HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 991 Petroleum Fuel Measuring Devices
SPONSOR(S): Commerce Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Commerce Committee		Thompson	Hamon

SUMMARY ANALYSIS

The Department of Agriculture and Consumer Services (DACS) is responsible for monitoring the accuracy of Florida's gas pumps, scales, price scanners, and other commercial weighing and measuring devices. This includes the responsibility of making sure that retail petroleum fuel measuring devices (measuring devices) used in selling petroleum fuel at retail are working safely and properly. DACS has the authority to issue warning letters, impose administrative fines, or revoke or suspend any registration issued by DACS for violations of the chapter of law governing gasoline and oil inspections.

Recently, local governments have been adopting fuel pump security measures that are more restrictive than the rules established by DACS related to reoccurring issues with skimmers at certain convenience stores.

PCS for HB 991:

- Preempts to the state and DACS the regulation of measuring devices.
- Effective January 1, 2022, requires owners of measuring devices to affix or install onto each measuring device at least two security measures, instead of one.
- Adds additional security measures that can be used by owners to comply with security measure requirements, including, security tape unique to the station, a physical locking mechanism with an access key unique to each station, an alarm to alert the owner or operator if there is an unauthorized opening of the measuring device panel, a daily inspection of each measuring device, and a contactless payment method that does not use a magnetic strip scanning device.
- Limits DACS' authority to impose administrative fines and penalties for violations of measuring device requirements, unless the person who owns the measuring device has failed to install or implement a security measure or placed the measuring device back in service before compliance has been restored.
- Prevents DACS from imposing a fine if noncompliance is the result of damage or alteration after repair by the owner of the security measure, and the owner demonstrates or provides sufficient evidence of such repair.
- Requires DACS, upon discovery of a measuring device without a security measure or with an illegal skimming or filtering device or an altered or damaged security measure, to prohibit further use until the security measure is installed, replaced, or repaired.
- Requires an owner of a measuring device that finds an illegal skimming or filtering device or an altered or damaged security measure to report such to DACS within three business days of the discovery on a form prescribed by DACS.
- Removes the 5-day timeframe within which an owner must take corrective action for a security measure violation, and the authority for DACS to immediately take the measuring device out of service for repeat violations found on the same measuring device.

The PCS may have an insignificant fiscal impact on state and local government.

Except as otherwise provided, the effective date of the bill is July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Petroleum Fuel Measuring Devices

The Division of Consumer Services (Division) within the Department of Agriculture and Consumer Services (DACS) is the state's clearinghouse for consumer complaints, information and protection. The Division regulates various businesses, such as charitable organizations and telemarketers. In addition, the Division protects consumers and businesses from unfair and unsafe business practices across a wide range of industries, including antifreeze, brake fluid, gasoline, liquefied petroleum (LP) gas, pesticides, water vending machines, and weighing and measuring devices.[1]

Chapter 525, F.S., which governs gasoline and oil inspections in the state, makes DACS responsible for monitoring the accuracy of Florida's gas pumps, scales, price scanners, and other commercial weighing and measuring devices to promote a fair and equitable marketplace and protect consumers. This includes the inspection of retail gas stations to ensure that fuel dispensers are working safely and properly.[2]

DACS Inspections

Current law requires DACS to inspect all measuring devices used in selling or distributing petroleum fuel at wholesale and retail, and to affix a sticker to each petroleum measuring device to signify that the device has been inspected and the device owner is responsible for its proper use and maintenance.[3]

Owners or managers of petroleum fuel measuring devices (measuring devices) are responsible for ensuring accurate measurement by the device within certain tolerances defined by the rule. An appropriate security seal must be placed on all measuring devices found to be giving accurate measure within the tolerances defined by DACS so that the metering adjustment cannot be changed without breaking the seal.[4]

A measuring device found to be operating outside the tolerances defined by rule is deemed inaccurate and DACS, at its discretion, must either:

- Give, in writing, the owner or manager of the measuring device a reasonable time to repair the measuring device; or
- Condemn or prohibit further use of the measuring device by using an appropriate security seal to obstruct operation without breaking the seal.[5]

It is unlawful to operate a measuring device that has been condemned or prohibited from further use by DACS, without the written consent from DACS.[6]

