RENDERING UNTO CAESAR THAT WHICH IS CAESARS'S: STATES RESPOND TO HIGH TECH TAX EVASION WITH NEW CRIMINAL LAWS

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This article examines the use of electronic sales suppressions systems focusing on the restaurant industry. Electronically facilitated tax fraud first garnered attention internationally with a wave of states in the U.S. beginning to criminalize the devices in 2011. A summary of existing state laws highlights what is prohibited in each state along with possible penalties for infractions. Further, utilizing 2015 industry forecasts from the National Restaurant Association, state-by-state projections of both under-reported register sales and corresponding sales taxes are provided. Finally, the implications of these developments and projections are discussed.

KEYWORDS: *electronic sales suppression software, zappers, phantomware, tax fraud, sales tax*

Skimming cash from the till is nothing new. But like much else in modern society, it has gone high tech putting tax collectors and politicians alike in the position of figuring out how to respond. Richard T. Ainsworth, the leading authority in the United States on the use of electronic sales suppression systems to commit tax fraud estimates that "5% of all restaurant industry sales in the United States are zapped from financial records" (Canada Revenue Agency, November 2014). With the National Restaurant Association projecting industry wide sales for 2015 of $709.2 billion (National Restaurant Association, 2015 Restaurant Industry Forecase: Executive Summary, 2015), Ainsworth's estimate suggests that the restaurant industry alone will skim billions of dollars in undeclared revenue in a single year. This has not gone unnoticed by many states that now have or are considering criminalizing the possession and/or use of electronic sales suppression systems.

Skimming Cash is Old School

In the old days, skimming from the till tended to be associated with smaller businesses that handle large amounts of cash, with restaurants being among them. If a customer paid in exact change, that cash might go directly into the owner's pocket – literally. Perhaps more commonly, the business operated with two sets of books. Cash was skimmed off the top with only some of the actual receipts making it into the cash register drawer. The skimmed cash went elsewhere and did not appear in the financial records used for accounting and tax purposes. One set of books was created for the owner that tracked actual receipts. The second set of books represented reduced sales and thereby reduced tax costs. The second set went to the accountant's office. Before the introduction of electronic sales suppressions software, skimming centered on cash transactions simply because they left no independent record that could be used to track them. Generally, detecting this type of tax fraud resulted from physically locating the second set of books, discovering a large and unexplained stash of cash, or identifying unexplained inconsistencies between inventory records and sales records (Ainsworth, Zappers and Phantom-Ware at the FTA: Are They Listening Now?, 2008). As the use of credit cards and other electronic forms of payment became more common, skimming was not as easy as in the past because fewer customers paid in cash. Furthermore, the records associated with electronic forms of payment were problematic. Electronic sales suppression software remedied many of those problems.

Skimming Goes New School

Electronic sales suppression systems (also referred to as electronic sales suppression software) come in two basic forms: zappers and phantomware. They share certain characteristics. Both are used with electronic cash registers (ECRs) to alter sales records at the point of sale (POS); and both include functionality that can alter not only cash transactions but those in which a customer paid using electronic funds such as a credit or debit card (Ainsworth, An American Look at Zappers, 2012). Further, some systems are designed to not only zap sales, but to also "eliminate ("zap") inventory records so that purchases closely match "zapped" sales" (Ainsworth, Zappers and Phantom-Ware at the FTA: Are They Listening Now?, 2008).

Phantomware, as the name suggests, is actually software that is "installed or embedded in the accounting software of the ECR or computerized POS system" (Organization for Economic Co-operation and Development, 2013). Depending on the version employed, phantomware can alter sales data in a variety of ways. Sales data may be deleted for both cash transactions as well as those using credit or debit cards. Individual transactions can be renumbered so the deleted transactions are not obvious. In another variation, sales transactions are neither deleted nor renumbered; instead sales records are altered by removing higher priced menu items and substituting the entries with lower priced menu items (Organization for Economic Co-operation and Development, 2013), (Ainsworth, Zappers and Phantom-Ware at the FTA: Are They Listening Now?, 2008). Zappers possess the same functional capabilities but operate differently. Zapper software is not embedded in the computerized ECR or POS system. Zapper software is stored externally such as on a CD, flash drive, or via the Internet. Users access the software to perform the desired alterations to the sales data and then remove it. Both phantomware and zappers create two sets of books, the altered data that is then used for official accounting and tax purposes as well as the accurate data which is available to the owner(s) and reflects the real financial condition of the business.

