

2013 SENATE FINANCE AND TAXATION

SB 2126

2013 SENATE STANDING COMMITTEE MINUTES

Senate Finance and Taxation Committee Lewis and Clark Room, State Capitol

SB 2126
1/22/2013
Job Number 17490

☐ Conference Committee

Committee Clerk Signature

Angela R. Smith

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact section 12.1-23-16 and a new subsection to section 57-39.2-14 of the North Dakota Century Code, relating to the prohibition of automated sales suppression devices; and to provide a penalty.

Minutes:

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Vice Chairman Campbell opened the hearing on SB 2126.

Senator Cook introduced SB 2126.

Vice Chairman Campbell - Isn't it true also that there are a lot of owners and managers encourage this because of tax evasion and so forth?

Senator Cook - I think there are 2 types of people that put these in. I think in a smaller business owner operated there is a strong motive for the owner and of course what he's doing is avoiding income tax, he's got some tax free income going into his pocket, but he's also skimming dollars that are collected from customers that are sales tax dollars that should be distributed to the state and city. I think the other type of person that is motivated to put these in is someone who manages a place for an owner or group of owners. Certainly a good way to enhance his salary. So, the motive exists for both parties and it's certainly a financial motive that is there in this amazing little device.

Senator Burckhard - So the zapper just makes it look like the sale never occurred, nothing? No audit trail, nothing?

Senator Cook - That is the way I understand it.

Emily Thompson, Office of State Tax Commissioner - I am here on behalf of tax commissioner Cory Fong to testify in support of SB 2126. As Senator Cook mentioned they are very creative little devices that do skim very large dollars, cumulatively off of sales tax that should be going to the state or the locals. The bill makes it illegal to use, possess, own, manufacture, or sell these devices. They do come in the 2 forms as mentioned. One, the zapper that they refer to is kind of what you would picture as say a flash drive, and then the phantom-ware that is mentioned in subsection 1C that is something that, you buy the register and the software is preinstalled in the register so it's more of an imbedded device within that machine. Those are kind of the 2 differences. One is something you attach to your machine or access remotely through the internet and one is actually embedded into the device. We are in support of this bill because it does assist in fraud prevention and it also gives the department another tool to enforce sales tax compliance. Again, that large loss in revenue is a concern.

Senator Oehlke - If you find a zapper in a cash register how do you know who put it there?

Emily Thompson - Right now in the bill the offense is for, you can't willfully sell, purchase, possess, install, transfer, manufacture or use. This is a criminal penalty and so there would be some investigating on part of the prosecuting attorney so the register was owned by the business owner and there was no evidence that the employee put that in the liability might attach to the owner. If you can show that the employee purchased or installed this it could attach to the employee.

Senator Oehlke - Can you track that somehow?

Emily Thompson - I would assume that if this was prosecuted they would look to who owned the machine and if there was evidence that this was installed prior to the person purchasing the register. I don't know if the liability would attach to that owner, but right now it's pretty stringent as far as liability you cannot even possess the device. Even if we can't show that you were using it. So very strict liability at this point.

Senator Oehlke - I own a convenient store and you find that one that one of these is on my till and maybe it covers everything from snacks to gasoline, I know I didn't do it, but I know one of my employees did, but all of them say 'not me' do I fire everybody, or what do I do? And a follow up to that would be will my insurance companies bond pay the claim when I can't show that someone else really did it or who did it. They like to have some kind of a trail.

Emily Thompson - I think these would be matters for the prosecuting attorney if say the owner said that this is not my device and thought one of his employees was liable. I'm assuming they would try to pursue some type of fact finding to see if there was any purchase history of that employee or where this zapper originated from or who was using it. As far as the bonding issue, I'm not familiar with that aspect.

Senator Cook - I'm wondering if it wouldn't be wise the question that Senator Oehlke raises, just to reach out, I think there is more than one state that has this law in place now.

Emily Thompson - That's correct I think it is 8 states.

Senator Cook - So there is some history as to what degree that offers a challenge there in finding who the actual person is. My other question goes down here to subsection 6 on the bottom; the person shall forfeit all proceeds associated with the sale or use of an automatic sales suppression device. Would that mean also the profit? Would they have to forfeit that?

Emily Thompson - Correct, what this section is referring to, one, say we had a situation where I'm selling the zapper. I'm charging \$500 that would be the proceeds associated with that device. I would have to forfeit that \$500. On the other hand if I was the owner of a restaurant and I was using this device, and let's say I skimmed off \$500 in sales, that would be my proceeds that I would have to forfeit.

Senator Cook - What if I was the manager of a store and what I actually skimmed off was sales that should have gone to the owner? Does the state then take those sales and keep them or somehow does the owner get that? I can see the state keeping the sales tax that should have come.

Emily Thompson - That's correct, that would be considered proceeds, and that would need to be forfeited to the state.

Senator Cook - So the owner would be out the proceeds.

Vice Chairman Campbell - Typically the paper trail would be if the person set it up to automatically transfer funds into a bank account or a credit card right? So you could just follow that trail or is it always anonymous and at the end of the day they take \$20 out of the till, or is it both?

Emily Thompson - My understanding is that the auto transfer feature, I haven't heard a lot about. It's more having that additional amount that comes out of the till every day. That just kind of gets erased from the paper trail.

Vice Chairman Campbell - So they take the cash out then? No one has ever had it automatically debited to their bank account?

Emily Thompson - Not that I'm aware of, but with technology that is available today I wouldn't past that ability.

Senator Oehlke - If I am an owner of a business and I want to check for these things is there a scan or something I can do kind of like virus scans or something that will pick up on these and give me an alert so I can fix the problem before I'm in trouble?

Emily Thompson - I'm not aware of devices that can scan for these. I know in other countries they have implemented requirements that all registers prior to their sale are not able to be tampered with, kind of tamper proof registers. I believe there is software that prohibits these devices from being installed.

Senator Burckhard - Let's compare it to a new car. A new car has so many features and you don't even know how to use them. What if the owner was to say "I didn't even know I had that feature in my new modern till"? Can you get away with that? Is it easy to know you don't have that feature?

Emily Thompson - Right now under the law if you possess this you carry the liability. I know Senator Cook mentioned in New York they had some stings and when people where purchasing registers it was being pitched to them and so typically the situation isn't inheriting a machine that has this device on it that you weren't aware of. Typically the situation is you seek out the software or it's pitched to you when you buy your register, and it does alter your receipts so unless the owner really was not paying attention to what was coming out of his tills every day, it would be noticeable when he compared it to his inventory versus what was balancing out in receipts.

Senator Cook - You mentioned inventory, I would guess really where you would find these places is somewhere where inventory coming in and going out is hard to measure. The number of shots you can pour out of a quart of brandy fits that description.

Emily Thompson - That is correct. Commonly these are found in cash heavy businesses.

Senator Dotzenrod - Can you put it in there for a few days and let it work and then take it out for a week or 2 and then put it back and take it out again in such a way that it's very hard for someone to get caught?

Emily Thompson - Yes this is, in the case of the zapper, rather than the register with embedded software, the zapper is something you can go on to the internet, you can operate it remotely off site, have it skim every third sale, or sales once every third day, you can program it to operate however you want.