It is also unlawful to:

- Install or operate a measuring device in this state which gives short measure.
- Break, cut, or remove any seal applied by DACS to a measuring device or container, unless broken by a DACS registered meter mechanic for repair and adjustment. After repairs and

[1] The Florida Department of Agriculture and Consumer Services, http://www.freshfromflorida.com/Divisions-Offices/Consumer-Services (last visited Jan. 19, 2018).
[2] Department of Agriculture and Consumer Services, Weights and Measures, https://www.fdacs.gov/Business-Services/Weights-and-Measures (last visited Mar. 11, 2021).
[3] S. 525.07(1), F.S.
[4] S. 525.07(3), F.S.
[5] S. 525.07(4), F.S.
[6] S. 525.07(5), F.S.

adjustments are made, the adjusting mechanism must immediately be resealed by the registered meter mechanic with a seal clasp bearing at least the name or initials of the registered mechanic, and the mechanic must immediately notify DACS of this action.[7]

Entities that adjust the accuracy of measuring devices are required to use test measures that have been calibrated with standards traceable to the National Institute of Standards and Technology[8] within one year prior to the date of the adjustment for volumes of less than 500 gallons and within three years before the date of the adjustment for volumes of 500 gallons or more.[9]

Security Measures

Owners or managers of retail measuring devices are required to have affixed or installed onto the device **one** security measure to restrict the unauthorized access of customer payment card[10] information. The security measure must include one or more of the following:

- The placement of pressure-sensitive security tape over the panel opening that leads to the scanning device[11] for the measuring device in a manner that will restrict the unauthorized opening of the panel.
- A device or system that will render the measuring device or the scanning device in the measuring device inoperable if there is an unauthorized opening of the panel.
- A device or system that encrypts the customer payment card information in the scanning device.
- Another security measure approved by DACS.[12]

When a measuring device is found to have no security measure, or with an altered or damaged security measure, DACS is required to send a written notice of noncompliance to the owner or manager. Upon written notice, they are given five calendar days to comply. After the fifth day of noncompliance, DACS is authorized to prohibit further use of the device until a security measure is installed, replaced, or repaired. In addition, DACS is authorized to take the measuring device out of service if repeat violations are found on the same measuring device,[13] and may also seize any skimming device[14] for use as evidence.[15]

DACS is authorized to adopt rules to administer these requirements.[16]

Administrative Fines and Penalties

DACS has the authority to issue warning letters, impose administrative fines, or revoke or suspend any registration issued by the department. In addition to the authority to issue a warning letter, impose an administrative fine in the Class II category, or revoke or suspend any DACS issued registration,

[7] S. 525.07(6) and (7), F.S.
[8] National Institute of Standards and Technology (NIST), *About NIST*, https://www.nist.gov/about-nist (last visited Mar. 1, 2021). The NIST, is a physical sciences laboratory and a non-regulatory agency of the United States Department of Commerce. Its mission is to promote innovation and industrial competitiveness. NIST's activities are organized into laboratory programs that include nanoscale science and technology, engineering, information technology, neutron research, material measurement, and physical measurement. From 1901–1988, the agency was named the National Bureau of Standards.
[9] S. 525.07(9), F.S.
[10] S. 817.625(1)(b), F.S., defines "payment card" as 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.
[11] S. 817.625(1)(d), F.S., defines "scanning device" as a scanner, reader, or any other electronic device that may be used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the computer chip, magnetic strip or stripe, or other storage mechanism of a payment card or from another device that directly reads the information from a payment card. The term does not include a skimming device.
[12] 525.07(10)(a), F.S.
[13] 525.07(10)(b), F.S.
[14] S. 817.625(1)(b), F.S.
[15] *See* s. 525.07(10), F.S.
[16] R. 5J-21.009, F.A.C.

violations are a first degree misdemeanor. DACS is authorized to submit cases for prosecution to the state attorney, and bring an action in circuit court to enjoin the violation.[17]

According to DACS, in calendar year 2020:

- Forty-seven warning letters were issued to device owners who were found to have skimmers for a second time.
- Fifty-six fines were levied against device owners who had previously received a warning letter, but whose devices were again found to be compromised by skimmers.
- There were no revocations or suspensions.
- There were no civil cases brought seeking injunctions.[18]