Global Problem

Unlike the United States in which sales taxes are collected at the state level and therefore require state enforcement, many other countries collect their version of sales (e.g. VAT) taxes on the national level. Consequently, it is not surprising that the issue of software facilitated tax evasion has received greater attention internationally from a number of countries that experience it as a problem of national proportions. In 2013, the Organization for Economic Co-Operation and Development (OECD) issued a report entitled "Electronic Sales Suppression: A Threat to Tax Revenues" detailing the nature and extent of the problem in addition to offering detection strategies and governmental responses (Organization for Economic Co-operation and Development, 2013). OECD members include: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, the European Commission, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

According to the OECD, when looked at internationally, tax evasion from the use of electronic sales suppression systems yields billions of dollars in lost sales and income tax revenues (Organization for Economic Co-operation and Development, 2013). The OECD report specifically cites the following examples and estimates. Except as noted for Canada, the examples and estimates relate to sales generally and are not restricted to restaurant sales only:

- Canada: Canadian Restaurant and Food Services Association estimates suppressed sales of CAD 2.4 billion in restaurants for 2009 alone.
- Norway: Single case revealed under-reported sales of EUR 7 million.
- Sweden: Over a four year period, audits recovered EUR 150 million.
- South Africa: Single case identified EUR 22 million in expatriated funds.

Other examples can be found in both the U.K. and Australia. In 2007, a tax fraud case out of Liverpool resulted in jail terms of over eleven years for those involved in a scheme that skimmed £5.3 million in cash from the sale of newspapers and auto repair shops (Ainsworth, Zappers: Tax Fraud, Technology and Terrorist Funding, 2008). Similarly, a 2001 Australian case involved a mother and her two sons who, over ten years, skimmed approximately AUD$15 to $17 million from their clothing business resulting in a substantial underpayment of applicable income taxes (Ainsworth, Zappers: Tax Fraud, Technology and Terrorist Funding, 2008).

Few U.S. Cases Litigated

There are three widely publicized cases involving sales suppression in the U.S. The earliest case, *United States of America vs. Leonard and Guthman*, resulted in the 1993 federal tax fraud conviction of Stewart Leonard and Frank Guthman who were found to have skimmed over $17 million from their family owned grocery store over a ten year period (U.S. v. Leonard and Guthman, 1994). In this case, after years of handling the skimming and associated record keeping manually, the store owners enlisted the assistance of one of their employees who was responsible for programming their computer system. He was directed “to write a complex computer program that reduced the store’s sales and financial data by the amount of skimmed cash…” (U.S. v. Leonard and Guthman, 1994).

The second case brought by the Internal Revenue Service involved the husband and wife team of Talal Chahine and Elfat El Aouar who owned a number of Lebanese restaurants in the metropolitan Detroit area. Here, Chahine employed a zapper program to skim more than $20 million in cash resulting in "approximately $6.9 million in evaded federal taxes" (U.S. v. El Aouar, 2007). The skimmed cash was never recovered and is believed to be in Lebanon along with Chahine who evaded U.S. prosecution by leaving the country. In 2007, El Aouar received an 18 (eighteen) month sentence for tax evasion (U.S. v. El Aouar, 2007).

The most recent case involved Tarek Elkafrawi who owned seven I-HOP restaurants located in Ohio and Indiana. Elkafrawi was charged in a fifty-three count criminal indictment that included illegally employing the use of zappers to "generate $1.2 million in unreported income" (U.S. v. Elkafrawi et al, 2012). The cash was used to, among other things, employ over two hundred illegal workers. As a result, Elkafrawi not only under-reported his personal income to both state and federal tax authorities, he also failed to report and pay the following employment related taxes for the two hundred illegal workers:

- State and federal income tax withholding;
- FICA taxes (i.e. social security and medicare);
- State and federal unemployment taxes; and
- Workers compensation insurance.

As a franchisee, Elkafrawi's skimming scheme garnered him further savings on a range of franchise fees that were tied to net income and owed to I-HOP Central (Ainsworth, Zappers & Employment Tax Fraud, 2013). Elkafrawi's financial and other crimes netted him an eight year federal prison term in addition to being ordered to provide financial compensation to some of his victims (Feehan, 2014).