Senator Dotzenrod - Can you give me an example a set of circumstances that could come up that someone would get caught? It seems to me it's going to be real hard to catch people doing this.

Emily Thompson - It is difficult to audit this. Some of the most success states have had are operating through stings, but there are ways that auditors can identify whether or not these zappers are being used. Computer altered records sometimes have signs and symbols that will signal possible tampering, software can also be purchased by auditors that can help identify these little discrepancies and show fraud. Also auditors are typically aware of the type of profit margins some of these businesses should be having and they will notice if there is under reporting. That will kind of raise a red flag.

Senator Dotzenrod - Subsection 4, what is 'used in a legitimate purpose' what would be an example.

Emily Thompson - This section was added for example, law enforcement wants to do a sting and they need to understand what these look like, how they operate, how they function in a machine, if their staff purchased one of these devices and did a seminar that would be a legitimate use, they wouldn't be liable for possessing one. The IRS has also held training seminars for its staff on how to detect fraud for their auditors, which would be another example.

Mike Rud, ND Petroleum Marketers and ND Retail Association - I think on the surface this looks like a pretty good bill. I think it's probably needed. Shrinkage is a big concern in all our businesses especially on the petroleum side. I would go along with Senator Oehlke I guess in wondering about the insurance aspect, if an owner is covered, and then the prosecution side and how do you find the employee that did it, but other than that I think this is a very much needed bill and will stop some things from happening that are probably already happening that we don't even know about.

Vice Chairman Campbell asked for more testimony in support, opposed, and neutral.

Vice Chairman Campbell closed the hearing on SB 2126.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Finance and Taxation Committee Lewis and Clark Room, State Capitol

SB 2126
1/29/2013
Job Number 17913

☐ Conference Committee

Committee Clerk Signature

Angele R. Miller

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact section 12.1-23-16 and a new subsection to section 57-39.2-14 of the North Dakota Century Code, relating to the prohibition of automated sales suppression devices; and to provide a penalty.

Minutes:

Committee Work

Chairman Cook opened discussion on SB 2126.

Senator Dotzenrod - I don't have any notes here that show any hanging issues that we need to get answers on.

Senator Oehlke - I'll move a **Do Pass**.

Seconded by **Senator Dotzenrod**.

(no action taken)

Senator Triplett - The thing that jumps out at me as being an issue is the level of the penalty. The class B felony and class A felony, that is right up there with murder. Do we really think it's of that significance? I think I would have to vote no just on that point.

Chairman Cook - That was the one question that we had with the tax department, was the level of penalty. We need to get someone in the position where the penalty is so high that they start talking about where all these zappers are.

Donnita Wald, Tax Department - Our zapper bill is crafted and based on Georgia's legislation and Georgia had very high penalties up to \$100,000 and we had discussion about what we could do in North Dakota to make our penalties as high.

Senator Oehlke - It says if they willfully sell, purchase, possess, install, transfer, manufacture, own or use. It's not like they can accidentally utilize this stuff to commit a crime.

Discussion on penalties followed.

Senator Triplett - Did the tax department consider attaching civil penalties?

Donnita Wald - There are civil penalties.

Penalty provisions in the bill were then discussed.

Chairman Cook - You find a cash register that has been operating for the last 3 years with one of these devices, you will be able to go back and somehow follow a paper trail that will determine how much that device skimmed?

Donnita Wald - Once we find that, we should be able to determine how many gross receipts he had from that machine, the sales tax, what his income or schedule C or whatever that should have been depending on what kind of business entity, we have good audit staff we will be able to figure that out.

Chairman Cook - Is it necessary with that type of a penalty or potential penalty to have the felony charge?

Donnita Wald - For income tax filers, we are already able to assess people at twice the tax that is due. You would not believe the number of people who are habitual non-filers and we assess them double the tax over and over and over and they still don't file. So doubling the tax, in my mind, that is something we already do and so I don't know, to me it's just consistent with what we do in normal course of business.

Senator Triplett - It seems to me that forfeiting proceeds associated with the sale is not a really big penalty, kind of to be expected, and what you have pointed out in subsection 5, having to come back and pay the sales tax that you would have paid anyway, and you pointed out that doubling it doesn't really work for some people, so I'll ask the question again, did you consider any other kind of a civil penalty? If you are thinking the \$10,000 that is associated with the class A felony maybe isn't enough, this does seem like a white collar kind of crime and maybe a large dollar penalty would be as much or more of an incentive not to do it as additional jail time.

Donnita Wald - We did not. Georgia was all criminal and so we kind of followed using some kind of criminal penalty. Would we object to adding \$100,000 just civil penalty on there, absolutely not. I guess that is a policy decision you will have to make.

Chairman Cook - The senator in Georgia, his argument for the penalty is that it's the jail time that gets them to talk, and that is how you police these things and find out where they are, you find the person selling them, that person is looking at jail time, and to save himself he starts telling where these things are at. That is the motive behind, in his argument for the strict penalty. I remember him emphasizing you have to get their attention with a club to really find out where these things are.

Senator Dotzenrod - You can put in law for the certain violations here that we identify, a penalty that is quite big and then once there's been a judicial process put in place they can negotiate that down? If you start providing information you can take that penalty and reduce that?

Senator Oehlke - Unless it says mandatory, that is a problem for the courts, they don't like mandatory penalties.

Senator Triplett - If we were to amend this by just removing the reference to the second subsequent violation, just leave section 3 to say any person convicted of a violation under subsection 2 is guilty of a class B felony, period, and then add a different subsection that added a substantial civil penalty. Then it would be a class B felony we are talking about instead of class A.

Senator Miller - I would say that once your caught obviously there's going to be some major repay involved in that aspect of things and then you've got a felony on its self which is not good, so I think a class B felony is plenty.

Senator Triplett - I would move to amend section 3 line 16 to put a period after the word felony and delete the rest of lines 16-18.

Seconded by **Senator Miller**.

Senator Dotzenrod - By deleting that then, a repeat offender would stay with the class B felony, we aren't going into class A.

Chairman Cook - We've got a motion to amend, you've all heard the amendment in subsection 3, any other discussion.

Verbal vote on the amendment 5-0-2.

Chairman Cook closed discussion on SB 2126.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Finance and Taxation Committee Lewis and Clark Room, State Capitol

SB 2126
1/30/2013
Job Number 18000

☐ Conference Committee

Committee Clerk Signature

Angele Ritzmiller

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact section 12.1-23-16 and a new subsection to section 57-39.2-14 of the North Dakota Century Code, relating to the prohibition of automated sales suppression devices; and to provide a penalty.

Minutes:

Committee Work

Chairman Cook opened discussion on SB 2126.

Donnita Wald, Tax Department, presented proposed amendments, attachment 1.

Senator Triplett - I will move to reconsider the action by which we formally amended SB 2126.

Seconded by **Senator Miller**.

Verbal vote 7-0-0

Senator Miller moved the amendments.

Seconded by **Senator Burckhard**.

Verbal vote 7-0-0

Senator Miller - I'll move a **Do Pass as Amended**.

Seconded by **Senator Burckhard**.

Roll Call Vote 7-0-0

Carried by **Senator Miller**.

Chairman Cook closed discussion on SB 2126.

