SENATE BILL 242-FN

AN ACT providing for protection of private customer information and rights of New Hampshire remote sellers in connection with certain foreign sales and use taxes.


COMMITTEE: Ways and Means

AMENDED ANALYSIS

This bill prohibits foreign taxing jurisdictions from requesting private customer information from, conducting examinations of, or imposing sales and use tax collection obligations on sellers in New Hampshire, unless the foreign taxing jurisdiction provides notice to the New Hampshire department of justice. This bill allows sellers to comply with any directive of a foreign taxing authority, while preserving the seller’s rights under the statute, if the seller determines that such compliance is in the seller’s best interest. The bill also establishes a commission to monitor changes in federal and state legislation concerning the imposition of tax collection obligations on New Hampshire remote sellers.

Explanation:

Matter added to current law appears in **bold italics.**

Matter removed from current law appears [in bracketed and struckthrough.]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.
AN ACT providing for protection of private customer information and rights of New Hampshire remote sellers in connection with certain foreign sales and use taxes.

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

280:1 New Chapter; Protection of Private Customer Information and Rights of New Hampshire Remote Sellers in Connection With Certain Foreign Sales and Use Taxes. Amend RSA by inserting after chapter 78-D the following new chapter:

CHAPTER 78-E

PROTECTION OF PRIVATE CUSTOMER INFORMATION AND RIGHTS OF NEW HAMPSHIRE REMOTE SELLERS IN CONNECTION WITH CERTAIN FOREIGN SALES AND USE TAXES

78-E:1 Findings and Purpose. The general court finds that:

I. Over 10,000 state and local jurisdictions within the United States impose sales and use taxes. Many of these jurisdictions have their own laws, regulations, policies, and standards for determining sales and use tax obligations.

II. The state of New Hampshire does not impose a traditional broad-based sales and use tax on customers making purchases of goods and services in New Hampshire, nor on goods and services purchased by its residents out of state for use, storage, or consumption in New Hampshire. New Hampshire law and policy does not require New Hampshire businesses to suffer the cost and burdens of establishing administrative systems to comply with the collection and remission provisions of a traditional broad-based sales and use tax law.

III. The state of New Hampshire is a year-round destination visited by millions of persons from various states that impose sales and use tax on their own residents. Complying with the complexities of these multiple and various foreign sales and use tax laws and regulations will impose very costly burdens on all affected New Hampshire retail businesses. These burdens will be especially difficult for smaller businesses that seek to expand their customer base by using old and new technologies such as traditional mail and communications using the Internet.

IV. On June 21, 2018, the United States Supreme Court issued its decision in South Dakota v. Wayfair, Inc., et al. The Court overturned over 50 years of precedent that had required the physical presence in a state of a retail seller before the state could impose on the seller its sales and use tax collection requirements. This decision exposes remote retail businesses, including those located within New Hampshire, to assertions by thousands of foreign taxing jurisdictions of various collection and remission requirements on remote retail businesses that were previously protected by
the longstanding physical presence rule.

V. The Wayfair decision left unresolved many questions relating to the scope of constitutionally allowable sales tax impositions on remote sellers, including the definition of a constitutionally sufficient safe harbor for the protection of relatively small businesses and others with relatively low levels of sales business in the foreign taxing jurisdiction. The Court directly invited further examination of these questions, observing that the Wayfair case involved only “large, national companies that undoubtedly maintain an extensive virtual presence” and stating that the “question remains whether some other principle in the Court’s Commerce Clause doctrine might invalidate the [South Dakota] Act.”

VI. New Hampshire has enacted the business enterprise tax (BET), which is a form of value-added or consumption tax imposed directly on the business, and not on the consumer. The enactment of the BET represents the affirmative adoption by New Hampshire of a fundamentally different consumption tax policy than other states’ adoption of retail sales and use taxes, and further reflects New Hampshire’s direct rejection of complexities and undue administrative burdens that result from traditional retail sales and use taxes and their third-party collection regimes.