Tax Savings from Sales Suppression

The financial impact of electronic sales suppressions systems takes a variety of forms. Historically, the illegal use of electronic sales suppression systems in the U.S. tended to come to light as the result of a federal income tax audit or investigation (Ainsworth, Zappers: Tax Fraud, Technology and Terrorist Funding, 2008). However, federal income taxes are but one of the range of taxes that go underpaid as the result of this type of tax fraud.

> The impact of a cash skimming fraud is felt throughout a revenue system. The most immediate losses are to consumption tax revenues (VAT or retail sales tax), but skimmed profits are also excluded from business taxes and not included in the personal income taxes of the owners (as distributions or dividends). The cash hoard from a successful skimming operation is almost always used to compensate employees under the table. Tax losses are further realized in the personal income tax of wage-earning employees as well as wage-indexed social security and Medicare premiums. In some cases fraudsters structure above-the-table payments to allow employees to qualify for welfare assistance. (Ainsworth, Zappers & Phantom-Ware: A Global Demand for Tax Fraud Technology, 2008).

Employees may accept cash based or “under-the-table” employment for a range of reasons. In addition to those who want to remain eligible for various categories of public assistance, others may be undocumented workers or in other situations that result in “under-the-table” employment being the best or only option available to them (Ainsworth, Zappers &

Employment Tax Fraud, 2013). As noted earlier, paying employees in this manner also yields savings to employers who do not then pay applicable employment taxes or workers' compensation insurance for such employees.

Finally, as was true in the case of I-HOP franchisee Tarek Elkafrawi discussed earlier, business owners who operate as franchisees stand to garner additional savings by underpaying applicable franchise payments and other fees that are based on the business's net income (Ainsworth, Zappers & Employment Tax Fraud, 2013).

Restaurants and Sales Tax Impact

Given the billions of dollars consumers spend annually in the restaurant industry, the potential impact on reduced sales taxes collected by the states is significant. Table 1 offers state-by-state estimates of unreported restaurant sales and the corresponding under-reporting of applicable sales taxes. The 2015 projected restaurant register sales by state are taken from the National Restaurant Association's industry forecast and are listed in billions of dollars (National Restaurant Association, How Big is the Restaurant Industry in Your State?, 2015). Ainsworth's previously cited estimate that 5% of all restaurant industry sales are zapped is used to project the unreported sales figures which are also listed in billions of dollars (Canada Revenue Agency, November 2014).

Each state's sales tax rate is then applied to its projected under-reported sales to arrive at the state-by-state estimate of under-reported sales taxes. For the purposes of this projection, the sales tax rate used is the base rate from each state. Because many states allow local governments to add a local sales tax in addition to the state rate, it becomes impossible to accurately calculate losses. As pointed out by Ainsworth: "There are over 11,000 retail sales tax jurisdictions in the

U.S. when all the county, city and district taxes are considered" (Ainsworth, Zappers: Tax Fraud, Technology and Terrorist Funding, 2008). Consequently, the estimate of under-reported sales tax collections in Table 1 are conservative. They are reported in millions of dollars. Finally, most states generate the majority of their tax collections from some combination of sales and individual income taxes (Federation of Tax Administrators, State Tax Collection by Source (Percentage of Total), 2014) with sales taxes revenues coming in second only to individual income taxes as a revenue source for states (Ainsworth, An American Look at Zappers, 2012). State-by-state data showing the percentage of each state's total tax collections from sales taxes and individual income taxes is provided.

Table 1

Projected Under-reported Restaurant Sales and Corresponding Under-reported Sales Taxes

