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HOUSE BILL 478-FN

AN ACT relative to remotely readable devices and relative to the illegal use of a payment card scanning device or reencoder.
SPONSORS: Rep. Kurk, Hills 7; Rep. M. Smith, Straf 7; Rep. Eaton, Ches 2; Rep. Coffey, Merr 6; Rep. Tupper, Merr 6; Sen. Letourneau, Dist 19
COMMITTEE: Commerce and Consumer Affairs
New Hampshire First Year of the 161st Session of the General Court

ANALYSIS

This bill:

- I. Requires consumer products or identification documents with remotely readable devices to include a consumer notice to that effect.
- II. Prohibits the implantation of a remotely readable device in a human without the individual's informed, written consent.
- III. Prohibits electronic tracking of another individual with certain limited exceptions.
- IV. Amends the definition of payment card and reencoding for purposes of the crime of using a scanning device or reencoder for fraudulent purposes.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nine

AN ACT relative to remotely readable devices and relative to the illegal use of a payment card scanning device or reencoder.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Chapter; Regulation of Remotely Readable Devices. Amend RSA by inserting after chapter 358-S the following new chapter:

CHAPTER 358-T

REGULATION OF REMOTELY READABLE DEVICES

358-T:1 Definitions. In this chapter:

- I. "Consumer" means an individual in the state of New Hampshire who consumes or uses a retail product for personal, noncommercial reasons.

II. "Consumer notice" means either:

(a) A commonly recognized symbol designed to provide a standard way to show the presence of a remotely readable device; or

(b) Notice given with the following text: "This product contains a remotely readable device that can be read without your knowledge if it is brought within range of a reader device."

III. "Consumer product" means a physical object that is, or is intended to be, used or consumed by a consumer and includes, but is not limited to food, alcoholic and nonalcoholic beverages, and prescription and nonprescription drugs, clothing, merchandise, motor vehicles, advertising and sales documents and literature, books, magazines, greeting and business cards, and any packaging intended to be removed by a consumer. A "consumer product" does not include an identification document or any product to the extent that unique identification via radio waves is an essential part of the consumer's use, including, but not limited to, commercial mobile radio service as described in 47 U.S.C. section 332, electronic toll collection systems as defined in RSA 236:31, I(c), keys, and garage door openers.

IV. "Identification document" means any document or object, and any packaging intended to be removed by a consumer, containing personal information that an individual uses alone or in conjunction with any other information to establish his or her identity, to obtain health or medical care, to engage in government-regulated activities, or to engage in financial transactions. Identification documents shall include but shall not be limited to:

(a) Drivers' licenses, identification cards, and license plates issued by the director of the division of motor vehicles, department of safety.

(b) Electronic toll collection systems as defined in RSA 236:31, I(c).

(c) Identification cards or badges issued to employees or contractors.

(d) Insurance benefit cards.

(e) Identification cards issued by schools and educational institutions.

(f) Benefit cards issued in conjunction with any government-supported aid program.

(g) Credit, debit, and financial account cards.

(h) Licenses, certificates, registrations, or other means to engage in a business or profession regulated by the state or its political subdivisions.

(i) Library cards issued by any public library.

V. "Personal information" means information that can be used to identify an individual. Such information includes an individual's name, address, telephone and cellular telephone number, social security number, credit card and financial account numbers, driver's license number, e-mail address, date of birth, race, religion, ethnicity, nationality, political affiliation, photograph and digital image, fingerprint or other biometric identification, and any other unique personal identifier or number.

VI. "Remotely readable device" means any item, application, or mark that

is passively or actively capable of transmitting an individual's identity, characteristics, status, group membership, travel history, or location, or capable of storing or transmitting a number, symbol, signal, pattern, or other identifier that could be linked with any such identification or location information. A remotely readable device includes, but is not limited to, technologies that use radio waves to identify individual objects, such as radio frequency identification.

VII. "Track" means to locate, follow, or plot the path of an individual by means of a remotely readable device, but shall not include locating technology used by the enhanced 911 system or commercial mobile radio service pursuant to 47 U.S.C. section 332.

358-T:2 Notice Required; Consumer Products.

I. No consumer product or identification document to which a remotely readable device has been affixed or implanted shall be sold or offered for sale to a consumer without a consumer notice affixed to the consumer product or identification document for each such tracking device.