The Division of Consumer Services adheres to the following process during skimmer enforcement:

- First skimmer detected – Business is notified that a skimmer was located and offered free training on skimmer detection.
- Second skimmer detected (within one year) – Business receives a warning letter including the dates the skimmers were found, along with notice that if they do not put additional safeguards in place, the finding of additional skimmers could result in a penalty.
- Third and subsequent skimmers detected (within one year) – The business is asked to provide information on the changes to their security or pump-monitoring program aimed at reducing the skimmer risk to consumers. If no additional steps were taken, an administrative complaint is issued for violations of law, which may result in a fine.[19]

Card Skimmers

Current law defines a "skimming device" as a self-contained device that is:

- Designed to read and store in the device's internal memory information encoded on the computer chip, magnetic strip or stripe, or other storage mechanism of a payment card or from another device that directly reads the information from a payment card; and
- Incapable of processing the payment card information for the purpose of obtaining, purchasing, or receiving goods, services, money, or anything else of value from a merchant.[20]

According to DACS, card skimmers are small electronic devices illegally installed inside gas pumps that collect information from the magnetic strip on a credit or debit card when it is used during a transaction. They first began to appear in Florida in 2015 and have grown exponentially since.[21]

Initially these devices were attached to card readers on the outside of the gas pump, but now scammers are installing them inside the pump and often employing Bluetooth technology or integrated cell phone components to transmit card and PIN information.[22]

DACS inspects gas pumps at about 9,000 gas stations, truck stops, and marinas each year, and has removed over 3,400 skimmers since 2015. Skimmers can be undetectable to consumers because of their location inside gas pumps, and have a potential for $1 million in fraudulent charges per skimmer.[23]

Local Regulations

The Florida Constitution grants local governments broad home rule authority. Non-charter county governments may exercise those powers of self-government that are provided by general or special

[17] S. 525.16, F.S.
[18] Blair Bodenmiller, Assistant Director of the Division of Consumer Services, Department of Agriculture and Consumer Services, RE: HB 991 Skimmer Bill, (Mar. 4, 2021).
[19] *Id.*
[20] S. 817.625(1)(b), F.S.
[21] Department of Agriculture and Consumer Services, *Card Skimmers*, https://www.fdacs.gov/Consumer-Resources/Scams-and-Fraud/Card-Skimmers (last visited Mar. 11, 2021).
[22] *Id.*
[23] *Id.*

law.[24] Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by vote of the electors.[25] Likewise, municipalities[26] have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform functions, provide services, and exercise any power for municipal purposes, except as otherwise provided by law.[27]

Currently, some local governments have adopted fuel pump security measures that are more restrictive than the rules established by DACS in response to repeated skimming violations of certain convenience stores. For instance, Lee County requires each fuel pump to be equipped with a visible lock, a system that would render the pump inoperable if it is accessed without a security code, or a device that encrypts customer payment card information.[28] Failure to affix an adequate security measure may result in fines of $250 per gas pump for every day that the appropriate devices are not installed.[29] Collier County,[30] Charlotte County,[31] and the Village of Estero[32] also have local fuel pump ordinances.

State Preemption

State preemption precludes a local government from exercising authority in a particular area and requires consistency with the state constitution or state statute.[33] A local government enactment may be found inconsistent with state law if:

- The Legislature has preempted a particular subject area to the state; or
- The local regulation conflicts with a state statute.[34]

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.[35] Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.[36] When local ordinances have been enacted in the face of state preemption, the effect has been to find such ordinances null and void.[37]

Implied preemption is a legal doctrine created to address those situations in which the courts may have been concerned by the legislature's failure to expressly preempt areas, which, for all intents and purposes, seemed dominated by the state. Findings of implied preemption are for a very narrow class of areas in which the state has legislated pervasively.[38]

Effect of the Bill

PCS for HB 991 preempts to the state and DACS the regulation of measuring devices.