State	2015 Projected Restaurant Register Sale (Billions)*	Estimate of Unreported Restaurant Sales 5% of Sales (Billions)**	Sales Tax Rate % ***	Estimate of Under-reported Sales Taxes by Restaurants (Millions)	2014 State Tax Collections Percentage of Total by Source****	
					Sales Tax	Individual Income Taxes
Alabama	$6.8	$0.34	4	$13.60	25.8	34.5
Alaska	$1.4	$0.07	0	$0.00	--	--
Arizona	$11.5	$0.58	5.6	$32.20	45.8	26.5
Arkansas	$3.7	$0.19	6.5	$12.03	35.0	29.1
California	$72.3	$3.62	7.5	$271.13	27.0	49.2
Colorado	$10.2	$0.51	2.9	$14.79	22.3	48.1
Connecticut	$6.4	$0.32	6.35	$20.32	25.0	48.8
Delaware	$1.7	$0.09	0	$0.00	--	32.8
D.C.	$2.8	$0.14	5.75	$8.05	17.8	26.3
Florida	$36.4	$1.82	6	$109.20	60.7	--
Georgia	$17.1	$0.86	4	$34.20	27.5	48.1
Hawaii	$4.0	$0.20	4	$8.00	46.8	28.9
Idaho	$2.1	$0.11	6	$6.30	37.4	36.4
Illinois	$23.0	$1.15	6.25	$71.88	21.7	41.0
Indiana	$9.8	$0.49	7	$34.30	41.6	29.1

Iowa	$3.6	$0.18	6	$10.80	32.1	38.7
Kansas	$4.1	$0.21	6.15	$12.61	40.7	34.2
Kentucky	$6.7	$0.34	6	$20.10	28.2	33.8
Louisiana	$7.3	$0.37	4	$14.60	30.2	28.4
Maine	$2.1	$0.11	5.5	$5.78	31.0	36.8
Maryland	$10.9	$0.55	6	$32.70	22.2	41.1
Massachusetts	$13.8	$0.69	6.25	$43.13	21.9	52.5
Michigan	$13.9	$0.70	6	$41.70	33.9	31.7
Minnesota	$8.7	$0.44	6.875	$29.91	23.5	41.2
Mississippi	$3.6	$0.18	7	$12.60	43.6	22.0
Missouri	$9.6	$0.48	4.225	$20.28	29.2	47.7
Montana	$1.6	$0.08	0	$0.00	--	40.0
Nebraska	$2.6	$0.13	5.5	$7.15	36.2	43.6
Nevada	$6.2	$0.31	6.85	$21.24	53.6	--
New Hampshire	$2.5	$0.13	0	$0.00	--	4.1
New Jersey	$15.0	$0.75	7	$52.50	29.9	40.3
New Mexico	$3.3	$0.17	5.125	$8.46	36.5	22.5
New York	$35.8	$1.79	4	$71.60	16.5	55.8
North Carolina	$16.5	$0.83	4.75	$39.19	25.0	44.4
North Dakota	$0.9	$0.05	5	$2.25	21.6	8.1
Ohio	$18.3	$0.92	5.75	$52.61	37.8	--
Oklahoma	$5.5	$0.28	4.5	$12.38	28.6	32.5
Oregon	$6.9	$0.35	0	$0.00	--	68.7
Pennsylvania	$18.8	$0.94	6	$56.40	27.8	31.6
Rhode Island	$2.0	$0.10	7	$7.00	30.9	36.7
South Carolina	$8.0	$0.40	6	$24.00	37.7	38.3
South Dakota	$1.1	$0.06	4	$2.20	56.9	--
Tennessee	$10.5	$0.53	7	$36.75	52.4	2.0
Texas	$44.5	$2.23	6.25	$139.06	58.5	--
Utah	$3.8	$0.19	5.95	$11.31	28.9	45.8
Vermont	$0.9	$0.05	6	$2.70	12.0	22.8
Virginia	$14.8	$0.74	5.3	$39.22	18.8	57.4
Washington	$11.6	$0.58	6.5	$37.70	60.5	--
West Virginia	$2.3	$0.12	6	$6.90	22.7	32.9
Wisconsin	$7.8	$0.39	5	$19.50	28.2	41.4
Wyoming	$0.9	$0.05	4	$1.8	33.8	--
	Total	**Total**		**Total**	**Average**	
	$535.6 Billion	$26.78 Billion		$1,532.08 Million	31.2%	35.8%

* National Restaurant Association, How Big is the Restaurant Industry in Your State? 2015.
** Canada Revenue Agency, November 2014.
*** Federation of Tax Administrators, State Sales Tax Rates and Food & Drug Exemptions (As of January 1, 2015), 2015.
**** Federation of Tax Administrators, 2014 State Tax Collection by Source (Percentage of Total), 2014.

