

**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.)

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Prepared By: The Professional Staff of the Committee on Criminal Justice

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BILL: SB 766

INTRODUCER: Senator Rodriguez

SUBJECT: Payment Card Offenses

DATE: March 31, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Hrdlicka	CJ	<b>Pre-meeting</b>
2.			ACJ	
3.			AP	

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**I. Summary:**

SB 766 makes it unlawful to knowingly possess, sell, or deliver a scanning device knowingly and with intent to defraud an authorized user of a payment card, the issuer of a payment card, or a merchant. A violation is a third degree felony and is also subject to the Florida Contraband Forfeiture Act.

The bill also:

- Provides that it is prima facie evidence of knowledge and the intent to defraud if the person possessing the scanning device is not a specified official or a person lawfully reporting the scanning device to a specified official;
- Provides that once prima facie of knowledge and the intent to defraud has been established, no additional identification of payment card data, payment card users, payment card issuers, or payment card merchants is required; and
- Expands the current definitions of “reencoder” and “scanning device” to include information encoded on a computer chip or other storage mechanism.

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any of legislation, estimates that the bill will have a “positive insignificant” prison bed impact (an increase of 10 or fewer prison beds).

## II. Present Situation:

### Skimming

The practice of “skimming” involves obtaining private information from someone’s payment card used in an otherwise normal transaction, such as using an ATM.<sup>1</sup> A person engaging in this practice can obtain a victim’s card number in different ways, including photocopying receipts, copying a PIN code, or using an electronic scanning device or reencoder to swipe and store a victim’s payment card numbers or transfer the data or information to another card.<sup>2</sup> Skimming can occur at a restaurant or bar where the skimmer has possession of the victim’s card out of his or her immediate view.<sup>3</sup> Similarly, skimming can also occur at gas stations when a third-party cardreading device is installed either outside or inside a fuel dispenser<sup>4</sup> or other card-swiping terminal.<sup>5</sup>

### Florida Law on Unlawful Use of a Scanning Device or Reencoder

Section 817.625(2), F.S., provides that it a crime to use:

- A scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card without the permission of the authorized user of the payment card and with the intent to defraud the authorized user, the issuer of the authorized user’s payment card, or a merchant.
- A reencoder to place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card without the permission of the authorized user of the payment card from which the information is being reencoded and with the intent to defraud the authorized user, the issuer of the authorized user’s payment card, or a merchant.

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<sup>1</sup> “Taking a Trip to the ATM?” (July 14, 2011), Federal Bureau of Investigation, available at <https://www.fbi.gov/news/stories/atm-skimming> (last visited on March 24, 2017). See also *Arnauta v. State*, 125 So.3d 1028, 1029 (Fla. 4th DCA 2013) (noting, in part, that charges were filed against the defendant after police discovered that the defendant had used an ATM skimming device to withdraw money from customer accounts and after police searched the defendant’s residence, storage units and vehicle, and discovered a multitude of ATM parts, molds, ATM keypads, circuit boards, blank bank credit cards, magnetic strips, and bank card readers/writers).

<sup>2</sup> Feinberg, Ashley, “The Evolution of ATM Skimmers” (August 27, 2014), *Gizmodo*, available at <http://gizmodo.com/the-terrifying-evolution-of-atm-skimmers-1626794130> (last visited on March 24, 2017).

<sup>3</sup> Denny, Dawn, “Cashier Linked to Credit Card Skimming Scam, Police Say” (May 20, 2014), *KXAN*, available at <http://kxan.com/2014/05/20/restaurant-cashier-linked-to-credit-card-skimming-scam-police-say/> (last visited on March 24, 2017).

<sup>4</sup> Jacobson, Susan, “State Finds 103 Credit-Card Skimmers in 3-month Inspection of Gas Pumps” (May 19, 2015), *Orlando Sentinel*, available at <http://www.orlandosentinel.com/business/os-gas-pump-skimmers-20150519-story.html> (last visited on March 24, 2017).

<sup>5</sup> Musil, Steven, “13 Indicted in \$2M Gas Station Card-Skimming Scheme” (January 22, 2014), *CNET*, available at <https://www.cnet.com/news/13-indicted-in-2m-gas-station-card-skimming-scheme/> (last visited on March 24, 2017).

