

Department of Legislative Services  
Maryland General Assembly  
2008 Session

FISCAL AND POLICY NOTE

House Bill 1107 (Delegate Lee, *et al.*)(Task Force to Study Identity Theft)  
Judiciary

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**Identity Fraud - Personal and Business Documents and Cardholder Affidavits -  
Evidence**

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This bill provides that specified personal and business documents are admissible as evidence and presumed to be authentic if the account holder testifies as to their authenticity in any judicial or administrative proceeding. The bill also expands to identity fraud offenses the use of an affidavit by a credit cardholder as evidence in a criminal case or juvenile proceeding.

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**Fiscal Summary**

**State Effect:** The change would not directly affect governmental finances. Potential operational efficiencies for the District Court due to decreased court time needed to admit the evidence affected by the bill and fewer contested hearings.

**Local Effect:** The change would not directly affect local finances. Potential operational efficiencies for circuit courts due to decreased court time needed to admit the evidence affected by the bill and fewer contested hearings.

**Small Business Effect:** None.

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**Analysis**

**Bill Summary:** The following documents are admissible as evidence and presumed to be authentic if the account holder testifies as to their authenticity in any judicial or administrative proceeding:

- personal and business bank records;
- personal and business credit card reports;
- personal and business credit card statements; and
- personal and business credit card notices.

The bill also establishes that in a criminal case or juvenile proceeding involving a violation of the identity fraud law, an affidavit sworn to by a lawful credit cardholder may be introduced as substantive evidence that the credit card number was taken, used, or possessed without the authorization of the credit cardholder.

**Current Law:** Nontestimonial evidence that does not qualify as being self-authenticating cannot be accepted at face value at trial. To be admitted, such evidence must be authenticated through extrinsic evidence. If the evidence is not authenticated, its contents cannot be revealed and it cannot be shown to a jury. Evidence overcomes the authentication hurdle to admissibility if there is extrinsic evidence sufficient to support a finding that the matter in question is what its proponent claims.

One example of authentication is testimony of a witness with knowledge that the offered evidence is what it is claimed to be. With respect to the records affected by the bill, the “witness with knowledge” would be the custodian of the records at the business (*e.g.*, credit reporting agency, bank, etc.), not the account holder.

The following documents do not need to be authenticated to be admitted into evidence:

- domestic public documents under seal;
- domestic public documents not under seal, under certain conditions;
- foreign public documents;
- certified copies of public records;
- official publications;
- newspapers and periodicals;
- trade inscriptions;
- documents accompanied by a certificate of acknowledgment;
- documents designated as self-authenticating under commercial law; and
- certified records of regularly conducted business activity.

### *Certified Records of Regularly Conducted Business Activity*

In general, the original or a duplicate of a record of regularly conducted business activity is considered self-authenticating if a custodian or another qualified individual certifies that the record (1) was made, at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters; (2) is made and kept in the regular course of business; and (3) is made and kept as a regular practice. The proponent of these records must make the intention to offer them as evidence known to the adverse party and make the evidence available for inspection by the adverse party sufficiently in advance for the adverse party to have a fair opportunity to challenge it.

An affidavit sworn to by a lawful credit cardholder may be introduced as substantive evidence that the credit card or credit card number was taken, used, or possessed without the credit cardholder's authorization. This provision applies to a criminal case or juvenile proceeding for the following offenses: (1) credit card theft; (2) credit card counterfeiting; (3) obtaining property by counterfeiting, theft, or misrepresentation; (4) honoring a stolen or counterfeit credit card with the intent to defraud the issuer or the cardholder; (5) completing a credit card or possessing a device to reproduce credit cards without consent; (6) receiving property by stolen counterfeit or misrepresented credit card; (7) publishing the number or code of a telephone credit card; or (8) unauthorized use and disclosure of a credit card or payment device number.

The State must provide at least 10 days notice to the defendant before a proceeding in which the State intends to introduce into evidence an affidavit of a credit card holder under the bill. On written demand of the defendant filed at least five days before the proceeding, the State must require the presence of the affiant as a prosecution witness.

