

Fiscal Note & Local Impact Statement

127th General Assembly of Ohio

Ohio Legislative Service Commission
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BILL: **Sub. S.B. 320** DATE: **December 16, 2008**

STATUS: **As Reported by House Criminal Justice** SPONSOR: **Sen. Seitz**

LOCAL IMPACT STATEMENT REQUIRED: **No — Offsetting revenues**

CONTENTS: **Ohio Corrupt Activity Law, alcohol beverage franchise agreements, and restitution for theft of rented property or services**

State Fiscal Highlights

STATE FUND	FY 2009 – FUTURE YEARS
General Revenue Fund (GRF)	
Revenues	- 0 -
Expenditures	(1) Potential, likely no more than minimal, annual incarceration cost increase; (2) Potential annual increase for Attorney General to investigate additional corrupt activities
Corrupt Activity Investigation and Prosecution Fund (Fund 6290)	
Revenues	Potential annual gain in criminal and civil fines and expense reimbursements
Expenditures	Potential annual increase, commensurate with revenue gain

Note: The state fiscal year is July 1 through June 30. For example, FY 2009 is July 1, 2008 – June 30, 2009.

- **GRF-funded incarceration expenditures.** From LSC fiscal staff's perspective, the bill's effect on the Department of Rehabilitation and Correction (DRC) is likely to be less in terms of additional offenders being sentenced to a prison term and more in terms of prison-bound offenders being sentenced to longer periods of incarceration than might otherwise have been the case under current law and sentencing practices. As the number of offenders that might be affected in this manner would be relatively small, especially in the context of a total inmate population exceeding 51,000, any related increase in DRC's GRF-funded incarceration costs will not likely exceed minimal annually. For the purposes of this fiscal analysis, a minimal increase means an estimated cost of less than \$100,000 per year for the state.
- **Attorney General's Ohio Organized Crime Investigations Commission.** The additional costs that the Commission might incur in assisting local organized crime task forces are uncertain, as variances based on geographic scope, available local resources, and the specific needs of a coordinated plan of action are unknown. That said, the Commission already has the ability under current law to assist local jurisdictions in the investigation and prosecution of organized retail theft as a pattern of corrupt activity.
- **Civil actions.** Certain types of relief, particularly those pertaining to the dissolution of various enterprises or corporations involved in the corrupt activity, require the Attorney General's involvement before the specific relief can be granted by the court. These types of civil actions are very rare because the offenders have few assets remaining in the wake of the criminal forfeiture actions that seize most of the property and cash that



were part of the pattern of organized criminal activity. The Office of the Attorney General is rarely, if ever, part of such civil suits.

- **Corrupt Activity Investigation and Prosecution Fund (Fund 6290).** Fines and expense reimbursements collected pursuant to a court order in criminal and civil corrupt cases prosecuted under the Ohio Corrupt Activities Law are generally deposited in the state treasury to the credit of the Attorney General's existing Corrupt Activity Investigation and Prosecution Fund (Fund 6290). These revenues are used to reimburse those injured by the corrupt activity, as well as the local law enforcement agencies and prosecutors that were part of the investigation and prosecution of the corrupt activity. In actual practice, very little fine or reimbursement revenue is ever collected, and that which is collected generally becomes part of the forfeiture revenue that is ultimately distributed to the prosecutors and law enforcement agencies involved in the investigation and prosecution.

Local Fiscal Highlights

LOCAL GOVERNMENT		FY 2009 – FUTURE YEARS
Counties, Municipalities, and Townships (Corrupt Activity Law)		
Revenues	Potential annual gain in criminal and civil fines and expense reimbursements	
Expenditures	Potential annual increase to investigate, prosecute, and adjudicate additional criminal and civil corrupt activity and/or related forfeiture cases, with costs potentially offset by criminal and civil fines and expense reimbursements	
Courts of Common Pleas (alcohol beverage franchise agreements)		
Revenues	Potential minimal annual gain in filing-related fees	
Expenditures	Potential minimal increase to adjudicate certain franchise agreement disputes	

Note: For most local governments, the fiscal year is the calendar year. The school district fiscal year is July 1 through June 30.