II. Consumer products to which a remotely readable device has been affixed or implanted, which are offered for loan or rental without an original consumer notice, shall include either:

(a) A consumer notice; or

(b) The following notice: "This (specify product type) may contain a remotely readable device which can be read without your knowledge if it is brought within range of a reader device."

III. Any notice provided pursuant to this subparagraph shall be given in a clear and conspicuous manner.

IV. No consumer notice required under paragraph I may be removed until it has been sold or provided to a consumer.

358-T:3 Removal and Deactivation. A person who sells or otherwise makes available to a consumer a consumer product or identification document shall, at the request of the consumer, remove or permanently deactivate the device. Such person shall not refuse to do business with or treat differently a consumer who so requests.

358-T:4 Human Implantation of Remotely Readable Device Prohibited.

I. No person shall implant or attempt to implant, place within, or physically incorporate a remotely readable device into or on the body, skin, teeth, hair, or nails of another individual without the prior, informed written consent of the individual. Consent of a guardian, guardian ad litem, attorney-in-fact, or parent of a minor child shall be considered adequate consent, unless a written instrument executed by the individual precludes implantation or physical incorporation. Use of a bracelet or other readily removable device is not considered implantation or physical incorporation under this section.

II. No individual shall be offered an incentive, denied an opportunity, or in any way treated by a person differently from any other individual as a consequence of providing or withholding consent under paragraph I.

III. No person shall use the presence or absence of an implanted remotely readable device as a basis for discriminating against an individual for any

purpose including, but not limited to, employment, housing, insurance, medical care, voting, education, travel, and commerce.

358-T:5 Restrictions on State Use of Remotely Readable Devices.

I. The state or a political subdivision, department, or agency shall not issue, or permit others to issue on its behalf, any identification document that contains a remotely readable device or uses remotely readable devices to locate an individual, either directly or indirectly through other persons, except in the following circumstances:

(a) To locate a person who is incarcerated in the state prison or county jail, is housed in a mental health facility pursuant to a court order after having been charged with a crime, is subject to court-ordered electronic monitoring, or is a resident of a state or county hospital, nursing facility, or assisted living facility.

(b) When the remotely readable device is implanted in an identification document that is to be used on a toll road or bridge owned or operated by the state or a political subdivision, department, or agency thereof, but only for the specific purpose of collecting funds for the use of that road or bridge.

(c) An identification document that is issued to a person for the limited purpose of facilitating secure access by the identification document holder to a secured public building or parking area.

(d) The identification document is part of a contactless identification document system used by the state or a political subdivision, department, or agency of the state that is operational and in use prior to January 1, 2007.

(e) Credit, debit, or financial account cards issued to a person for use on behalf of the state or a political subdivision, department, or agency of the state, provided that such card complies with RSA 358-T:2.

II. No identification document permitted under this section shall contain, transmit, or enable the remote reading of any personal information other than a unique personal identifier number which is not a social security number.

III. Except as set forth in paragraph I, neither the state nor a political subdivision, department, or agency shall imbed readers in or use readers on any public way in order to track an individual or a vehicle.

IV. This section shall not apply to the use of remotely readable devices or readers by law enforcement officials pursuant to a court order.

358-T:6 Tracking Prohibited.

I. Except as otherwise provided in this chapter, no person may track an individual without a valid court order or the consent of the person being tracked. A person may track property owned or otherwise legally possessed where the person has reason to believe the property is being used in violation of the person's property interests or the property interest of the legal owner or legal possessor, and the person is acting on behalf of the legal owner or legal possessor to recover the property.

II. No individual shall be offered an incentive, denied an opportunity, treated by a person differently in any way from any other individual, or discriminated against for any purpose as a consequence of providing or withholding such consent.

358-T:7 Penalties.

I. Any person convicted of violating RSA 358-T:2, RSA 358-T:3, or RSA 358-T:6 shall be guilty of a misdemeanor if a natural person and a felony if any other person. Each such act shall constitute a separate offense.

II. Any person convicted of violating RSA 358-T:4 shall be guilty of a class B felony.

III. An aggrieved individual or the state may bring suit for damages for up to \$1,000 or actual damages, whichever is greater, plus court costs and reasonable attorney's fees, for each violation of this chapter.

2 Illegal Use of Payment Card Scanning Device or Reencoder. Amend RSA 638:28, I-III to read as follows:

I. "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~~ or in a payment card.

II. "Reencoder" means an electronic device that places encoded information from ~~the magnetic strip or stripe of~~ a payment card onto ~~the magnetic strip or stripe of~~ or into a different payment card.