13.0418.01001
Title.02000

Adopted by the Finance and Taxation
Committee

January 30, 2013

VK
1/30/13

PROPOSED AMENDMENTS TO SENATE BILL NO. 2126

Page 2, line 16, replace "and" with an underscored period

Page 2, line 17, replace "any" with "Any"

Page 2, line 17, remove "guilty of a"

Page 2, line 18, replace "class A felony" with "subject to a civil penalty of not more than one hundred thousand dollars"

Renumber accordingly

Date: 1-29-13
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2126

Senate Finance & Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Oehlke Seconded By Senator Dotzenrod

Senators	Yes	No	Senator	Yes	No
Chairman Dwight Cook			Senator Jim Dotzenrod		
Vice Chairman Tom Campbell			Senator Connie Triplett		
Senator Joe Miller					
Senator Dave Oehlke					
Senator Randy Burckhard					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

NO vote taken

Date: 1-29-13
Roll Call Vote #: 2

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2126

Senate Finance & Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0418.01001

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Triplett Seconded By Senator Miller

Senators	Yes	No	Senator	Yes	No
Chairman Dwight Cook			Senator Jim Dotzenrod		
Vice Chairman Tom Campbell			Senator Connie Triplett		
Senator Joe Miller					
Senator Dave Oehlke					
Senator Randy Burckhard					

Total (Yes) 5 No 0

Absent 2

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Verbal Vote

Date: 1-30-13
Roll Call Vote #: 3

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2126

Senate Finance & Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☒ Reconsider

Motion Made By Senator Triplett Seconded By Senator Miller

Senators	Yes	No	Senator	Yes	No
Chairman Dwight Cook			Senator Jim Dotzenrod		
Vice Chairman Tom Campbell			Senator Connie Triplett		
Senator Joe Miller					
Senator Dave Oehlke					
Senator Randy Burckhard					

Total (Yes) 7 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Verbal vote to reconsider

Date: 1-30-13
Roll Call Vote #: 4

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2126

Senate Finance & Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0418.01001 Title # 02000

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Miller Seconded By Senator Burckhard

Senators	Yes	No	Senator	Yes	No
Chairman Dwight Cook			Senator Jim Dotzenrod		
Vice Chairman Tom Campbell			Senator Connie Triplett		
Senator Joe Miller					
Senator Dave Oehlke					
Senator Randy Burckhard					

Total (Yes) 7 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Verbal vote

Date: 1-30-13
Roll Call Vote #: 5

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 226

Senate Finance & Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0418.01001 title 02000

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Miller Seconded By Senator Burckhard

Senators	Yes	No	Senator	Yes	No
Chairman Dwight Cook	X		Senator Jim Dotzenrod	X	
Vice Chairman Tom Campbell	X		Senator Connie Triplett	X	
Senator Joe Miller	X				
Senator Dave Oehlke	X				
Senator Randy Burckhard	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Miller

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2126: Finance and Taxation Committee (Sen. Cook, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2126 was placed on the Sixth order on the calendar.

Page 2, line 16, replace "and" with an underscored period

Page 2, line 17, replace "any" with "Any"

Page 2, line 17, remove "guilty of a"

Page 2, line 18, replace "class A felony" with "subject to a civil penalty of not more than one hundred thousand dollars"

Renumber accordingly

2013 HOUSE INDUSTRY, BUSINESS, AND LABOR

SB 2126

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

SB 2126
March 6, 2013
Job 19528

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact section 12.1-23-16 and a new subsection to section 57-39.2-14 of the North Dakota Century Code, relating to the prohibition of automated sales suppression devices; and to provide a penalty.

Minutes:

Attachment 1

Hearing opened.

Dwight Cook, District 34: This is about a device known as a zapper. Zappers automatically skim a till. They also skim the taxes that are then not remitted to the state. The tax department will address the technical questions. Gave example from New York. There is a stiff penalty included in the bill. Around ten states have passed legislation concerning zappers.

2:43 **Chairman Keiser:** Consulted page 2, subsection 3, line 16. Is there a criminal penalty on the second offense?

Senator Cook: I have not checked that out. When the bill was introduced, there had been a tougher penalty for a second offense. The Senate Finance and Tax committee looked at a civil penalty.

3:52 **Chairman Keiser:** Commented on fine compared to potential amounts which could be skimmed. We also discussed page 2, line 1, the definition of phantom-ware. Should we add *or collect*?

Senator Cook: I would support that addition.

4:46 **Representative Gruchalla:** Is there a legitimate use in business for these devices?

4:59 **Senator Cook:** I cannot think of any. I've been asked if these things are patented.

5:35 **Representative Beadle:** Referred to subsection 1 of Section 1. When we start listing the means by which the data is transferred, there will be additional methods which

come about. Do we really want to list specific methods, or should we clean it up by using a more general phrase?

6:27 **Senator Cook:** You raise a good point.

6:51 **Representative Ruby:** Section 2, is that a retail license or permit?

Senator Cook: I'd assume a sales tax permit.

Support:

7:35 **Emily Thompson, legal counsel for the Office of the State Tax Commissioner:** Provided written testimony, attachment 1. Summarized and elaborated on written testimony. The second section of the bill does refer to a sales tax license.

9:36 **Representative Gruchalla:** If you're underreporting your sales tax and your state income tax, you are also underreporting your federal income tax?

Emily Thompson: That would typically be correct if they are fraudulently reporting both their income sales and federal tax.

9:55 **Representative Gruchalla:** Would these violations be forwarded to the Internal Revenue Service?

10:02 **Emily Thompson:** That could be something the IRS and the State's Attorney could pursue.

10:25 **Representative Frantsvog:** If you reconcile your cash every day, do you put extra in your pocket? Is that how it works?

Emily Thompson: That is correct.

11:02 **Representative Frantsvog:** How do you detect that there is a device within the system?

11:10 **Emily Thompson:** They are relatively difficult to detect. Provided three examples of ways auditors can detect discrepancies which indicate the present of a zapper.

12:51 **Representative Frantsvog:** So there is not a device you as an owner could carry to detect a zapper?

13:07 **Emily Thompson:** No, there is not a device to use to detect them. These zappers can be purchased on the internet and accessed remotely. It would have to be discovered by audit. If the device was a phantom-ware device, you could see the physical device embedded within the register.

14:31 **Representative N. Johnson:** On page 2, line 19, it mentions a legitimate purpose. At this point, is there a known legitimate purpose?

14:43 **Emily Thompson:** Gave examples of legitimate purposes of possessing a zapper.

15:16 **Representative Amerman:** Section 2 talks about the revocation of a sales tax permit and ineligibility to receive another permit for ten years. Are we basically putting them out of business?

15:45 **Emily Thompson:** In order to make sales in North Dakota, you have to be registered and have a sales tax permit. If you were convicted of having a zapper or one of these devices, you would not be allowed under this proposed law to obtain another license for ten years. Other states have stricter policies. Gave examples.

16:33 **Representative Becker:** Couldn't some of the thumb-drive devices be used by employees? When you'd do an audit, it would show that the owner's receipts are not matching what was expected. Would you be sending the owner out of business because of employee theft?