- **Reimbursements.** Fines and expense reimbursements collected pursuant to a court order in criminal and civil corrupt activity cases would be used to reimburse those injured by the corrupt activity, as well as the local law enforcement agencies and prosecutors that were part of the investigation and prosecution of the corrupt activity. Any estimate of the amount of fine and reimbursement revenue that would likely, or even possibly, be collected and redistributed is difficult to calculate at this time given the uncertain number and scope of the organized retail theft cases that might be generated by the bill. That said, historically, very little fine and expense reimbursements revenue is ever collected and redistributed back to local jurisdictions.
- **Criminal and civil forfeiture actions.** As a result of the bill, a local prosecutor may file, and the appropriate local court would then be required to adjudicate, additional criminal and/or civil forfeiture actions. The associated prosecution and adjudication expenses for any affected local jurisdiction are uncertain, but presumably the filing of such actions will be relatively infrequent in comparison to the ongoing and relatively large criminal caseload generated by individuals who commit drug, robbery, sex, burglary, and assault offenses.
- **Alcoholic beverage franchise agreements.** As a result of the bill's alcoholic beverage franchise agreement provisions, additional disputes may be filed for adjudication by courts of common pleas. Such filings may create additional work for the affected courts and generate associated filing fee revenues. However, as the number of such filings in any given court is likely to be extremely small, any related costs and revenues are likely to be no more than minimal annually.

Detailed Fiscal Analysis

For the purposes of this fiscal note, the bill most notably: (1) expands the list of offenses under Ohio Corrupt Activity Law to also include retail theft and (2) specifies the circumstances under which the territories for a particular product or brand of alcoholic beverage may be assigned to another distributor. The bill also permits a court to order restitution for the theft of rented property or rental services.

(1) Ohio Corrupt Activity Law

For the purposes of this analysis, the bill contains the following fiscally notable Corrupt Activity Law provisions:

- Expands the list of offenses that are within the definition of "corrupt activity" to also include engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another to engage in "organized retail theft."
- Defines "organized retail theft" as the theft of retail property with a retail value of \$500 or more from a retail establishment with the intent to sell, deliver, or transfer that property to a retail property fence.
- Clarifies that a "pattern of corrupt activity" involving retail theft is defined as two or more incidents of "corrupt activity" within a six month period that are related to the affairs of the same enterprise, and not so closely related to each other and connected in time and place that they constitute a single event.

The bill does not create any new criminal activity or new cases, as any form of retail theft is currently illegal. In fact, according to experts involved with the Ohio Corrupt Activity Law, current law already provides sufficient tools to effectively handle cases involving organized retail theft. The Ohio Organized Crime Investigations Commission, which is part of the Office of the Ohio Attorney General, has already provided support for three task forces investigating organized retail theft over the past three years.

Comparing theft offenses generally and the bill's organized retail theft prohibitions

Table 1 below visually summarizes the differences between the degrees of the offense of theft under current law and those of the offense of organized retail theft as defined by the bill. Under the bill, a violation of the organized retail theft prohibition constitutes either a felony of the first or second degree, depending on the value of the property stolen. In the matter of theft under current law, the offense contains a wider range of penalties that also vary depending upon the value of the property stolen.

More specifically, a violation involving retail theft that would be a felony of the fourth or fifth degree under current law is elevated by the bill to a felony of the second degree if the violation constituted a pattern of corrupt activity. If at least one of the incidents of corrupt activity (retail theft) were a felony of the first, second, or third degree under current Theft Law,

then engaging in a pattern of corrupt activity, under the terms of the bill, constitutes a felony of the first degree.

Generally, most of the criminal conduct where the circumstances present would constitute organized retail theft under the bill will increase the degree of the offense to a felony of the first or second degree, the penalties for which include presumed definite prison terms of three to ten years and two to eight years, respectively.

Table 1 Comparing Current Law's Theft Offenses Generally and Bill's Organized Retail Theft Prohibitions			
Type of Offense	Value of Property Stolen	Offense under Current Theft Law	Organized Retail Theft under Bill's Corrupt Activity Law Prohibitions
Petty Theft	Less than \$500	Misdemeanor 1st degree	N/A
Theft	\$500 or more and less than \$5,000	Felony 5th degree	Felony 2nd degree
Grand Theft	\$5,000 or more and less than \$100,000	Felony 4th degree	Felony 2nd degree
Aggravated Theft	\$100,000 or more and less than \$500,000	Felony 3rd degree	Felony 1st degree
Aggravated Theft	\$500,000 or more and less than \$1,000,000	Felony 2nd degree	Felony 1st degree
Aggravated Theft	\$1,000,000 or more	Felony 1st degree	Felony 1st degree

State incarceration expenditures

According to the Department of Rehabilitation and Correction (DRC), there are currently around 400 offenders incarcerated for violations of the Ohio Corrupt Activity Law. Most of these involve drug-related activities, and the average time served for this offense category is 3.86 years. There do not appear to be many offenders currently serving time for organized retail theft offenses investigated and prosecuted under the existing Corrupt Activity Law.