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[24] Art. VIII, s. 1(f), Fla. Const.
[25] Art. VIII, s. 1(g), Fla. Const.
[26] A municipality is a local government entity created to perform functions and provide services for the particular benefit of the population within the municipality, in addition to those provided by the county. The term "municipality" may be used interchangeably with the terms "town," "city," and "village."
[27] Art. VIII, s. 2(b), Fla. Const. *See also* s. 166.021(1), F.S.
[28] *See* Lee County, Florida Ordinance No. 19-09.
[29] *Id*.
[30] *See* Collier County, Florida Ordinance No. 18-55.
[31] *See* Charlotte County, Florida Ordinance No. 19-026.
[32] *See* Village of Estero, Ordinance No. 18-25.
[33] James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009), available at https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/.
[34] *Id.*
[35] *See City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008).
[36] *Mulligan*, 934 So. 2d at 1243.
[37] *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami,* 812 So.2d 504 (Fla. 3d DCA 2002).
[38] Wolf and Bolinder, *supra* note 17.

The PCS removes DACS' authority to impose administrative fines and penalties for violations of measuring device requirements, unless the person who owns or operates the measuring device has:

- Failed to install or implement a security measure; or
- Placed the measuring device back in service before compliance has been restored.
    - However, if noncompliance is the result of damage or alteration after repair by the owner or operator of the security measure, and the owner or operator demonstrates or provides sufficient evidence of such repair, the owner or operator may not be fined.

The PCS adds the following additional security measures to the current list of security measures:

- The placement and maintenance of pressure-sensitive custom branded security tape unique to the station in more than one location over the panel opening.
- A physical locking mechanism that requires an access key unique to each station to restrict the unauthorized access of customer payment card information.
- A device or system that will sound an alarm to alert the owner or operator if there is an unauthorized opening of the retail petroleum measuring device panel.
- A daily inspection of each measuring device that includes opening the panels, using an anti-skimmer application that detects wireless based skimmers, and documenting such inspections.
- A device or system that permits customers to use a contactless payment method, such as an electronic contact-free system, tap-and-go system, or mobile cryptographic system, for payment that does not use a magnetic strip scanning device.

Effective January 1, 2022, the PCS requires owners or operators of a measuring device to affix or install onto the measuring device at least two security measures, instead of one. The use and maintenance of two security measures on each measuring device by an owner or operator is deemed to be in compliance with security measure requirements.

The PCS removes:

- The requirement that DACS provide written notice to an owner or operator without a security measure or with an altered or damaged security measure.
- The 5-day timeframe within which an owner or operator must take corrective action for a security measure violation.
- The authority for DACS to immediately take the measuring device out of service for repeat violations found on the same measuring device.

The PCS requires DACS, upon discovery of a measuring device without a security measure or with an illegal skimming or filtering device or an altered or damaged security measure, to prohibit further use until the security measure is installed, replaced, or repaired, and authorizes DACS to take a measuring device that is in violation of the security measure requirements out of service until compliance is restored.

The PCS requires an owner or operator of a measuring device that finds an illegal skimming or filtering device or an altered or damaged security measure to report the illegal device or altered or damaged measure to DACS within three business days of the discovery on a form prescribed by DACS.

B. SECTION DIRECTORY:

Section 1: Amends s. 525.07, F.S., relating to powers and duties of department; inspections; unlawful acts.

Section 2: Amends s. 525.16, F.S., relating to administrative fine; penalties; prosecution of cases by state attorney.

Section 3: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Limiting the ability of the department to issue fines in certain circumstances may have an insignificant fiscal impact on state government.

2. Expenditures:

Requiring the department to take devices out of service and monitoring whether the devices have been repaired prior to being placed by in service may have an insignificant fiscal impact on state government.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Preempting local governments from enacting additional requirements for fuel pump security measures and enforcing such requirements will prevent a local government from imposing and collecting fines from owners and operators of gas stations. The fiscal impact is unknown but could be offset by a reduction in enforcement costs.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCS may provide a more predictable and uniform regulatory framework to owners and operators of gas stations related to fuel pump security measures. The illegal practice of card skimming may be reduced by the statewide enhancement of security measures required by owners of gas stations on measuring devices.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18 of the Florida Constitution may apply because this bill prohibits local governments from regulating measuring devices and collecting fines from non-compliant owners. This may result in a decrease in fines collected. However, an exemption may apply because the fiscal impact is likely to be insignificant since the costs expended regulating and enforcing such measures will also decrease.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.