16:58 **Emily Thompson:** Page 2, line 14, notes that it is unlawful to willfully do those behaviors. There are cases in which employees are embezzling from employers without the employers' knowledge. Gave example of employee theft by use of a zapper. Section 2 talks about the holder of the permit being convicted. If the employee is the one convicted of holding the device and skimming the device, the permit holder would not be convicted of using that device. It is up to the State's Attorney to prove the element of intent.

18:30 **Representative Kreun:** Would this just be for cash sales but also for credit card sales?

18:37 **Emily Thompson:** It is mostly used in cash-heavy businesses because that is the easiest transaction to hide. The more sophisticated devices can change the account history on a register for debit cards and credit cards, but that is more advanced technology which is not as prevalently used.

Representative Kreun: But this covers all sales?

Emily Thompson: Correct.

19:17 **Representative Kreun:** Senator Cook indicated that eleven of fourteen manufacturers or those who bid registers out had this installed. Would that be by the request of the person purchasing the registers, or was that by the manufacturer? If they are putting the zappers in with the intent to defraud, are they going to be part of the investigation and penalized as well?

19:53 **Emily Thompson:** This proposed law does cover the manufacture and sale as the use and ownership of these devices.

20:13 **Representative M. Nelson:** Referred to section 2. What if the person holding the skimmer did not have a sales tax permit? After a conviction, would he be eligible to get a sales tax permit?

20:39 **Emily Thompson:** I would read that section to indicate that the person convicted would not be eligible for a permit for ten years.

21:02 **Chairman Keiser:** Referred to page 2, line 1. What is your opinion about adding *or collect*?

21:39 **Emily Thompson:** I do not believe the addition of that phrase would have a negative effect on the statute. I have no opposition to adding that if Senator Cook does not oppose.

22:10 **Chairman Keiser:** Why would we have a Class B felony for the first offense and only a civil penalty for the second offense?

22:26 **Emily Thompson:** On the second offense, they would still be convicted of a violation. They would potentially be liable to having the additional \$100,000 penalty.

Chairman Keiser: Should it be more severe?

22:52 **Emily Thompson:** It had been more severe when first presented to the Senate. Read original language. Clarified amounts of fines and length of imprisonment for Class B and Class A felonies. Some were not content with only the fine attached to that felony level, so that is why the additional monetary amount was attached.

23:45 **Chairman Keiser:** Zappers and other systems are being used to steal credit card information during an electronic transaction. Will this legislation cover the theft of personal information?

Emily Thompson: I have not researched the identify theft aspect to the use of zappers. I can do extra research and provide that to the committee.

Chairman Keiser: It is a big issue that we're losing money, but the theft of personal information is a much bigger issue. Please check into that.

25:07 **Mike Rud, President of Petroleum Marketers Association and North Dakota Retailers Association:** We support this bill. Retail theft and employee theft are huge issues in our industries. We think this is a good first step to try to stop this. The tougher you make the penalty, the better so that it happens only once if it ever does happen.

Opposition:

Neutral:

Hearing closed.

Chairman Keiser: We will hold this and will give Emily a chance to look into this.

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

SB 2126
March 11, 2013
Job 19668

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to the prohibition of automated sales suppression devices; and to provide a penalty

Minutes:

Attachments 1-5

Chairman Keiser: Walked through amendment 13.0418.02001, attachment 1. Walked through attachment 2, an amendment offered by Emily Thompson from the tax department.

Distributed attachments 4 and 5 as additional information from Emily Thompson, legal counsel with the Office of State Tax Commissioner.

4:00 **Jake Geiermann, legal intern for the Industry, Business, and Labor Committee:** Walked through attachment 3, classification of offenses.

4:48 **Chairman Keiser:** Do you know the average time served for these?

4:56 **Jake Geiermann:** I do not know that. State courts do have sentencing guidelines, but I do not know how rigidly those are followed. I can research that if wished.

5:15 **Representative M. Nelson:** Would the civil penalty be in addition to the fine which accompanies the felony?

5:32 **Jake Geiermann:** My understanding is that it would be in addition to the fine.

Representative Vigesaa moved the adoption of 1st set of amendments, 13.0418.02001. Seconded by **Representative Boschee**.

Voice vote on adoption of amendment. Motion carries.

6:29 **Representative N. Johnson:** On the second set of amendments, there is wording to insert Class B felony, and that would need to be removed since we've adopted the first set of amendments. Would number 3 on the second page need to be changed, too?

6:40 **Chairman Keiser:** Since we've adopted the first amendment making it a Class A, we would make this amendment conform to Class A in those two places.

7:22 **Representative Amerman:** It seems that with this second amendment and with the engrossed bill, there are two different things identified as Section 2.

7:53 **Chairman Keiser:** Jake says that it will get renumbered automatically by corrections and revisions.

Representative Kasper moves the adoption of 2nd amendment, attachment 2, but with adjustments to conform to Class A. **Representative N. Johnson seconds.**

Representative Sukut moves a Do Pass as Amended. **Representative Boschee** seconds.

Roll call vote on motion for a Do Pass as Amended. Motion carries.

Yes = 13

No = 0

Absent = 2

Carrier: Representative Gruchalla

March 11, 2013

✓
3/11/13
102

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2126

Page 1, line 1, replace the first "section" with "sections"

Page 1, line 1, after "12.1-23-16" insert "and 12.1-23-17"

Page 1, line 3, after "devices" insert "and skimming devices used for a fraudulent purpose"

Page 1, remove line 11

Page 1, line 12, remove "internet link, or"

Page 1, line 12, remove "other"

Page 1, line 12, remove the second underscored comma

Page 1, line 12, after "falsifies" insert "or collects"

Page 2, line 1, after "falsify" insert "or collect"

Page 2, line 17, after "is" insert "guilty of a class A felony and also is"

Page 3, after line 3, insert:

"SECTION 2. Section 12.1-23-17 of the North Dakota Century Code is created and enacted as follows:

12.1-23-17. Unlawful skimming of credit, debit, or other electronic payment cards - Penalty.

1. For purposes of this section:

- a. "Authorized card user" means any person with the empowerment, permission, or competence to use an electronic payment card.
- b. "Electronic payment card" means a credit card, charge card, debit card, hotel key card, stored value card, or any other card that is issued to an authorized card user which allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.
- c. "Merchant" means an owner or operator of a retail mercantile establishment or an agent, employee, lessee, consignee, officer, director, franchisee, or independent contractor of a retail mercantile establishment who receives from an authorized user or someone believed to be an authorized user, an electronic payment card or information from an electronic payment card, or what is believed to be an electronic payment card or information from an electronic payment card, as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from the retail mercantile establishment.
- d. "Re-encoder" means an electronic device that places encoded information from the magnetic strip or stripe of an electronic payment

card onto the magnetic strip or stripe of a different electronic payment card.

- e. "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card.

2. A person is guilty of unlawful skimming if the person uses:

- a. A scanning device to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card without the permission of the authorized user of the electronic payment card, with the intent to defraud the authorized user of the electronic payment card, the issuer of the electronic payment card, or a merchant; or
- b. A re-encoder to place information encoded on the magnetic strip or stripe of an electronic payment card onto the magnetic strip or stripe of a different electronic payment card without the permission of the authorized user of the card from which the information is being re-encoded, with the intent to defraud the authorized user of the electronic payment card, the issuer of the electronic payment card, or a merchant.