From LSC fiscal staff's perspective, the bill's effect on DRC is likely to be less in terms of additional offenders being sentenced to a prison term and more in terms of prison-bound offenders being sentenced to longer periods of incarceration than might otherwise have been the case under current law and sentencing practices. As the number of offenders that might be affected in this manner would be relatively small, especially in the context of a total inmate population exceeding 51,000, any related increase in DRC's GRF-funded incarceration costs will not likely exceed minimal annually. For the purposes of this fiscal analysis, a minimal increase means an estimated cost of less than \$100,000 per year for the state.

To put that \$100,000 cost threshold in perspective, DRC's average annual incarceration cost per inmate (fixed plus marginal expenses) is, as of December 2008, budgeted at \$24,590. LSC fiscal staff estimates DRC's marginal cost of adding an additional individual to the prison system at between \$3,500 and \$4,000 per year. Thus, depending upon whether one works from the full versus marginal cost figure, it could take as few as four additional individuals being sentenced to a prison term of at least one year (\$24,590 average annual incarceration cost per

inmate times four prison-bound offenders), or as many as two dozen or so individuals being sentenced to a prison term of at least one year (\$3,500 to \$4,000 marginal annual incarceration cost per inmate times 25 to 29 prison-bound offenders) to increase DRC's incarceration costs by more than \$100,000 per year.

Office of the Ohio Attorney General

Task forces. The Attorney General's Ohio Organized Crime Investigations Commission is generally involved at several stages of cases involving the Ohio Corrupt Activity Law. At the investigation phase, the Commission authorizes the formation of an organized crime task force to assist local law enforcement agencies that perform the actual investigation and prosecution. The costs associated with the creation of future task forces to deal with organized retail theft are uncertain, as variances based on geographic scope, available local resources, and the specific needs of a coordinated plan of action are unknown. As previously mentioned, the Commission has provided support for three organized retail theft task forces over the past three years.

Fine and other revenues. According to the provisions affecting those convicted of violating the Ohio Corrupt Activity Law, in addition to fines authorized by the general Felony Sentencing Law, the court may impose a fine of up to three times the gross value gained or three times the gross loss caused by the pattern of corrupt activity. The Revised Code specifies that such a fine is paid into the state treasury to the credit of the Attorney General's existing Corrupt Activity Investigation and Prosecution Fund (Fund 6290), which is used to reimburse those injured by the corrupt activity, as well as the local law enforcement agencies and prosecutors that were part of the investigation and prosecution of the corrupt activity.

In actual practice, very little fine revenue is ever collected, and that which is collected generally becomes part of the forfeiture revenue that is ultimately distributed to the prosecutors and law enforcement agencies involved in the investigation and prosecution. The Office of the Attorney General assists in the collection and accounting of forfeiture moneys, and then facilitates the redistribution to the local participants in the task force. The state does not keep a share of this revenue. Of any fine or other court cost revenue collected, 25% is distributed to the local prosecutor(s), and 75% is distributed to the appropriate local law enforcement agencies.

The court may additionally order the offender to pay court costs, and the reasonable expenses incurred by local law enforcement and prosecutors. Any estimate of the amount of fine and reimbursement revenue that would likely, or even possibly, be collected and redistributed is difficult to calculate given the uncertain number and scope of the organized retail theft cases that might be generated by the bill. Historically, very little of this type of revenue is ever collected and redistributed back to local jurisdictions.

Civil actions. The Ohio Corrupt Activity Law also creates the ability of the victims of some corrupt activity to bring civil actions against the individuals involved in the corrupt activities. Certain types of relief, particularly those pertaining to the dissolution of various enterprises or corporations involved in the corrupt activity, require the Attorney General's involvement before the specific relief can be granted by the court. According to the Ohio Organized Crime Investigations Commission, these types of civil actions are very rare because the offenders have few assets remaining in the wake of the criminal forfeiture actions that seize

most of the property and cash that were part of the pattern of organized criminal activity. The Office of the Attorney General is rarely, if ever, part of such civil suits.

Civil penalties. Under the bill, if an individual is not convicted of a violation of the organized retail theft prohibitions as contained in the Ohio Corrupt Activity Law, the prosecuting attorney may institute proceedings against that individual to recover a civil penalty for conduct that the prosecuting attorney proves by clear and convincing evidence is in violation of the prohibition. The civil penalty cannot exceed \$100,000 and must be paid into the state treasury to the credit of the Attorney General's existing Corrupt Activity Investigation and Prosecution Fund. If a civil penalty is imposed, the court is required to order the defendant to pay to the state, municipal, or county law enforcement agencies that handled the investigation and litigation the costs of investigation and litigation that are reasonably incurred. Again, any estimate of the amount of civil penalty revenue that would likely, or even possibly, be collected and redistributed is difficult to calculate given the uncertain number and scope of the organized retail theft cases that might be generated by the bill. Historically, very little revenue from this type of civil penalty is ever collected and redistributed back to local jurisdictions.