Table 2 provides the same information for the twenty-three states that, to date, have adopted laws prohibiting electronic sales suppression devices.

Table 2

<u>Projected Under-reported Restaurant Sales and Corresponding Under-reported Sales Taxes for States that Criminalize Electronic Sales Suppression Systems</u>

State	2015 Projected Restaurant Register Sales (Billions)*	Estimate of Unreported Restaurant Sales -- 5% of Sales (Billions)**	Sales Tax Rate % ***	Estimate of Under-reported Sales Taxes by Restaurants (Millions)	2014 State Tax Collections **** -- Percentage of Total by Source	
					Sales Tax	Individual Income Taxes
Arkansas	$3.70	$0.19	6.50	$12.03	35	29.1
California	$72.30	$3.62	7.50	$271.13	27	49.2
Connecticut	$6.40	$0.32	6.35	$20.32	25	48.8
Florida	$36.40	$1.82	6	$109.20	60.7	0
Georgia	$17.10	$0.86	4	$34.20	27.5	48.1
Illinois	$23.00	$1.15	6.25	$71.88	21.7	41
Indiana	$9.80	$0.49	7	$34.30	41.6	29.1
Kentucky	$6.70	$0.34	6	$20.10	28.2	33.8
Louisiana	$7.30	$0.37	4	$14.60	30.2	28.4
Maine	$2.10	$0.11	5.50	$5.78	31	36.8
Michigan	$13.90	$0.70	6	$41.70	33.9	31.7
North Carolina	16.50	$0.83	4.75	$39.19	25	44.4
North Dakota	$0.90	$0.05	5	$2.25	21.6	8.1
Oklahoma	$5.50	$0.28	4.50	$12.38	28.6	32.5
Rhode Island	$2.00	$0.10	7	$7.00	30.9	36.7
Tennessee	$10.50	$0.53	7	$36.75	52.4	2
Texas	$44.50	$2.23	6.25	$139.06	58.5	0
Utah	$3.80	$0.19	5.95	$11.31	28.9	45.8

Vermont	$0.90	$0.05	6	$2.70	12	22.8
Virginia	$14.80	$0.74	5.30	$39.22	18.8	57.4
Washington	$11.60	$0.58	6.50	$37.70	60.5	0
West Virginia	$2.30	$0.12	6	$6.90	22.7	32.9
Wyoming	$0.90	$0.05	4	$1.80	33.8	0
	Total	**Total**		**Total**	**Average**	
	$312.90	$15.65		$971.47	32.8	28.6

* National Restaurant Association, How Big is the Restaurant Industry in Your State? 2015.
** Canada Revenue Agency, November 2014.
*** Federation of Tax Administrators, State Sales Tax Rates and Food & Drug Exemptions (As of January 1, 2015), 2015.
**** Federation of Tax Administrators, 2014 State Tax Collection by Source (Percentage of Total), 2014.

On a national level, the projections in Table 1 yield an underpayment of sales taxes from restaurants alone to be in excess of $1,500 million. Table 2 which looks only at the twenty-three states that criminalize electronic sales suppression systems, the projected underpayment of sales taxes from restaurants alone is over half of the national figure coming in at over $970 million. It is not surprising that among the states with such laws are four that rely heavily on sales taxes due to their lack of a state income tax. These states are: Florida, Texas, Washington, and Wyoming each of which generates over 50% of its state tax revenue from sales tax collections alone.

States Respond

The “Great Recession (2009-2010)” has pushed states to look at a range of solutions to address revenue shortfalls (Ainsworth, An American Look at Zappers, 2012). “The states have … taken note of successful international enforcement efforts against sales suppression … and these developments have *pulled* the states to consider enhancing enforcement measures against suppression frauds” (Ainsworth, An American Look at Zappers, 2012). Georgia became the first state to ban the “sale, purchase, or possession of sales suppression devices” by criminalizing such violations (Georgia Code Section 16-9-62, 2011). As of this writing, twenty-two other states joined them. Table 3 identifies the states that have adopted such laws along as well as the kinds of activities each treats as a violation and the maximum penalty possible for a first violation. As noted, all but two states create a wide range of possible violations including the sale, purchase, installation, possession or use of such devices. Kentucky takes a more generalized approach by prohibiting “knowing possession” of such a device while Virginia does not prohibit mere possession but instead makes it a violation to “willfully utilize” such a device (Kentucky Statute Section 517.130, 2014)..