3. Any person convicted of a violation under subsection 2 is guilty of a class B felony. Any person convicted of a second or subsequent violation of subsection 2 is guilty of a class A felony and also is subject to a civil penalty of not more than one hundred thousand dollars."

Page 3, line 8, replace "revocation" with "conviction"

Page 3, line 8, after the underscored period insert "Any person convicted of violating section 12.1-23-16 who is not a holder of a permit at the time of conviction is not eligible to receive a permit for a period of ten years from the date of conviction."

Renumber accordingly

Date: 3-11-2013

Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2126**

House Industry, Business, and Labor Committee

Legislative Council Amendment Number 13-0418.02001

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Vigesaa Seconded By Boschee

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser			Rep. Bill Amerman		
Vice Chairman Gary Sukut			Rep. Joshua Boschee		
Rep. Thomas Beadle			Rep. Edmund Gruchalla		
Rep. Rick Becker			Rep. Marvin Nelson		
Rep. Robert Frantsvog					
Rep. Nancy Johnson					
Rep. Jim Kasper					
Rep. Curtiss Kreun					
Rep. Scott Louser					
Rep. Dan Ruby					
Rep. Don Vigesaa					

Total Yes No

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 3-11-2013

Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2120

House Industry, Business, and Labor Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Kasper Seconded By Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser			Rep. Bill Amerman		
Vice Chairman Gary Sukut			Rep. Joshua Boschee		
Rep. Thomas Beadle			Rep. Edmund Gruchalla		
Rep. Rick Becker			Rep. Marvin Nelson		
Rep. Robert Frantsvog					
Rep. Nancy Johnson					
Rep. Jim Kasper					
Rep. Curtiss Kreun					
Rep. Scott Louser					
Rep. Dan Ruby					
Rep. Don Vigasaa					

Total Yes _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Attachment 2
- but conform to Class A cs in
Attachment 1
- Skimming

Date: 3-11-2013

Roll Call Vote #: 3

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2126

House Industry, Business, and Labor Committee

Legislative Council Amendment Number 13.0418.02002

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By

Sukut

Seconded By

Boschee

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman	✓	
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee	✓	
Rep. Thomas Beadle		no	Rep. Edmund Gruchalla	✓	
Rep. Rick Becker		no	Rep. Marvin Nelson	✓	
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total Yes

8 13
2

No

0

Absent

Floor Assignment

Gruchalla

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2126, as engrossed: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (13 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2126 was placed on the Sixth order on the calendar.

Page 1, line 1, replace the first "section" with "sections"

Page 1, line 1, after "12.1-23-16" insert "and 12.1-23-17"

Page 1, line 3, after "devices" insert "and skimming devices used for a fraudulent purpose"

Page 1, remove line 11

Page 1, line 12, remove "internet link, or"

Page 1, line 12, remove "other"

Page 1, line 12, remove the second underscored comma

Page 1, line 12, after "falsifies" insert "or collects"

Page 2, line 1, after "falsify" insert "or collect"

Page 2, line 17, after "is" insert "guilty of a class A felony and also is"

Page 3, after line 3, insert:

"SECTION 2. Section 12.1-23-17 of the North Dakota Century Code is created and enacted as follows:

12.1-23-17. Unlawful skimming of credit, debit, or other electronic payment cards - Penalty.

1. For purposes of this section:

- a. "Authorized card user" means any person with the empowerment, permission, or competence to use an electronic payment card.
- b. "Electronic payment card" means a credit card, charge card, debit card, hotel key card, stored value card, or any other card that is issued to an authorized card user which allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.
- c. "Merchant" means an owner or operator of a retail mercantile establishment or an agent, employee, lessee, consignee, officer, director, franchisee, or independent contractor of a retail mercantile establishment who receives from an authorized user or someone believed to be an authorized user, an electronic payment card or information from an electronic payment card, or what is believed to be an electronic payment card or information from an electronic payment card, as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from the retail mercantile establishment.
- d. "Re-encoder" means an electronic device that places encoded information from the magnetic strip or stripe of an electronic payment card onto the magnetic strip or stripe of a different electronic payment card.

- e. "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card.
- 2. A person is guilty of unlawful skimming if the person uses:
 - a. A scanning device to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card without the permission of the authorized user of the electronic payment card, with the intent to defraud the authorized user of the electronic payment card, the issuer of the electronic payment card, or a merchant; or
 - b. A re-encoder to place information encoded on the magnetic strip or stripe of an electronic payment card onto the magnetic strip or stripe of a different electronic payment card without the permission of the authorized user of the card from which the information is being re-encoded, with the intent to defraud the authorized user of the electronic payment card, the issuer of the electronic payment card, or a merchant.
- 3. Any person convicted of a violation under subsection 2 is guilty of a class B felony. Any person convicted of a second or subsequent violation of subsection 2 is guilty of a class A felony and also is subject to a civil penalty of not more than one hundred thousand dollars."

Page 3, line 8, replace "revocation" with "conviction"

Page 3, line 8, after the underscored period insert "Any person convicted of violating section 12.1-23-16 who is not a holder of a permit at the time of conviction is not eligible to receive a permit for a period of ten years from the date of conviction."

Renumber accordingly

2013 CONFERENCE COMMITTEE

SB 2126

2013 SENATE STANDING COMMITTEE MINUTES

Senate Finance and Taxation Committee

Lewis and Clark Room, State Capitol

SB 2126

4/12/2013

Job Number 21137

☒ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact section 12.1-23-16 and a new subsection to section 57-39.2-14 of the North Dakota Century Code, relating to the prohibition of automated sales suppression devices; and to provide a penalty.

Minutes:

Conference Committee

Present: Senator Miller, Senator Cook, Senator Dotzenrod
Representative Sukut, Representative Beadle, Representative Gruchalla

Senator Miller opened the conference committee on SB 2126.

Senator Cook - This is a good bill, there is one word I didn't concur on that was pointed out to me by the Tax Department.

Emily Thompson, Tax Department - The House Industry Business and Labor they wanted to add 'or collects' in the definitions sections. The concern there is that if there is accounting software or something that is added to the register that might collect data but doesn't skim or zap data we don't want that to be considered a zapper and prohibited under this section. (1:31)

Senator Cook - If we were going to put in code something that would protect citizens from skimmers or put a penalty in place for people who used it, would this accomplish that?

Emily Thompson - This was very consistent in location to several other states that I looked at. I believe this would be a proper place in the century code to add this language in.

Senator Dotzenrod - There was reference on line 12 that said internet link, I see the House amended to take that out. Is that something you suggested?

Emily Thompson - Correct, for purposes of just consistency though the various state statutes that are seen in other states, that language was repeated so as far as the Tax Department is concerned, we are probably recommending keeping that in rather than removing it just for of purposes if the State's Attorney does go to prosecute this and they are comparing other states law they can say the language is consistent. Essentially what

the House did is just made it very broad. A software program accessed through any method. (9:00)

Representative Beadle - We thought make it broad. The act of using the zapper or the skimmer is illegal so it's the act of actually not having these sales of being reported is what the crime is. The device itself we recognize with technology being ever changing, let's say with everyone that uses their Ipad for credit card processing, well these can all be Bluetooth linked so with technology changing we figure referencing individual pieces of technology it might soon become archaic.

