

OFFICE OF FISCAL AND PROGRAM REVIEW

Date: February 7, 2012

To: Members, Joint Standing Committee on Taxation

From: Elizabeth Cooper, Legislative Analyst

LD 1764, An Act To Prohibit Computer Software Programs Used To Evade Sales Tax

Summary: This bill prohibits the possession of automated sales suppression devices, which alter the amounts of sales made by a business for the express purpose of illegally withholding or skimming sales taxes paid by customers. For those persons who correct and fully report any previously underreported sales records before September 1, 2012, certain penalties are reduced but other existing financial liabilities are not reduced. The bill also authorizes the Department of Administrative and Financial Services, Bureau of Revenue Services to adopt routine technical rules to implement this interim compliance period. The bill also requires the bureau to report to the joint standing committee in January 2013 and December 2014 on efforts to detect and prevent crimes involving automated sales suppression devices.

Public Hearing:Proponents

- Sponsor explained in his testimony while tax evasion is already illegal in Maine, it is the intent of this bill to prohibit the possession of automated sales suppression devices or “zapper” software a Class C crime. He noted that sections two and three of the bill are intended to help Maine Revenue Services develop the technological and auditing resource needed to detect and control zapper/phantomware theft. However, he acknowledge that legislation may not be needed to accomplish this goal, agreed some changes should be made to the bill and suggested a new title.
- The Maine Restaurant Association testified in favor of the making the possession, sale and use of “zapper” software illegal and suggested an amendment that deletes the emergency preamble and sections 2 and 3 of the bill.

Opposed

There was no testimony in opposition to LD 1764.

NFNA

- Maine Merchants Association and Maine Grocers Association testified “neither for nor against” LD 1655. Maine Merchants Association and Maine Grocers Association indicated that would be supportive of the changes proposed in Maine Restaurant Association amendment, and Maine Merchants Association requested that any rulemaking required be major substantive rather than routine technical.

Additional Information:

- Maine Revenue Services memo – does the Committee want to see AGs office opinion about whether this is already covered by Maine Unfair Trade Practices Act? Does Maine was to solicit input from the Criminal Law Advisory Commission (via Criminal Justice Committee)?

Fiscal Information: The preliminary fiscal impact statement from OFPR was not available at this time this analysis was prepared.

~~**An Act To Prohibit Computer Software Programs Used To Evade Sales Tax**~~

An Act To Reduce High-Tech Tax Evasion and Theft

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, automated sales suppression devices, commonly referred to as "zappers" and "phantom-ware," are used to underreport sales and have enabled fraud and theft from government, from shareholders and business partners and from other state and federal taxpayers; and

~~**Whereas,** the Province of Quebec, on Maine's northern border, has found that in one recent year it lost approximately \$425,000,000 to fraud from zappers and phantom-ware in restaurants alone; and~~

~~**Whereas,** if adjusted for Maine's smaller gross domestic product and lower tax rates, the same degree of undetected tax evasion from Maine's restaurant sector alone would mean the loss of \$50,000,000 annually in sales tax, corporate income tax, personal income tax and related employment taxes; and~~

Whereas, many foreign governments and several states have already acted to reduce and prevent the use of zappers and phantom-ware and their actions have yielded positive results; and

~~**Whereas,** the Department of Administrative and Financial Services, Bureau of Revenue Services presently lacks sufficient technological and auditing resources to detect, document and control zapper and phantom-ware fraud and theft; and~~

~~**Whereas,** the reputations and the fiscal competitiveness of all law-abiding businesses are harmed by the continued existence of this threat; and~~

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 17-A MRSA §909 is enacted to read:

§ 909. Possession of automated sales suppression device

1. A person is guilty of possession of an automated sales suppression device if the person sells, purchases, installs, manufactures, transfers or owns any automated sales suppression device or phantom-ware.

2. Possession of an automated sales suppression device is a Class C crime.

3. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Automated sales suppression device" means a computer software program, which may be stored on magnetic or optical media, accessed through the Internet or accessed through any other means, that is designed or used primarily to falsify the electronic records of an electronic cash register or other point-of-sale system, including, but not limited to, transaction data and transaction reports.

B. "Electronic cash register" means a device that keeps a register or supporting documents through the means of an electronic device or computer system designed to record transaction data for the purpose of computing, compiling or processing retail sales transaction data.

C. "Phantom-ware" means a hidden, preinstalled or installed programming option embedded in the operating system of an electronic cash register or hardwired into the electronic cash register that can be used to create a virtual 2nd cash register or to eliminate or manipulate transaction records, which may or may not be preserved in digital formats, and can represent either the true or the manipulated records of transactions in the electronic cash register.

D. "Transaction data" includes a description of items purchased by a customer; the price for each item; a taxability determination for each item; a segregated tax amount for each taxed item; the amount of cash or credit tendered; the net amount returned to the customer in change; the date and time of the purchase; the name, address and identification number of the vendor; and the receipt or invoice number of the transaction.

E. "Transaction report" means a report that includes, but is not limited to, sales, taxes collected, methods of payment and voided sales at an electronic cash register that is printed on cash register tape at the end of a day or shift or a report that includes every action at an electronic cash register that is stored electronically.

Sec. 2. Interim compliance period. ~~Notwithstanding the Maine Revised Statutes, Title 17-A, section 909 or any other law, a person who corrects and fully reports any previously underreported sales records between the effective date of this Act and September 1, 2012 is not subject to criminal and civil penalties for violating Title 17-A, section 909 in the absence of any audit, investigation or request by the Department of Administrative and Financial Services, Bureau of Revenue Services to correct and fully report previously underreported sales records. Nothing in this section may be construed to restrict a person's liability for taxes and interest due to the State or Federal Government, for restitution to a person's shareholders or business partners or for any other liabilities arising from the underreporting of sales. To qualify for a waiver of penalties under this section, a person must notify the bureau of the person's possession of an automated sales suppression device on or before September 1, 2012 and provide any information requested by the bureau, including but not limited to transaction records, software specifications, encryption keys, passwords and other data. The bureau shall work with the business community to notify potentially affected taxpayers and may adopt rules to implement this section. Rules adopted pursuant to this section are routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A.~~

~~**Sec. 3. Review and report.** The Department of Administrative and Financial Services, Bureau of Revenue Services shall immediately review its audit practices and results with respect to cash intensive businesses and identify steps to improve the bureau's ability to audit those businesses and identify and prevent crimes involving automated sales suppression devices. The bureau shall update the joint standing committee of the Legislature having jurisdiction over taxation matters on these efforts orally in January 2013 and submit to the committee a final, written report by December 2014. The final report must include an estimate of the extent of crimes involving automated sales suppression devices in the State and an update on the efforts of the bureau and of other domestic and international authorities in better identifying and preventing crimes involving automated sales suppression devices.~~

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

SUMMARY

This amendment changes the title of the bill and retains the provision that prohibits the possession of automated sales suppression devices, which alter the amounts of sales made by a business for the express purpose of illegally withholding or skimming sales taxes paid by customers. The amendment removes language from the emergency preamble, but retains the emergency clause so the legislation takes effect when approved. It removes the section of the bill that provided for those who correct and fully report any previously underreported sales records before September 1, 2012, certain penalties are reduced but other existing financial liabilities are not reduced. The amendment removes language from the bill that authorizes the Department of Administrative and Financial Services, Bureau of Revenue Services to adopt routine technical rules to implement this interim compliance period. The amendment removes language that requires the bureau to report to the joint standing committee in January 2013 and December 2014 on efforts to detect and prevent crimes involving automated sales suppression devices.