III. "Payment card" means a credit card, charge card, debit card, or any other card or device that is issued to an authorized ~~card~~ user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.

3 Illegal Use of Payment Card Scanning Device or Reencoder. Amend RSA 638:29, I to read as follows:

I. A person is guilty of the crime of using a scanning device or reencoder to defraud when the person knowingly:

(a) Uses a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on ~~the magnetic strip or stripe of a~~ or in a payment card without the permission of the authorized user of the payment card and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant; or

(b) Uses a reencoder to place information encoded on ~~the magnetic strip or stripe of a~~ or into a different payment card onto ~~the magnetic strip or stripe of~~ or into a different card without the permission of the authorized user of the card from which the information is being reencoded and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

4 Consumer Notice. Amend RSA 358-T:1, II(a) to read as follows:

(a) A commonly recognized symbol designed to provide a standard way to show the presence of a remotely readable device , and if such device is a radio frequency identification (RFID) transponder, its frequency and data structure ; or

5 Effective Date.

I. Section 4 of this act shall take effect January 1, 2014.

II. The remainder of this act shall take effect January 1, 2010.

HB 478-FN FISCAL NOTE

AN ACT relative to remotely readable devices and relative to the illegal use of a payment card scanning device or reencoder.

FISCAL IMPACT:

The Judicial Branch, the Judicial Council, the Department of Justice, the Department of Corrections, and the New Hampshire Association of Counties state this bill may increase state and county expenditures by an indeterminable amount in FY 2010 and each year thereafter. There will be no fiscal impact on local expenditures or state, county, and local revenue.

METHODOLOGY:

The Judicial Branch states this bill will add RSA chapter 358-T to regulate use of remotely readable devices, including the prohibition of implanting them in humans without consent. The Department states violation of the proposed RSA 358-T:8, I would be a class A misdemeanor and violation of the proposed RSA 358-T:8, II would be a class B felony. In addition, proposed RSA 358-T:8, III provides for civil penalties of up to \$10,000, plus costs and attorney's fees, for each violation of RSA chapter 358-T.

The Branch states the cost of a class A misdemeanor case in the district court is \$51.14 in FY 2010 and each year thereafter, the cost of a class B felony case in the superior court is \$335.98 in FY 2010 and each year thereafter, and the cost of a civil case in the superior court is \$559.43 in FY 2010 and each year thereafter. The Branch has no information to estimate how many charges would be brought as a result of the changes contained in the bill to determine the fiscal impact on expenditures. However, if a single case were to be appealed to the New Hampshire Supreme Court, the fiscal impact would be in excess of \$10,000.

The Judicial Council states this bill may result in an indeterminable increase in general fund expenditures in FY 2010 and each year thereafter. The Council states if an individual is found to be indigent, the flat fee of \$275 per misdemeanor or \$756.24 per felony is charged by a public defender or contract attorney. If an assigned counsel attorney is used, the fee is \$60 per hour with a cap of \$1,400 for a misdemeanor charge and \$4,100 for a felony charge. The Council also states additional costs could be incurred if an appeal is filed. The public defender, contract attorney and assigned counsel rates for Supreme Court appeals is \$2,000 per case, with many assigned counsel attorneys seeking permission to exceed the fee cap. Requests to exceed the fee cap are seldom granted. Finally, expenditures would increase if services other than counsel are requested and approved by the court during the defense of a case or during an appeal.

The Department of Justice states this bill may result in an indeterminable increase in general fund expenditures in FY 2010 and each year thereafter. The Department states the criminal offense created by this bill could be prosecuted by the Attorney General's Office or county attorney's office. The Department is unable to estimate how many cases would be prosecuted by the Department or appealed to the Supreme Court.

The Department of Corrections states the average annual cost of incarcerating an individual in the general prison population for the fiscal year ending June 30, 2008 was \$32,753. The cost to supervise an individual by

the Department's division of field services for the fiscal year ending June 30, 2008 was \$779. The Department states this bill may increase expenditures by an indeterminable amount, but is unable to predict the number of individuals that might be impacted.

The New Hampshire Association of Counties states to the extent an individual is prosecuted, convicted, and sentenced to incarceration, the counties may have increased expenditures. The Association is unable to determine the number of individuals who might be detained or incarcerated as a result of this bill. The average cost to incarcerate an individual in a county facility is \$30,165 a year.