Given that these violations are categorized as crimes, most states’ laws carry the possibility of a fine or imprisonment or both (in addition to owing all taxes due to the appropriate taxing authorities). Seven of the twenty-three states carry the possibility of as much as a $100,000 fine: Connecticut (Connecticut General Statutes Section 12-428a, 2012), Georgia (Georgia Code Section 16-9-62, 2011), Michigan (Michigan Statute Chapter 750.411w, 2014), Oklahoma (Oklahoma Statutes Chapter 68 Section 212.1, 2012), Tennessee (Tennessee 39-14-704, 2012), Vermont (Vermont 13-2032, 2013), and West Virginia (West Virginia 61-3-22a, 2012). Tennessee is the only state of the twenty-three to carry a fine only; prison is not a possible penalty (Tennessee 39-14-704, 2012). Among all the other states, the possible prison terms range from one to ten years.

Four states adopted other penalty schemes. In Utah, the fine assessed can be as much as double the tax due or five years in prison or both (Utah 76-6-1302, 2012). Virginia imposes a fine of up to $25,000 or one year in prison or both and then in addition, adds a civil fine of $20,000 (Virginia Code 58.1-1814, 2014). Washington state takes the most comprehensive approach. It imposes a fine of up to $10,000 or five years in prison or both (Washington Code 82.32.290(4), 2013). This is coupled with electronic monitoring of the business’s sales for a period of 5 years (at the business's expense) and a mandatory additional fine. This mandatory fine is the greater of $10,000 or the amount of the tax revenue lost by the state as a result of the use of the device. Finally, Oklahoma not only imposes a fine of up to $100,000 or 5 years in prison or both, it also assesses a $10,000 administrative fine and immediate revocation of the business's sales tax permit (Oklahoma Statutes Chapter 68 Section 212.1, 2012).

Table 3

States Laws That Criminalize Electronic Sales Suppression Systems

State	Year of Enactment	Legal Authority	Violations Include ….	Maximum Penalty
Arkansas	2013	A.C.A. §5-37-507	Sell, purchase, install, possess, or use such device	$10,000 or 10 years in prison or both
California	2013	Cal.Rev.&Tax Code §7153.6	Sell, purchase, install, possess, or use such device	$10,000 or 3 years in prison or both
Connecticut	2012	Ct St §12-428a	Sell, purchase, install, possess, or use such device	$100,000 or 5 years in prison or both
Florida	2014	Fl St §213.295	Sell, purchase, install, possess, or use such device	$5,000 or 5 years in prison or both
Georgia	2011	Ga St §16-9-62	Sell, purchase, install, possess, or use such device	$100,000 or 5 years in prison or both
Illinois	2014	Il St Ch 35 §110/15	Sell, purchase, install, possess, or use such device	$25,000 or 5 years in prison or both
Indiana	2014	In St 35-43-5-4.6	Sell, purchase, install, or possess such device	$10,000 or 6 years in prison or both
Kentucky	2014	Ky St §517.130	Knowingly possess such device	$10,000 or 5 years in prison or both
Louisiana	2012	La R.S. 47:1641.1	Sell, purchase, install, or possess such device	$5,000 fine or 5 years in prison or both
Maine	2012	Me St T. 17-A C. 37 §909	Sell, purchase, install, or possess such device	$5,000 fine or 5 years in prison or