Representative Sukut - So we are in agreement with everything if we remove the 'or collects'.

Senator Cook - I move the House recede from their amendments and further amend.

Seconded by **Representative Gruchalla**.

Roll Call Vote 6-0-0

Committee adjourned.

March 11, 2013

lot2
4/12/13
TD

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2126

That the House recede from its amendments as printed on pages 751 and 752 of the Senate Journal and pages 882-884 of the House Journal and that Engrossed Senate Bill No. 2126 be amended as follows:

Page 1, line 1, replace the first "section" with "sections"

Page 1, line 1, after "12.1-23-16" insert "and 12.1-23-17"

Page 1, line 3, after "devices" insert "and skimming devices used for a fraudulent purpose"

Page 1, remove line 11

Page 1, line 12, remove "internet link, or"

Page 1, line 12, remove "other"

Page 1, line 12, remove the second underscored comma

Page 2, line 17, after "is" insert "guilty of a class A felony and also is"

Page 3, after line 3, insert:

"SECTION 2. Section 12.1-23-17 of the North Dakota Century Code is created and enacted as follows:

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1. For purposes of this section:

- a. "Authorized card user" means any person with the empowerment, permission, or competence to use an electronic payment card.
- b. "Electronic payment card" means a credit card, charge card, debit card, hotel key card, stored value card, or any other card that is issued to an authorized card user which allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.
- c. "Merchant" means an owner or operator of a retail mercantile establishment or an agent, employee, lessee, consignee, officer, director, franchisee, or independent contractor of a retail mercantile establishment who receives from an authorized user or someone believed to be an authorized user, an electronic payment card or information from an electronic payment card, or what is believed to be an electronic payment card or information from an electronic payment card, as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from the retail mercantile establishment.
- d. "Re-encoder" means an electronic device that places encoded information from the magnetic strip or stripe of an electronic payment

card onto the magnetic strip or stripe of a different electronic payment card.

- e. "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card.

2. A person is guilty of unlawful skimming if the person uses:

- a. A scanning device to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card without the permission of the authorized user of the electronic payment card, with the intent to defraud the authorized user of the electronic payment card, the issuer of the electronic payment card, or a merchant; or
- b. A re-encoder to place information encoded on the magnetic strip or stripe of an electronic payment card onto the magnetic strip or stripe of a different electronic payment card without the permission of the authorized user of the card from which the information is being re-encoded, with the intent to defraud the authorized user of the electronic payment card, the issuer of the electronic payment card, or a merchant.

3. Any person convicted of a violation under subsection 2 is guilty of a class B felony. Any person convicted of a second or subsequent violation of subsection 2 is guilty of a class A felony and also is subject to a civil penalty of not more than one hundred thousand dollars."

Page 3, line 8, replace "revocation" with "conviction"

Page 3, line 8, after the underscored period insert "Any person convicted of violating section 12.1-23-16 who is not a holder of a permit at the time of conviction is not eligible to receive a permit for a period of ten years from the date of conviction."

Renumber accordingly

Date 4-12-13Roll Call Vote # 1

2013 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. _____ SB 2126 _____ as (re) engrossed

Senate _____ Finance & Taxation _____ Committee

- Action Taken**
- ☐ SENATE accede to House Amendments
- ☐ SENATE accede to House Amendments and further amend
- ☐ HOUSE recede from House amendments
- ☒ HOUSE recede from House amendments and amend as follows
to remove 'or collects'
- ☐ Unable to agree, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Cook Seconded by: Gruchalla

Senators	$\frac{1}{2}$		Yes	No	Representatives	$\frac{1}{2}$		Yes	No
Senator Miller	X		X		Representative Sukut	X		X	
Senator Cook	X		X		Representative Beadle	X		X	
Senator Dotzenrod	X		X		Representative Gruchalla	X		X	
Total Senate Vote					Total Rep. Vote				

Vote Count Yes: 6 No: 0 Absent: 0

Senate Carrier _____ House Carrier _____

LC Number 13.0418. 02003 of amendment

LC Number _____ of engrossment

REPORT OF CONFERENCE COMMITTEE

SB 2126, as engrossed: Your conference committee (Sens. Miller, Cook, Dotzenrod and Reps. Sukut, Beadle, Gruchalla) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ pages 751-752, adopt amendments as follows, and place SB 2126 on the Seventh order:

That the House recede from its amendments as printed on pages 751 and 752 of the Senate Journal and pages 882-884 of the House Journal and that Engrossed Senate Bill No. 2126 be amended as follows:

Page 1, line 1, replace the first "section" with "sections"

Page 1, line 1, after "12.1-23-16" insert "and 12.1-23-17"

Page 1, line 3, after "devices" insert "and skimming devices used for a fraudulent purpose"

Page 1, remove line 11

Page 1, line 12, remove "internet link, or"

Page 1, line 12, remove "other"

Page 1, line 12, remove the second underscored comma

Page 2, line 17, after "is" insert "guilty of a class A felony and also is"

Page 3, after line 3, insert:

"SECTION 2. Section 12.1-23-17 of the North Dakota Century Code is created and enacted as follows:

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- a. "Authorized card user" means any person with the empowerment, permission, or competence to use an electronic payment card.**
- b. "Electronic payment card" means a credit card, charge card, debit card, hotel key card, stored value card, or any other card that is issued to an authorized card user which allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.**
- c. "Merchant" means an owner or operator of a retail mercantile establishment or an agent, employee, lessee, consignee, officer, director, franchisee, or independent contractor of a retail mercantile establishment who receives from an authorized user or someone believed to be an authorized user, an electronic payment card or information from an electronic payment card, or what is believed to be an electronic payment card or information from an electronic payment card, as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from the retail mercantile establishment.**
- d. "Re-encoder" means an electronic device that places encoded information from the magnetic strip or stripe of an electronic payment card onto the magnetic strip or stripe of a different electronic payment card.**

- e. "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card.
- 2. A person is guilty of unlawful skimming if the person uses:
 - a. A scanning device to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card without the permission of the authorized user of the electronic payment card, with the intent to defraud the authorized user of the electronic payment card, the issuer of the electronic payment card, or a merchant; or
 - b. A re-encoder to place information encoded on the magnetic strip or stripe of an electronic payment card onto the magnetic strip or stripe of a different electronic payment card without the permission of the authorized user of the card from which the information is being re-encoded, with the intent to defraud the authorized user of the electronic payment card, the issuer of the electronic payment card, or a merchant.
- 3. Any person convicted of a violation under subsection 2 is guilty of a class B felony. Any person convicted of a second or subsequent violation of subsection 2 is guilty of a class A felony and also is subject to a civil penalty of not more than one hundred thousand dollars."

Page 3, line 8, replace "revocation" with "conviction"

Page 3, line 8, after the underscored period insert "Any person convicted of violating section 12.1-23-16 who is not a holder of a permit at the time of conviction is not eligible to receive a permit for a period of ten years from the date of conviction."

Renumber accordingly

Engrossed SB 2126 was placed on the Seventh order of business on the calendar.

