

Bill Criminalizing Sales Tax Skimming Software Passed by Florida Legislature—New York Bill Would Do the Same

BY MARVIN KIRSNER

Marvin Kirsner (kirsnerm@gtlaw.com) is a Shareholder in the Boca Raton, FL office of Greenberg Traurig P.A.

Introduction

The sale, possession or use of software designed to eliminate (or “zap”) cash sales from a retailer’s electronic records in order to skim sales tax will be subject to criminal penalties in Florida under a bill passed by the legislature. The New York legislature is considering similar legislation. This is likely the start of a trend as cash strapped states are considering similar criminal penalties. Computer consulting and cloud computing businesses should be very careful not to run afoul of such new laws by merely installing or storing such software. Retail landlords might want to build provisions into their leases to deal with tenants who might be caught using this type of software.

Automated sales suppression devices (“zappers” or “phantom-ware”) are software programs or devices designed to falsify records of cash sales on electronic registers in order to allow the business owner to skim sales taxes—and report reduced sales for income tax purposes. Such software, which electronically creates two sets of books, has been in use for years in countries that impose a value added tax. The use of such software by smaller retailers is growing in the United States.

State Legislation

The Florida legislature is taking aim at such software by making it a third degree felony

to knowingly sell, purchase, possess, install, or use zapper or phantom-ware software. In addition to the criminal penalty, a violator would also be personally liable for the tax, penalties and interest on the skimmed sales, and required to forfeit all profits resulting from such sales.

The New York legislature is considering a bill (S2852A-2011) that, in addition to prohibiting the sale, purchase, installation, possession and use, would also make it illegal to manufacture such software. The staff analysis of the New York bill estimates that \$1.8 billion a year in tax revenue is lost from the restaurant industry alone in the Empire State as a result of this type of software.

Georgia enacted a law last year making zapper and phantom-ware illegal, and the governors of Maine, West Virginia and Utah have recently signed similar bills into law. Other states are considering such legislation as well. The Florida bill, H.B. 7099, passed both chambers with veto-proof majorities, and is headed to Governor Scott’s desk. When the public comes to the realization that they are paying sales tax to retailers who are pocketing the tax, this might cause other legislatures to act as well.

Analysis

Although retailers who comply with sales tax obligations will likely applaud such legislative efforts to create a level playing field, computer

and software consulting businesses might find themselves in trouble because of the wide net cast by these laws, since the mere installation of the software would be subject to criminal penalties. It is possible that some provisions of these laws might ultimately be set aside by the courts if prosecutors go after third party consultants who might not actually be aware of the tax skimming purpose of the software, yet “knowingly” install it on their customer’s system. Cloud computing sites might also have exposure if a customer uses the cloud to operate this type of software, since the sites might “possess” the software on their servers.

Computer consulting firms and cloud computing sites might want to add a provision to their customer

agreements saying that the customer represents that it does not use or possess any automated sales suppression devices or software designed to reduce the actual amount of the customer’s gross sales.

Retail landlords might want to structure leases to give them the option to require a sales audit, and also an additional security deposit in the event a tenant is charged with a violation of a sales tax skimming software law. The additional deposit would provide a fund to pay the percentage rent based on actual sales after the results of the audit are known. The lease might also provide an option to terminate if the tenant is adjudicated guilty of such charges.