A first violation of s. 817.625(2), F.S., is a third degree felony;<sup>6</sup> a second or subsequent violation of this subsection is a second degree felony.<sup>7</sup> A violation of s. 817.625(2), F.S., is also subject to the Florida Contraband Forfeiture Act (ss. 932.07 – 932.7062, F.S.).<sup>8</sup>

Section 817.625, F.S., provides the following definitions of relevant terms:

- “Scanning device” means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card.
- “Reencoder” means an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different payment card.
- “Payment card” means a credit card, charge card, debit card, or any other card that is issued to an authorized card user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.
- “Merchant” means a person who receives from an authorized user of a payment card, or someone the person believes to be an authorized user, a payment card or information from a payment card, or what the person believes to be a payment card or information from a payment card, as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from the person.<sup>9</sup>

### Permissive Inference

A permissive inference is an evidentiary device. “A permissive inference allows, but does not require, the trier of fact to infer the elemental fact from proof of a basic fact and does not place any burden on the defendant. In this situation, the basic fact may constitute prima facie evidence of the elemental fact.”<sup>10</sup> “Criminal acts declaring one fact prima facie evidence or presumption of another are frequent. Their purpose is not to relieve the [s]tate of the burden of proof but to allow the establishment of a prima facie case.”<sup>11</sup>

The “trier of fact” (jury or judge) must be free to accept or reject the inference and the inference cannot shift the state’s burden of proof to the defendant.<sup>12</sup> The inference “affects the application of the ‘beyond a reasonable doubt’ standard only if, under the facts of the case, there is no

<sup>6</sup> Section 817.625(2)(a), F.S. A third degree felony is punishable by up to 5 years in state prison, a fine of up to \$5,000, or both. Sections 775.082 and 775.083, F.S. This offense is ranked as a Level 4 offense in s. 921.0022(3)(d), F.S., of the Criminal Punishment Code (Code) offense severity ranking chart.

<sup>7</sup> Section 817.625(2)(b), F.S. A second degree felony is punishable by up to 15 years in state prison, a fine of up to \$10,000, or both. Sections 775.082 and 775.083, F.S. This offense is ranked as a Level 5 offense in s. 921.0022(3)(e), F.S.

<sup>8</sup> Section 817.625(2)(b), F.S.

<sup>9</sup> Section 817.625(a) – (d), F.S.

<sup>10</sup> *State v. Rygwelski*, 899 So.2d 498, 501 (Fla. 2d DCA 2005) (citations omitted).

<sup>11</sup> *State v. Kahler*, 232 So.2d 166, 168 (Fla. 170). “Prima facie” is Latin for “at first sight.” *Wex* (legal dictionary), Legal Information Institute, Cornell University Law School, available at [https://www.law.cornell.edu/wex/prima\\_facie](https://www.law.cornell.edu/wex/prima_facie) (last visited on March 24, 2017). “Prima facie may be used as an adjective meaning ‘sufficient to establish a fact or raise a presumption unless disproved or rebutted;’ e.g., prima facie evidence. It may also be used as an adverb meaning ‘on first appearance but subject to further evidence or information;’ e.g., the agreement is prima facie valid.” *Id.* “A prima facie case is the establishment of a legally required rebuttable presumption. It is generally understood as a flexible evidentiary standard that measures the effect of evidence as meeting, or tending to meet, the proponent’s burden of proof on a given issue. In that sense, a prima facie case is a cause of action or defense that is sufficiently established by a party’s evidence to justify a verdict in his or her favor, provided such evidence is not rebutted by the other party.” *Id.*

<sup>12</sup> *State v. Rygwelski*, 899 So.2d at 501.

rational way the trier of fact could make the connection permitted by the inference.”<sup>13</sup> The inference “will be valid so long as, under the facts of the case, the presumed fact ‘more likely than not’ flows from the basic fact and the inference is not the sole basis for a finding of guilt.”<sup>14</sup>

### III. Effect of Proposed Changes:

The bill amends s. 817.625, F.S., to create a new subsection (3) which makes it unlawful to knowingly possess, sell, or deliver a scanning device with intent to defraud an authorized user of a payment card, the issuer of a payment card, or a merchant. A violation of s. 817.625(3), F.S., is a third degree felony<sup>15</sup> and is also subject to the Florida Contraband Forfeiture Act (ss. 932.07 – 932.7062, F.S.).