2013 TESTIMONY

SB 2126

/

Prepared by the
Office of State Tax Commissioner
For the Senate Finance and
Taxation Committee
January 30, 2013

PROPOSED AMENDMENTS TO SENATE BILL NO. 2126

Page 2, line 16, replace "and" with a period

Page 2, line 17, replace "any" with "Any"

Page 2, line 17, replace "is guilty of a" with "shall be subject to a civil penalty of not more than one hundred thousand dollars."

Page 2, remove line 18

Renumber accordingly

①
3-6-13
SB 2126

**TESTIMONY OF THE OFFICE OF STATE TAX COMMISSIONER
BEFORE THE
HOUSE INDUSTRY BUSINESS AND LABOR COMMITTEE**

ENGROSSED SENATE BILL 2126

MARCH 6, 2013

Chairman Keiser, members of the House Industry Business and Labor Committee, my name is Emily Thompson, Legal Counsel for the North Dakota Office of State Tax Commissioner, and I are here today on behalf of the Tax Commissioner to testify in support of Engrossed Senate Bill 2126.

PURPOSE OF THE BILL

The purpose of Engrossed Senate Bill 2126 is to prohibit the sale, purchase, possession, installation, transfer, manufacture, or use of sales tax zappers or phantom-ware. Zappers and phantom-ware provide a means by which the records from an electronic cash register can be modified to show a reduced amount of sales. Zappers and phantom-ware are most commonly found in cash heavy businesses, such as restaurants and convenience stores, as it is easier to hide modified cash transactions than transactions made with a debit or credit card.

The method in which zappers skim sales is quite simplistic. For instance, the transaction record for a sandwich that was sold for \$4.00 may be reduced to \$3.00 and the record of the drink sold with it may be eliminated entirely. The customer still pays tax on the full amount of the transaction yet the owner only remits tax on the amount of the charge that appears on the modified register records. For every dollar in sales a business "zaps" from its records, the owner will retain those few extra cents that would otherwise go to state and local government as sales tax.

The use of sales tax zappers by businesses over extended periods of time can result in large losses in sales tax revenue. In addition to underreporting sales tax, an owner who is skimming sales is also less likely to be reporting the full amount of income tax due. The provisions within Engrossed Senate Bill 2126 will aid in deterring these fraudulent practices and will provide the Tax Department with another means to enforce sales tax compliance.

EXPLANATION OF THE BILL

SECTION 1 – Prohibition of automated sales suppression devices.

Section one prohibits the willful sale, purchase, possession, installation, transfer, manufacture, or use of sales tax zappers or phantom-ware. The terms "zapper" and "phantom-ware" are also defined in this section. Phantom-ware can be distinguished from zappers as it is embedded *within* the electronic cash register rather than located on a removable device. This section also lays out the penalties associated with a violation as well as provides a defense to prosecution for those possessing zappers for a legitimate purpose. (For instance, law enforcement officers familiarizing themselves with the device in order to detect and prevent its use.)

An individual found guilty of violating this section is liable for any tax, penalty, and interest and must forfeit any proceeds associated with the sale or use of the zapper or phantom-ware. Additionally, any device containing the zapper or phantom-ware will be deemed contraband and may be subject to forfeiture.

SECTION 2 – Sales tax permit revocation.

Section two specifies that a permit holder who has their sales tax permit revoked due to a violation of section one will not be eligible to receive another sales tax permit for 10 years from the date of permit revocation.

CONCLUSION

Legislation prohibiting "zappers" has already passed in many states including Georgia, West Virginia, Tennessee, Michigan, Utah, Oklahoma, Maine, Wyoming and Connecticut and is pending in several other states. Passage of Engrossed Senate Bill 2126 will help deter the fraudulent use of zappers and phantom-ware and provide a means to penalize those caught using the devices. For these reasons, the Tax Commissioner respectfully requests that you give favorable consideration to Engrossed Senate Bill 2126. I thank you for your time and consideration and would be happy to respond to any questions.

13.0418.02001
Title.

① 3-11-2013
SB 2126

Prepared by the Legislative Council staff for
Representative Keiser
March 6, 2013

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2126

Page 1, remove line 11

Page 1, line 12, remove "internet link, or"

Page 1, line 12, remove "other"

Page 1, line 12, remove the second underscored comma

Page 1, line 12, after "falsifies" insert "or collects"

Page 2, line 1, after "falsify" insert "or collect"

Page 2, line 16, after "felony" insert "and any person convicted of a second or subsequent violation under subsection 2 is guilty of a class A felony"

Page 2, line 17, after "is" insert "also"

Renumber accordingly

(2) 3-11-2013
SB 2126

Prepared for the House
Industry, Business and Labor Committee
March 8, 2013

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2126

Page 1, line 1, after "12.1-23-16" insert ", 12.1-23-17"

Page 1, line 3, after "devices" insert "and skimming devices used for a fraudulent purpose"

Page 2, line 17, after "2" insert "is guilty of a class B felony and"

Page 3, after line 3, insert:

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- d. "Re-encoder" means an electronic device that places encoded information from the magnetic strip or stripe of an electronic payment card onto the magnetic strip or stripe of a different electronic payment card.
- e. "Scanning device" means a scanner, reader or any other electronic device that is used to access, read, scan, obtain, memorize or store, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card.

2. A person is guilty of unlawful skimming if the person uses:

- a. A scanning device to access, read, obtain or memorize, temporarily or permanently, information encoded on the magnetic strip or stripe of an electronic payment card without the permission of the authorized user of the electronic payment card, with the intent to defraud the authorized user, the issuer of the authorized user's electronic payment card or a merchant; or

- b. A re-encoder to place information encoded on the magnetic strip or stripe of an electronic payment card onto the magnetic strip or stripe of a different card without the permission of the authorized user of the card from which the information is being re-encoded, with the intent to defraud the authorized user, the issuer of the authorized user's electronic payment card or a merchant.
3. Any person convicted of a violation under subsection 2 is guilty of a class B felony."

Page 3, line 8, replace "revocation" with "conviction. Any person convicted of a violation of section 12.1-23-16 who is not a holder of a permit at the time of conviction shall not be eligible to receive a permit for a period of ten years from the date of conviction."

Renumber accordingly

CHAPTER 12.1-32
PENALTIES AND SENTENCING

③ 3-11-2013
SB 2120

12.1-32-01. Classification of offenses - Penalties.

Offenses are divided into seven classes, which are denominated and subject to maximum penalties, as follows:

1. Class AA felony, for which a maximum penalty of life imprisonment without parole may be imposed. The court must designate whether the life imprisonment sentence imposed is with or without an opportunity for parole. Notwithstanding the provisions of section 12-59-05, a person found guilty of a class AA felony and who receives a sentence of life imprisonment with parole, shall not be eligible to have that person's sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct, after that person's admission to the penitentiary.
2. Class A felony, for which a maximum penalty of twenty years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.
3. Class B felony, for which a maximum penalty of ten years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.
4. Class C felony, for which a maximum penalty of five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
5. Class A misdemeanor, for which a maximum penalty of one year's imprisonment, a fine of two thousand dollars, or both, may be imposed.
6. Class B misdemeanor, for which a maximum penalty of thirty days' imprisonment, a fine of one thousand dollars, or both, may be imposed.
7. Infraction, for which a maximum fine of five hundred dollars may be imposed. Any person convicted of an infraction who has, within one year prior to commission of the infraction of which the person was convicted, been previously convicted of an offense classified as an infraction may be sentenced as though convicted of a class B misdemeanor. If the prosecution contends that the infraction is punishable as a class B misdemeanor, the complaint shall specify that the offense is a misdemeanor.