VII. Because New Hampshire has never enacted a traditional broad-based sales and use tax law, New Hampshire retailers selling intrastate and remotely to other states had been fully protected pre-Wayfair from the burden of sales tax collection and remittance responsibilities. Post-Wayfair, New Hampshire has a compelling governmental interest in providing for the continuing protection of these retailers, especially relatively small retailers, from any unlawful imposition of this burden. The establishment and expansion of small and “micro-businesses” represent a particularly valuable segment of New Hampshire’s economy and comprise a majority of employers in the state. The high cost and practical difficulty of compliance with sales and use tax requirements in a state that has chosen not to impose sales and use tax obligations would disproportionately and negatively impact these businesses and discourage other aspiring entrepreneurs from starting new businesses in New Hampshire.

VIII. New Hampshire has a compelling governmental interest in protecting the privacy of an individual’s personal information that may be used to facilitate the sale of goods and services within this state.

IX. New Hampshire has a compelling governmental interest in protecting its remote sellers and the private, personal information they possess from consumers from persons who may attempt to steal money or sensitive information from remote sellers by impersonating a foreign taxing jurisdiction or foreign taxing authority.

X. New Hampshire has a compelling governmental interest in protecting New Hampshire remote sellers from tax assessment and collection practices by foreign taxing jurisdictions and authorities that unlawfully discriminate against out-of-state persons in favor of in-state persons.

XI. The purpose of this chapter is to (a) ensure that no foreign taxing jurisdiction or
authority imposes or attempts to impose sales and use tax collection obligations on a New
Hampshire remote seller in a manner that violates the United States or New Hampshire
constitutions or any other applicable provision of law and (b) protect New Hampshire remote sellers
and the private, personal information they possess from consumers from persons who may attempt
to steal money or sensitive information from remote sellers by impersonating a foreign taxing
jurisdiction or foreign taxing authority.

78-E:2 Definitions. In this chapter:

I. “Foreign taxing authority” means an agency or other instrumentality of, or a person acting
on behalf of, a foreign taxing jurisdiction that is authorized to administer, audit, and enforce sales or
use tax laws of the foreign taxing jurisdiction.

II. “Foreign taxing jurisdiction” means a state, territory, the District of Columbia, a local
government, political subdivision, or any other entity which assesses a retail sales tax or use tax on
its persons with respect to the use, storage, and consumption of goods and services.

III. “New Hampshire remote purchase transaction” means any sale of services or goods, or
both, for any purpose other than resale in the regular course of business where the customer takes
possession of the services or goods in a foreign taxing jurisdiction.

IV.(a) “New Hampshire remote seller” means any individual, trust, estate, fiduciary,
partnership, corporation, or other legal entity, including a retailer as defined in RSA 78-D, located
within the state, that engages in New Hampshire remote purchase transactions, and that does not
have a physical presence within the foreign taxing jurisdiction.

(b) For purposes of this paragraph, a person has a “physical presence” in a foreign taxing
jurisdiction only if such person’s business activities within the jurisdiction include any of the
following:

(1) Maintaining its commercial or legal domicile in the foreign taxing jurisdiction;
(2) Owning, holding a leasehold interest in, or maintaining real property for
business purposes such as a retail store, warehouse, distribution center, manufacturing operation,
assembly facility, or any other facility in the foreign taxing jurisdiction;
(3) Leasing or owning tangible personal property for business purposes (other than
computer software) of more than de minimis value in the foreign taxing jurisdiction;
(4) Having one or more employees or independent sales persons present in the
foreign taxing jurisdiction actively soliciting sales;
(5) Maintaining an office in the foreign taxing jurisdiction at which it regularly
employs 3 or more employees for any purpose.

(c) For purposes of this paragraph, the term “physical presence” shall not include:
(1) Entering into an agreement under which a person, for a commission or other
consideration, directly or indirectly refers potential purchasers to a person outside the foreign taxing
jurisdiction, whether by an Internet-based link or platform, Internet website, or otherwise;
(2) Any presence in a foreign taxing jurisdiction, as described in this paragraph, for less than 15 days in a taxable year (or a greater number of days if provided by foreign taxing jurisdiction law);

(3) Product placement, setup, or other services offered in connection with delivery of products by an interstate or in-state carrier or other service provider;

(4) Internet advertising services provided by in-state residents which are not exclusively directed towards, or do not solicit exclusively, in-state customers;

(5) Ownership by a person outside the foreign taxing jurisdiction of an interest in a limited liability company or similar entity organized or with a physical presence in the foreign taxing jurisdiction;

(6) The furnishing of information to customers or affiliates in such foreign taxing jurisdiction, or the coverage of events or other gathering of information in such foreign taxing jurisdiction by such person, or his or her representative, which information is used or disseminated from a point outside the foreign taxing jurisdiction; or

(7) Business activities directly relating to such person's potential or actual purchase of goods or services within the foreign taxing jurisdiction if the final decision to purchase is made outside the foreign taxing jurisdiction.

