondary metals recycler; a sheriff acting under the authority of a court's writ of execution, or by virtue of any process issued by a court, if proof thereof has been presented to the secondary metals recycler; or a manufacturing, industrial, or other commercial vendor that generates regulated materials in the ordinary course of business.

Additionally, this section lists the items considered to be “restricted regulated metals property,” which are subject to heightened ownership verification requirements. Specifically, a secondary metals recycler is prohibited from purchasing any “restricted regulated metals property” unless the seller is the owner. If the seller is the owner of the property, reasonable proof of ownership 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’s 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.

Lastly, the removal of language concerning the failure to pay sales tax owed to the Department of Revenue or have a sales tax registration number streamlines statutory language given that existing provisions under ch. 212, F.S., require secondary metals recyclers to register as dealers and remit such taxes.

Section 9 creates s. 538.28, F.S., and provides that the regulation of purchase transactions involving “regulated metals property” is preempted to the state with the exception of those ordinances enacted prior to March 1, 2012. However, such ordinances or regulations may only be subsequently amended to meet or exceed the requirements found in part II of ch. 538, F.S. Additionally, a local ordinance may not require verification of compliance with federal law, 40 C.F.R. part 82, relating to refrigerant removal in items sold to a secondary metals recycler.

Section 10 amends s. 538.23, F.S., to correct a cross-reference.

Section 11 amends s. 812.145, F.S., by expanding the definition of utility in subsection (1) to mean “a public utility or electric utility as defined in s. 366.02, or a person, firm, cooperative, corporation, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of heat, water, oil, sewer service, telephone or telegraph service, radio, telecommunications, communications, gas, or electricity services.”

A person who knowingly and intentionally “assists with the taking of copper or other nonferrous metals from a utility or communications service provider,” which results in damage to its facilities, commits a violation of subsection (2), which is a felony of the 1st degree.¹⁷

In addition, the newly created subsection (3) provides that a person who is found in a civil action to have illegally taken copper or other nonferrous metals from a utility or communications services provider based upon a conviction for a violation of subsection (2), is liable to the utility or communications services provider for damages in an amount equal to three times the actual damages sustained by the utility or communications services provider due to any personal injury, wrongful death, or property damage caused by the illegal taking of the nonferrous metals, or an amount equal to three times any claim made against the utility or communications services provider for any personal injury, wrongful death, or property damage caused by the malfunction

¹⁷ A felony of the 1st degree is punishable by up to 30 years of imprisonment and a fine of up to \$10,000. See ss. 775.082(3)(b) and 775.083(1)(b), F.S.

of the facilities of the utility or communications services provider resulting from the violation, whichever is greater.

Section 12 creates an undesignated section of law and provides that a secondary metals recycler is not liable to a person who is injured during theft or attempted theft of metal from their property. Furthermore, a secondary metals recycler is not liable for injuries caused by a dangerous condition created as a result of the theft or attempted theft of the owner's property if the owner did not know, or have reason to know, of the dangerous condition.

Section 13 provides that this 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:

Preemption

Section 538.28, F.S., created by this bill provides that the regulation of purchase transactions involving "regulated metals property" is preempted to the state. 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.¹⁸ As such, express preemption of a field by the Legislature must be accomplished by clear language stating that intent.¹⁹ As created by this bill, s. 538.28, F.S., would likely accomplish that effect.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹⁸ *Phantom of Brevard, Inc. v. Brevard*, 3 So. 3d 309, 314 (Fla. 2008).

¹⁹ *Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 1996).

B. Private Sector Impact:

Persons purchasing, consigning, or trading secondhand goods at a flea market will now be subject to the statutory provisions required of secondhand dealers as well as any costs to comply with these provisions.

The bill requires that an electronic record of all the previous day's purchase transactions made by a secondary metals recycler be submitted to the appropriate law enforcement official. As such, secondary metals recyclers may be required to devote financial resources towards obtaining proper electronic devices and additional staffing to comply with the record-keeping requirements.

C. Government Sector Impact:

Law enforcement officials will now be required to implement the statutory provisions related to secondhand dealers for persons purchasing, consigning, or trading secondhand goods at a flea market. Agencies enforcing these provisions will incur additional costs.