This section shall not be construed to forbid sentencing under section 12.1-32-09, relating to extended sentences.

12.1-32-01.1. Organizational fines.

Any organization, as defined in section 12.1-03-04, shall, upon conviction, be subject to a maximum fine in accordance with the following classification:

1. For a class A felony, a maximum fine of fifty thousand dollars.
2. For a class B felony, a maximum fine of thirty-five thousand dollars.
3. For a class C felony, a maximum fine of twenty-five thousand dollars.
4. For a class A misdemeanor, a maximum fine of fifteen thousand dollars.
5. For a class B misdemeanor, a maximum fine of ten thousand dollars.

Nothing in this section shall be construed as preventing the imposition of the sanction provided for in section 12.1-32-03, nor as preventing the prosecution of agents of the organization under section 12.1-03-03.

12.1-32-02. Sentencing alternatives - Credit for time in custody - Diagnostic testing.

1. Every person convicted of an offense who is sentenced by the court must be sentenced to one or a combination of the following alternatives, unless the sentencing alternatives are otherwise specifically provided in the statute defining the offense or sentencing is deferred under subsection 4:
 - a. Payment of the reasonable costs of the person's prosecution.
 - b. Probation.
 - c. A term of imprisonment, including intermittent imprisonment:
 - (1) In a state correctional facility in accordance with section 29-27-07, in a regional corrections center, or in a county jail, if convicted of a felony or a class A misdemeanor.



STATE OF NORTH DAKOTA
OFFICE OF STATE TAX COMMISSIONER
Cory Fong, Commissioner

(4) 311-2013
SB 2126

March 8, 2013

The Honorable George Keiser
Chairman, House Industry, Business and Labor Committee
North Dakota House of Representatives
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Representative Keiser:

During the hearing for S.B. 2126 on Wednesday, March 6, 2013, you requested information regarding the addition of language to address the fraudulent acquisition and use of customers' credit card information. Enclosed is a memorandum detailing the information you requested as well as an accompanying proposed amendment to S.B. 2126. Additional copies have also been provided for distribution to the House Industry, Business and Labor Committee members.

If I can be of further assistance, please do not hesitate to contact me at (701) 328-2776 or via e-mail at emthompson@nd.gov.

Sincerely,

Emily Thompson
Legal Counsel
Office of State Tax Commissioner

Enclosures

Memorandum

To: Representative Keiser and Members of the House Industry Business and Labor Committee

From: Emily Thompson, Legal Counsel, Office of State Tax Commissioner

Re: Research Regarding the Inclusion of Language to Address the Fraudulent Acquisition or Use of Customers' Credit Card Information within the Text of S.B. 2126.

Date: March 8, 2013

BACKGROUND

The North Dakota Century Code (N.D.C.C.) does not currently contain language that specifically addresses the prohibition of devices used to copy or re-encode credit card information. The proposed language of S.B. 2126 addresses the prohibition of devices such as "zappers" or "phantom-ware" that can be used to falsify the records of an electronic cash register. The primary purpose of "zappers" and "phantom-ware" is to modify an electronic cash register's records to make it appear as though a business has made fewer sales, thus reducing the businesses sales tax liability.

Research conducted by the Office of State Tax Commissioner while assisting in the drafting of S.B. 2126 did not allude to the fact that these devices were being used in the fraudulent acquisition or use of customers' credit card information. However, many of the other states that have "zapper" laws also have separate provisions of law regarding the fraudulent use of devices that copy or re-encode credit card information. These devices, generally referred to as "skimmers," serve to copy credit card information or re-encode copied credit card information onto a new card. The chart below provides a summary of those states that have both "zapper" laws and laws prohibiting the fraudulent use of "skimming" devices.

State	Statute Prohibiting Zappers	Location in the Code	Statute Prohibiting Fraudulent Use of Skimming Devices	Location in the Code
Connecticut	YES CT ST § 12-428a	Taxation – Sales and Use Taxes	YES CT ST § 53-388a	Crimes – Crimes Involving Credit Cards
Georgia	YES GA ST § 16-9-62	Crimes and Offenses – Fraud	YES GA ST § 10-15-7	Commerce and Trade – Business Administration
Louisiana	YES LA R.S. 47:1641.1	Revenue and Taxation – Criminal Penalties	YES LA R.S. 14:67.4	Criminal Law – Offenses Against Property
Maine	YES ME ST T. 17-A § 909	Criminal Code - Fraud	YES ME ST T. 17-A § 905B	Criminal Code - Fraud
Michigan	YES MI ST 750.411w	Penal Code - Miscellaneous	NO	N/A
Oklahoma	YES OK ST T. 68 § 212.1	Revenue and Taxation – Tax Procedure	NO	N/A
Tennessee	YES TN ST § 39-14-707	Criminal Offenses – Criminal Instruments	NO	N/A
Utah	YES UT ST § 76-6-1302	Criminal Code – Offenses Against Property	YES UT ST § 76-6-506.7	Criminal Code – Offenses Against Property
West Virginia	YES WV ST § 61-3-22a	Crimes and Their Punishment – Crimes Against Property	YES WV ST § 61-3-56	Crimes and Their Punishment – Crimes Against Property
Wyoming	YES WY ST § 39-15-108	Taxation and Revenue – Sales Tax	YES WY ST § 6-3-803	Crimes and Offenses – Credit Card Fraud
North Dakota	PROPOSED LAW S.B. 2126 N.D.C.C. §12.1-23-16	Criminal Code – Theft and Related Offenses	NO	N/A

Other devices, such as theft detection shielding devices, which are bags used to shield merchandize from detection from magnetic theft alarms or sensors, are already prohibited within the North Dakota Century Code. N.D.C.C. § 12.1-23-13. The fraudulent use of skimming devices is not currently addressed. Additional language would be required if it is the Committee's intent to prohibit the fraudulent use of these devices within the text of S.B. 2126.

In the accompanying proposed amendments, language prohibiting the fraudulent use of "skimming devices" such as scanners and re-encoders has been included. The language is mostly based off of the text of Wyoming's skimmer statute. WY ST § 6-3-803. Similar language can be found in the statutes of a multitude of other states as well. The preparation of these amendments was discussed and approved by Senator Cook on March 7, 2013.

Also included in the amendments are two additional clarifying edits based on the concerns the Committee raised during the March 6, 2013, hearing. Line 17, on page 2 of the bill, has been amended to clarify that a person convicted of a second violation is subject to a ***class B felony*** as well as a civil penalty of up to \$100,000. Additional text has also been added to line 8, on page 3 of the bill, explicitly stating that a person who is convicted of a violation of the zipper statute, and ***who does not currently hold a sales tax permit***, will not be eligible for a sales tax permit for ten years from the date of conviction.