The bill also creates a permissive inference. For the purposes of s. 817.625(3), F.S., it is prima facie evidence of knowledge and the intent to defraud if the person possessing the scanning device is not:

- A law enforcement officer, an authorized representative of a law enforcement officer, an officer of the Department of Agriculture and Consumer Services, a state attorney, a financial security investigator employed by a merchant or financial institution, or an authorized vendor to any of the aforementioned authorized investigative agencies.
- A person lawfully reporting the scanning device to a law enforcement officer, an officer of the Department of Agriculture and Consumer Services, a state attorney, a financial security investigator employed by a merchant or financial institution, or an authorized vendor to any of the aforementioned authorized investigative agencies.

Once prima facie evidence of knowledge and the intent to defraud has been established, no additional identification of payment card data, payment card users, payment card issuers, or payment card merchants is required.

The bill also expands the current definitions of “reencoder” and “scanning device” to include information encoded on a computer chip or other storage mechanism.

Finally, the bill reenacts ss. 525.07 and 921.0022, F.S., to incorporate the amendments made by the bill to s. 817.635, F.S.

The bill takes effect July 1, 2017.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

<sup>13</sup> *Id.* (citation omitted).

<sup>14</sup> *Id.*, citing *County Court v. Allen*, 442 U.S. 140, 165-167 (1979).

<sup>15</sup> The bill does not rank this offense in s. 921.0022, F.S., the Code offense severity ranking chart, so the offense is assigned a Level 1 ranking pursuant to s. 921.0023, F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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, estimates that the bill will have a “positive insignificant” prison bed impact (an increase of 10 or fewer prison beds).<sup>16</sup>

Per the Department of Corrections (DOC), in FY 2015-2016, there were 10 (adj.)<sup>17</sup> offenders sentenced for fraudulently using a scanning device or reencoder, and 1 (adj.) of these offenders was sentenced to prison (sentence length of 19.0 months and an incarceration rate of 10.0 percent adj. to -12.5 percent unadj.). There were no offenders sentenced for committing this offense a second or subsequent time.

In FY 2015-2016, the incarceration rate for an unranked third degree felony was 9.9 percent.

**VI. Technical Deficiencies:**

**Permissive Inference**

The bill provides that, for the purposes of s. 817.625(3), F.S., it is prima facie evidence of knowledge and the intent to defraud if the person possessing the scanning device is not a specified official or a person lawfully reporting the scanning device to a specified official. However, a scanning device may be legitimately possessed by more people than the bill excludes, such as retailers and common carriers. The bill sponsor may wish to amend or remove

<sup>16</sup> “Narrative Analyses of Adopted Impacts” (updated through March 2, 2017), available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/adoptedimpacts.cfm> (last visited on March 24, 2017). All information in this section of the analysis is from this source.

<sup>17</sup> The abbreviation “adj.” means “adjusted.” The abbreviation “unadj.” means “unadjusted.” Sentencing data from the DOC is incomplete, which means that the numbers the Legislature’s Office of Economic and Demographic Research (EDR) receives are potentially lower than what the actual numbers are. The EDR adjusts these numbers by the percentage of scoresheets received for the applicable fiscal year.

the permissive inference to avoid the unintended possibility of a person in legitimate possession of the device being charged with this offense.

### **Ranking Offenses**

Currently, a first violation of s. 817.625(2), F.S., is a third degree felony. This offense is ranked in Level 4 of the Code offense severity ranking chart in s. 921.0022, F.S. A second or subsequent violation of this subsection is a second degree felony and is ranked in Level 5 of the chart.

The bill creates a new offense in s. 817.625(3), F.S., which is a third degree felony. The third degree felony is unranked in the chart, so it is assigned a Level 1 ranking pursuant to s. 921.0023, F.S. There is no second degree felony offense.

If it is the intent of the bill sponsor to make penalties for a violation of s. 817.625(3), F.S., equivalent to penalties for a violation of s. 817.625(2), F.S., and the Code offense severity ranking chart should be amended so that the rankings of offenses in s. 817.625(3), F.S., are the same as the rankings of offenses in s. 817.625(2), F.S.

### **VII. Related Issues:**

None.

### **VIII. Statutes Affected:**

This bill substantially amends section 817.625 of the Florida Statutes.

This bill also reenacts ss. 525.07 and 921.0022, F.S., to incorporate the amendments made by the bill to s. 817.635, F.S.

### **IX. Additional Information:**

#### **A. Committee Substitute – Statement of Changes:**

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

None.

#### **B. Amendments:**

None.