				both
Michigan	2014	Mi St 750.411w	Sell, purchase, install, or possess such device	$100,000 fine or 5 years in prison or both
North Carolina	2013	NC St §14-118.7	Sell, purchase, install, or possess such device	$10,000 fine or 25 months in prison or both
North Dakota	2013	ND St 12.1-23-16	Sell, purchase, install, or possess such device	$10,000 fine or 10 years in prison or both
Oklahoma	2012	Ok St T. 68 §212.1	Sell, purchase, install, or possess such device	$100,000 fine or 5 years in prison or both – plus a $10,000 administrative fine and the immediate revocation of business's sales tax permit
Rhode Island	2014	RI St. §44-19-42	Sell, purchase, install, or possess such device	$50,000 fine or 5 years in prison or both
Tennessee	2012	Tn St §39-14-704	Sell, purchase, install, or possess such device	$100,000 fine
Texas	2013	Tx Bus&Com §326.001	Sell, purchase, install, or possess such device	$10,000 fine or 2 years in prison or both
Utah	2012	Ut St §76-6-1302	Sell, purchase, install, or possess such device	Fine of twice the tax due or 5 years in prison or both
Vermont	2013	Vt St T. 13 §2032	Sell, purchase, install, or possess such device	$100,000 fine or 5 years in prison or both
Virginia	2014	Va St §58.1-1814	Willfully utilizes such device	$25,000 fine or 1 year in prison or both -- plus a civil fine of $20,000
Washington	2013	Wa St 82.32.290(4)	Sell, purchase, install, or possess such device	$10,000 fine or 5 years in prison or both – plus electronic monitoring of sales for 5 years – plus mandatory fine that is the greater of $10,000 or revenue

				lost by the state as the result of the use of the device
West Virginia	2012	WV St §61-3-22a	Sell, purchase, install, or possess such device	$100,000 fine or 5 years in prison or both
Wyoming	2013	Wy St §39-15-108(f)	Sell, purchase, install, or possess such device	$5,000 fine or 3 years in prison or both

In addition to these states with existing laws, others such as New York are currently considering the enactment of similar legislation (N.Y. Bill No. S5308-2015: An Act to Amend the Tax Law in Relation to Prohibiting the Use of Automated Sales Suppression Devices, Zappers or Phantom-ware, 2015). This proposed legislation is similar to statutes from other states. Specifically, the New York proposal makes it illegal to "knowingly purchase, possess, install, update, maintain, upgrade, transfer or use any automated sales suppression device, zapper or phantom-ware. It is also an offense to transmit transaction data with the intent of data manipulation for the purpose of evading any taxes under this article" (N.Y. Bill No. S5308-2015:). As a Class E felony, it is punishable by up to four years of probation and fine of up to $25,000 for a first offense with increased fines for subsequent offenses. A separate provision of the bill, also makes it a crime for someone to "knowingly sell" such devices. This offense is a Class E felony as well carrying a punishment of up to four years of probation and a fine of $25,000 *per incident* (N.Y. Bill No. S5308-2015). According to the bill's supporting memo that includes a justification for the bill, the state of New York "loses over $1 billion in tax revenue annually as a result of these devices" being used by businesses (N.Y. Bill No. S5308-2015). This $1 billion dollar loss is comprised of all taxes impacted by the use of the devices (e.g. sales taxes, income taxes and employment taxes). Further justification highlights the results of a sting operation undertaken in New York: "… New York State operated a series of sting operations in which cash register vendors were invited to pitch their equipment to phony restaurants. The results were shocking. In many cases, the vendors offered the phony restaurant opportunities to underpay their taxes using zapper software” (N.Y. Bill No. S5308-2015). News accounts of the sting operations indicate that in four separate sting operations, 80% of the cash register sales representatives offered sales suppression systems as part of the deal (Lemov, 2012).

Implications

On the most basic level, any time a new wave of regulation affects an industry, it is important for those impacted to remain abreast of its developments. The New York sting operations suggest that the use of electronic sales suppression systems is a wide spread problem that is not limited to the restaurant industry but likely permeates any retail sector that employs ECRs.

Understating sales revenues results in the understatement and underpayment of applicable sales, income taxes, and employment taxes. Given that sales and income taxes represent the largest sources of tax revenue in most states, it is to be expected that tax authorities will continue their efforts to further regulate, audit, and pursue such cases in the restaurant industry as well as other retail sectors.

Finally, at this point in time, the restaurant industry is particularly vulnerable should it become widely perceived as routinely failing to accurately report sales and pay its fair share of taxes. As is widely and routinely reported, the economy continues to recover from the Great Recession. In response to that, many state and local governments are considering raising the minimum wage to as high as $15 per hour with the plight of fast food workers in particular often used as the poster child of the cause (Pollin, 2015). As a matter of course, the restaurant industry opposes such increases citing low profit margins of 3-6%, among other reasons (National Restaurant Association, Issue Brief: Minimum Wage, 2015). On a national level, the estimated $26.78 billion in under-reported sales brings these margins into question and suggest that restaurant owners do have some capacity to absorb such increases.

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