V. “Person” means any individual, trust, estate, fiduciary, partnership, corporation, or any state, territory, the District of Columbia, a local government or political subdivision, or any other legal entity.

VI. “Private customer transaction information” means, with respect to any New Hampshire remote seller, any documents, records, and other information possessed or maintained by a New Hampshire remote seller in any form which contain information concerning the name, address, or telephone number of any customer, or any other information related to a customer such as credit card, debit card, or checks used to complete a customer transaction, a description of the goods or service purchased, the identity of any person for whom the goods or services were purchased, and the identification of the point of transfer of any goods or services that comprise a transaction of sales used for the calculation of sales or use tax liability.

VII. “Streamlined Sales and Use Tax Agreement” means the Streamlined Sales and Use Tax Agreement as adopted and amended from time to time by the Streamlined Sales Tax Governing Board.

VIII. “Written notice” means a notice in writing, by physical letter, addressed and physically mailed to the New Hampshire department of justice. No other form of notice shall be deemed to meet the requirements of this chapter.

78-E:3 Voluntary Information Sharing and Collaboration.

I. In furtherance of the purposes of this chapter, the department of justice shall develop a system providing for voluntary information sharing and collaboration between the department of
II. In collaboration with the department of revenue administration and through such other means as it determines appropriate, the department of justice shall transmit periodic bulletins to businesses located in New Hampshire providing information about the provisions of this chapter and about new developments relating to the collection and remission of sales taxes to foreign taxing jurisdictions and authorities. The department of revenue administration is hereby authorized to collaborate with the department of justice in developing and distributing such bulletins.

III. The system established by the department of justice shall encourage and enable the confidential transmission to the department of justice by New Hampshire remote sellers of information regarding sales tax collection or remission actions, including actions seeking private customer information, taken or threatened against said sellers by foreign taxing jurisdictions and authorities or by other persons. Such information shall be exempt from disclosure under RSA 91-A.

78-E:4 Notice Requirements; Prohibitions.

I. A foreign taxing authority shall provide written notice to the department of justice at least 45 days prior to taking any action to determine or impose sales or use tax liability against a New Hampshire remote seller. The written notice regarding a particular New Hampshire remote seller shall state that it is an “RSA 78-E Notice,” shall provide the full legal name and address of the seller, shall contain the reasons for the request or examination, shall cite the legal authorities that authorize imposition of a tax collection obligation on the seller, and shall explain why the seller is subject to those laws.

II. No foreign taxing authority shall request from a New Hampshire remote seller any private customer transaction information for use in the determination of sales or use tax liability of the customer or for use in the determination, collection, and remittance of sales or use tax by the seller with respect to a customer transaction, nor shall a foreign taxing authority proceed with conducting such an examination or imposing sales and use tax collection obligations, unless the foreign taxing authority has first provided the department of justice with written notice of its intent to request such information or conduct such an examination from a particular New Hampshire remote seller pursuant to paragraph I and 45 days from the date of such written notice have elapsed.

III.(a) A New Hampshire remote seller should provide to the department of justice notice of a foreign taxing authority’s first request for any private customer transaction information for use in the determination of sales or use tax liability of the customer or for use in the determination, collection, and remittance of sales or use tax by the seller with respect to a customer transaction, to insure that the foreign taxing authority has provided the notice required by paragraph I.

(b) Notwithstanding the provisions of subparagraph (a), a New Hampshire remote seller may elect immediate compliance with a request or directive of a foreign taxing authority if the seller determines that such compliance is in its best interests. If a New Hampshire remote seller elects immediate compliance, that seller should remit notice to the department of justice after such
compliance to insure that the foreign taxing authority has provided the notice required by paragraph I. Immediate compliance by a New Hampshire remote seller shall not relieve a foreign taxing authority’s obligation to comply with the notice requirements contained in paragraph I.

(c) A New Hampshire remote seller may satisfy the notice provisions under this paragraph through email, phone call, letter, or other method established and specified by the department of justice.