The bill requires that an electronic record of all the previous day's purchase transactions made by a secondary metals recycler be submitted to the appropriate law enforcement official. As such, law enforcement agencies may be required to devote financial resources towards obtaining proper electronic devices and additional staffing to comply with the record-keeping requirements.

The Criminal Justice Impact Conference met on January 30, 2012 and found that similar bills, CS/SB 1324 and CS/HB 1323 will have an insignificant impact upon prison beds.

VI. Technical Deficiencies:

None.

VII. Related Issues:

An exception to preemption is provided for in section 8 of the bill which creates s. 538.28(2), F.S., stating:

[T]his part does not preempt an ordinance or regulation originally enacted by a county or municipality before March 1, 2012. Such an ordinance or regulation may subsequently be amended to meet or exceed the requirements of this part.

As currently written, the effect of this language would be to immune pre-March 1, 2012, ordinances from preemption. Accordingly, it should be noted that this language will result in the existence of pre-March 1, 2012, ordinances that fall below the requirements found in part II of ch. 538, F.S., as amended by this bill.²⁰

²⁰ According to Senate Committee on Commerce and Tourism's the best knowledge, three 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.

VIII. Additional Information:

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

CS/CS/CS by Criminal Justice on January 31, 2012:

- Reinstates the current law exemption for any auction business.
- Provides that a local ordinance may not require verification of compliance with federal law relating to refrigerant removal pursuant to 40 C.F.R. part 82.
- Clarifies that the newly created civil treble damages provision applies to a person who has been convicted for illegally taking or assisting in taking copper or other nonferrous metals from a utility or communications services provider.

CS/CS by Community Affairs on January 23, 2012:

- Specifies that the Department of Revenue shall only accept secondary metals recyclers registration applications from a fixed address.
- Prohibits a secondary metals recycler from purchasing regulated metals from a seller: not using his or her real name, a person younger than 18, or someone under the influence of drugs or alcohol.
- Provides that a secondary metals recycler shall make an original transaction form available within 24 hours of a request by law enforcement.
- Expands the definition of “utility” as it relates to the theft of copper and other nonferrous materials.
- Provides that a person who steals copper or other nonferrous materials from a utility or communications services provider is liable for damages equal to three times actual damages or claims sustained by or made against the utility or communications services provider.
- Makes conforming cross references.

CS by Commerce and Tourism on January 9, 2012:

- Regulates both secondary metals recyclers and secondhand dealers.
- Inserts an information-sharing provision that requires all secondary metals recyclers to submit data relating to the previous day’s purchase transactions of regulated metals to law enforcement officials in a format to be determined by the Department of Law Enforcement.
- Requires that records concerning purchase transactions must be maintained for 3 years. In the original bill, the period was reduced from 5 to 2 years.
- Prohibits a secondary metals recycler from issuing a payment at the time of the purchase transaction, but rather requires that payment be performed either by check through mail or electronically. A mailing address to a post office box is not accepted.
- Prohibits the selling of regulated metals property on weekdays before 7 a.m. or after 6 p.m., on Saturdays before 7 a.m. or after 1 p.m., or on Sundays. Moreover, purchases can only take place at a fixed location.

- Inserts the following items into the definition of a restricted regulated metals property: brass water meter, storm grate, and brass sprinkler head used in commercial agriculture.
- Allows for ordinances passed prior to May 1, 2012, to be exempted from preemption, but requires that subsequent amendments to such ordinances meet or exceed the requirements of part II of ch. 538, F.S.
- Provides that a person who knowingly and intentionally “assists with the taking of copper or other nonferrous metals from a utility or communications service provider,” which results in damage to its facilities, commits a felony of the 1st degree.
- Provides that a secondary metals recycler is not liable to a person who is injured during theft or attempted theft of metal property. Furthermore, a secondary metals recycler is not liable for injuries caused by a dangerous condition created as a result of the theft or attempted theft of the owner’s property if the owner did not know, or have reason to know, of the dangerous condition.
- Removes the creation of a statutory inference.

B. Amendments:

None.