Local fiscal effects

Reimbursements. As previously mentioned, the court may impose a separate fine of up to three times the gross value gained or three times the gross loss caused by the pattern of corrupt activity, which are to be used to reimburse those injured by the corrupt activity, as well as the local law enforcement agencies and prosecutor's offices that were part of the investigation and prosecution of the corrupt activity. The court may additionally order the offender to pay court costs, and the reasonable expenses incurred by local law enforcement and prosecutors. Very little of this type of fine or court cost revenue is ever collected, and that which is collected generally becomes part of the forfeiture revenue that is ultimately distributed to the prosecutors and law enforcement agencies involved in the investigation and prosecution.

The Office of the Attorney General assists in the collection and accounting of the forfeiture revenues, and then facilitates the redistribution to the local participants in the task force. The state does not keep a share of this revenue. Of any fine or other court cost revenue collected, 25% is distributed to the local prosecutor(s), and 75% is distributed to the appropriate local law enforcement agencies.

Criminal forfeiture. According to the provisions affecting those convicted of violating the Ohio Corrupt Activity Law, in addition to any other penalty or disposition authorized or required by law, the court is required to order any offender so convicted to criminally forfeit any personal or real property in which that offender has an interest and that was somehow utilized in, or derived from, the pattern of corrupt activity. Many local jurisdictions are currently very aggressive in using forfeiture provisions as part of the task force activities under the Ohio Corrupt Activity Law. This would already include cases involving organized retail theft under current law.

The bill may or may not produce some increase in the number of forfeiture actions brought before the court in cases where organized retail theft is found to constitute a pattern of corrupt activity. It is difficult to determine the precise magnitude of any such increase, or ascribe a specific cost to such potential increases in courtroom-related activities. Prosecutors and local

law enforcement agencies may also realize some additional gain in revenues and/or other property resulting from successful forfeiture actions stemming from the bill.

Civil actions. The Ohio Corrupt Activity Law provides that any person who is injured, or threatened with injury as a result of some pattern of corrupt activity may initiate a civil action in an appropriate court to seek relief from the person or persons perpetrating the corrupt activity. Such an outcome would presumably generate local revenues in the form of fees and court costs and require the court to expend some amount of time and effort to adjudicate the matter. LSC fiscal staff's research suggests that the number of additional civil actions likely to be filed in any affected court will be relatively small in the context of that court's total caseload. Assuming this was true, then the annual fiscal effect on local revenues collected and moneys expended will likely be no more than minimal.

(2) Alcoholic beverage franchise agreements

The bill provides that, with respect to a successor manufacturer of alcoholic beverages that acquires all or substantially all of the stock or assets of another manufacturer of alcoholic beverages through merger or acquisition, or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer of alcoholic beverages, the territories for the particular product or brand of alcoholic beverage must not be assigned to another distributor of alcoholic beverages until the successor manufacturer compensates the terminated or nonrenewed distributor of alcoholic beverages for the diminished value of the distributor's business.

The bill further specifies a procedure to determine the diminished value of the distributor's business. This process involves a period (up to 90 days) of negotiation after which either party may bring an action in the court of common pleas of the county in which the distributor's principal place of business is located. Once such an action is filed, the court must determine the diminished value of the distributor's business within 90 days after the action is filed. The decision of the common pleas court is appealable to the court of appeals.

State and local fiscal effects

It would appear that, in cases where the manufacturer and a terminated distributor of alcoholic beverages must determine the diminished value of the distributor's business, and the parties fail to successfully negotiate a settlement, there may be an increase in filings in the courts of common pleas requesting the court to resolve these disputes. Some subset of these cases may be appealed to the court of appeals.

LSC fiscal staff believes the number of such common pleas court filings in any particular county, or appealed to the courts of appeals, would likely be rather small, and any additional expenditures for the courts to adjudicate such matters would not likely exceed minimal in any given jurisdiction. The jurisdictions in which such actions are filed would also presumably collect filing-related revenues, with such revenues likely to be minimal at most, if that.

(3) Theft of tented property or services

The bill also specifies that, in addition to the existing penalties for theft, if the offender committed theft by stealing rented property or rental services, the court may order the offender to make restitution to the victim. This provision does not appear to significantly increase the workload of the courts in the sentencing phase of such theft cases, and carries no readily discernible fiscal effects for either the state or any of its political subdivisions.

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