IV. A New Hampshire remote seller who elects immediate compliance under paragraph III of this section may do so under protest while reserving all rights provided under this chapter, the United States or New Hampshire Constitutions, or any other provision of law.

78-E:5 No person shall impersonate or attempt to impersonate a foreign taxing jurisdiction, foreign taxing authority, or any other government agency for any reason and, any person who does shall be deemed to have committed an unfair or deceptive act or practice within the meaning of RSA 358-A:2. Any right, remedy, or power set forth in RSA 358-A, including those set forth in RSA 358-A:4, may be used to enforce the provisions of this section. The exemptions provided for in RSA 358-A:3, I shall not apply to this paragraph.

78-E:6 Administration; Enforcement.

I. Upon receipt of a written notice of a foreign taxing authority’s intent to request private customer information from, conduct an examination of, or impose sales and use tax collection obligations on one or more New Hampshire remote sellers, the department of justice shall determine whether the laws of the foreign taxing jurisdiction meet the requirements of the United States and New Hampshire Constitutions and, if they do, whether they can be applied to the New Hampshire remote seller or sellers based on the reasons provided in the required written notice. In conducting the review required by this paragraph, the department of justice shall consider all laws and regulations existing as of the time of the review, and all applicable principles of the United States and New Hampshire Constitutions, including but not limited to: whether or not the foreign taxing jurisdiction’s laws provide a satisfactory safe harbor for New Hampshire remote sellers that conduct only limited business within the jurisdiction; whether or not the laws ensure that no obligation to remit sales or use tax may be applied retroactively; whether or not the foreign taxing jurisdiction has adopted the Streamlined Sales and Use Tax Agreement or otherwise adopted laws that are substantially compliant with each of the requirements set forth in the Streamlined Sales and Use Tax Agreement; whether or not the foreign taxing jurisdiction’s laws provide for deduction, reimbursement, or exemption for the cost of compliance of the New Hampshire remote seller in collecting, accounting, and remitting the foreign taxing jurisdiction’s sales or use taxes; whether or not the laws require substantial compliance and enforcement of the entirety of such laws, including whether or not the laws include a use tax and the requirement that persons report and pay use tax liability; whether or not the foreign taxing jurisdiction or authority is actively seeking to enforce its own requirement that persons report and pay use tax liability; and whether or not the application of
such laws in practice are fairly related to the tangible benefits provided by such state to the New Hampshire remote seller.

II. Whenever the department of justice has reason to believe that a foreign taxing jurisdiction or authority or any other person has taken, is taking, or is threatening to take any tax assessment or collection action against any New Hampshire remote seller, and the department further determines that said action constitutes an undue burden on interstate commerce within the meaning of Article 1, Section 8, Clause 3 of the United States Constitution, or that said action violates any other provision of the United States Constitution or New Hampshire constitution or of any other applicable state or federal law, including but not limited to the notice requirements in RSA 78-E:4, the department may bring a civil action in the name of the state against such person to restrain by temporary, preliminary, or permanent injunction the said action and may petition the court for an order of restitution of money or property to any person or class of persons injured thereby. The department of justice may further bring a declaratory judgment action against any foreign taxing authority or jurisdiction to establish that the proposed assertion of an obligation to collect and remit sales tax by one or more New Hampshire remote sellers violates applicable state or federal law. The action may be brought in any court of competent jurisdiction. Nothing in this chapter shall be construed as creating a cause of action against the state of New Hampshire or any of its officials or employees. Any action taken by the department of justice pursuant to the provisions of this chapter shall not be read to preclude a New Hampshire remote seller from bringing its own action under paragraph IV, or upon any other legal basis, and nothing in this chapter shall be construed to require or permit the department of justice to act as legal counsel or provide legal advice to a New Hampshire remote seller or any other person to whom the department of justice is not otherwise authorized by law to provide legal counsel.

III. Any information, testimony, or documentary material obtained under the authority of this section shall be used only for one or more of the following purposes:

(a) In connection with investigations instituted under this chapter or for the prosecution of legal proceedings instituted under this chapter or any other provision of New Hampshire law; and

(b) In connection with any formal or informal program of or request for information exchange between the department of justice and any other local, state, or federal agency. However, no information or material obtained or used pursuant to the authority of this section shall be released publicly by any governmental agency except in connection with the prosecution of legal proceedings instituted under this chapter or any other provision of New Hampshire law. In addition, any information, testimony, or documentary material obtained or used pursuant to a protective order shall not be exchanged or released, as provided herein, publicly except in compliance with such protective order.