**Background:** The bill is one of the measures recommended by the Task Force to Study Identity Theft. The task force was created by Chapters 241 and 242 of 2005 and extended by Chapters 9 and 10 of 2007. Among other things, the task force was directed to • study the problems associated with identity theft in Maryland, including the adequacy of current Maryland law in deterring identity theft; • consult with relevant State and federal agencies and other experts on identity theft; and • make recommendations regarding possible remedies to identity theft, including statutory changes.

The task force met six times between November 15, 2006 and December 6, 2007 and heard from law enforcement agencies, bank security officers, citizens, credit card companies, and consumer advocates about the prevalence of identity theft and ways in which the crime could be prevented. The task force received several recommendations, particularly from State's Attorneys for reform of the rules of evidence to improve prosecution of identity fraud cases. Testimony provided to the task force indicated that State's Attorneys had a difficult time getting identity fraud victims to come to Maryland

to appear as witnesses especially if the credit card company had provided financial reimbursement. Some cases are relatively low level, in terms of the amount stolen or the possible penalties, making it difficult to justify the effort of guaranteeing the personal appearance of accountholders, who are able to only testify that he or she held the account that was compromised. Because of these difficulties, the State is unable to proceed, but is also unable to get the court to grant a continuance so that evidence can be obtained. As a result, charges are often dropped in identity fraud cases. The task force believes that the use of a witness affidavit will assist with the prosecution of identity theft cases and will create parity with the credit card crimes for which affidavits are already authorized. Even if the defense objects to the affidavit and demands presentation of the witness, a court may be more willing to grant a continuance so that the witness may be produced at a later time.

The Identity Theft Data Clearinghouse, sponsored by the Federal Trade Commission (FTC) and the Consumer Sentinel, a consortium of national and international law enforcement and private security entities, released *Identity Theft Victim Complaint Data* for calendar 2006 (the latest information available). In calendar 2006, FTC received 246,035 identity theft complaints. In calendar 2005, the number of identity theft complaints was 255,613. In Maryland, residents reported 4,656 instances of identity theft in 2006, or 82.9 complaints per 100,000 population, ranking Maryland eleventh in the nation for identity theft. As has been the case for the last several years, the most common type of identity theft was credit card fraud, which comprised 25% of all complaints. The second most prevalent type of identity fraud involved the opening of new accounts for wireless devices, utilities, and the telephone, at 16% of all complaints.

In November 2007, FTC released a national survey, *The 2006 Identity Theft Survey Report*. FTC reports that the survey suggests that 8.5 million U.S. adults discovered that they were victimized by some form of identity theft in calendar 2005.

**State and Local Fiscal Effect:** Changing the criteria for admissibility of these personal and business records would not directly affect State finances. Under the bill, testimony of the custodian of the records affected by this bill will no longer be needed to admit these documents. Testimony by the account holder will be sufficient to authenticate these documents. Therefore, the District Court may experience operational efficiencies due to decreased court time needed to introduce this evidence.

The Administrative Office of the Courts advises that the expenditure savings that could result from admitting a credit cardholder's affidavit as evidence in criminal or juvenile proceedings depends on the vigilance of the State's attorney in making sure that the affidavit is a true attestation of the credit cardholder. To the extent that identity fraud cases result in restitution hearings, the use of affidavits would also substantively establish the crime and decrease the number of contested hearings.

The Office of State's Attorneys advises that the use of credit card affidavits as provided in the bill could result in savings as a State's Attorney would be able to submit the affidavit as evidence, rather than reimbursing the alleged victim (especially if the victim does not live in Maryland) for travel, lodging, and other expenses to make a personal appearance to testify at trial.

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### **Additional Information**

**Prior Introductions:** The bill is similar to HB 407 of 2006, which was given an unfavorable report by the House Judiciary Committee.

**Cross File:** SB 327 (Senator Kelley, *et al.*) (Task Force to Study Identity Theft) – Judicial Proceedings.

**Information Source(s):** Judiciary (Administrative Office of the Courts), Department of Legislative Services

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