IV. A New Hampshire remote seller who is subject to collection, audit, or examination by a foreign taxing authority in connection with alleged sales tax collection or remission obligations may
file an action in any court of competent jurisdiction seeking immediate, emergency relief to enjoin any collection, audit, or examination attempt that is occurring or will occur in violation of rights provided by this chapter or of any other provision of constitutional or statutory law. Any New Hampshire remote seller who prevails in such an action shall be entitled to recover any damages suffered as a result of the violation of rights provided by this chapter and reasonable attorney fees and costs incurred in maintaining the action. Nothing in this paragraph is intended to limit a New Hampshire remote seller’s judicial recourse to enforcement of this chapter.

78-E:7 Reimbursement for Sales and Use Tax Collection. Notwithstanding the provisions of this chapter, if a New Hampshire remote seller is determined to be obligated to collect and remit a sales or use tax on behalf of a foreign taxing jurisdiction or foreign taxing authority, then that New Hampshire remote seller shall be entitled to recover or deduct from any taxes collected on behalf of such foreign taxing jurisdiction or foreign taxing authority any reasonable costs, including any initial set up and ongoing maintenance costs, incurred in the collection and remission of sales and use taxes to that jurisdiction or authority.

78-E:8 Rulemaking. The department of justice may establish procedures, in rules adopted by the attorney general under RSA 541-A, to facilitate the department of justice’s implementation of this chapter, including the creation of forms, schedules, explanatory documents, or other materials. Such rules may be adopted through emergency rulemaking under RSA 541-A:18.

78-E:9 Supplement to RSA 78-D. The protections for New Hampshire remote sellers provided by this chapter are intended to supplement, and not replace or supplant, protections provided to retailers under RSA 78-D. Therefore, in any situation where a provision of this chapter conflicts with the provisions of RSA 78-D, the provision that provides greater protection from sales and use tax collection liabilities to a New Hampshire remote seller or retailer, as that term is defined in RSA 78-D, shall control.

78-E:10 On or before November 1 of each year, the department of justice shall report on the status of implementation of the provisions of RSA 78-E along with any recommendations for proposed legislation to the president of the senate, the speaker of the house of representatives, the chairs of the senate and house committees on ways and means, the senate clerk, the house clerk, the governor, and the state library.

78-E:11 Commission Established. There shall be a commission established to monitor changes in federal and state-level legislation and actions concerning the imposition of tax collection obligations on New Hampshire remote sellers.

I. The commission shall be composed of 7 members, as follows:

(a) The attorney general, or designee.

(b) The commissioner of the department of revenue administration, or designee.

(c) Three members of the house of representatives, one of whom shall be from the minority party, appointed by the speaker of the house of representatives.
(d) Two members of the senate, one of whom shall be from the minority party, appointed
by the president of the senate.

II. The duties of the commission shall include, but are not limited to:

(a) Monitoring subsequent United States Supreme Court decisions relating to the issues
raised in South Dakota v. Wayfair, Inc., and any other relevant court decisions that may impact New
Hampshire businesses’ obligations to collect sales and use taxes on behalf of foreign taxing
jurisdictions or authorities.

(b) Monitoring attempts by other states to impose sales and use tax collection obligations
on New Hampshire remote sellers and remote service providers.

(c) Addressing concerns related to costs incurred by New Hampshire businesses in the
collection of sales and use taxes on behalf of a foreign taxing jurisdiction or authority.

(d) Monitoring implementation by the department of justice and the department of
revenue administration of RSA 78-E.

(e) Proposing further legislation or other state action intended to address these concerns.

III. The commission may solicit information from any person or entity the commission
deems relevant to its duties.

IV. The members of the commission shall elect a chairperson from among the members. The
first meeting of the commission shall be called by the first-named senate member. The first meeting
of the commission shall be held within 30 days of the effective date of this section. Four members of
the commission shall constitute a quorum.

V. The commission shall report its findings and any recommendations for proposed
legislation to the president of the senate, the speaker of the house of representatives, the senate
clerk, the house clerk, the chairpersons of the senate and house ways and means committees, the
governor, and the state library, in an initial report on or before November 1, 2019 and a final report
on or before November 1, 2020.

78-E:12 Severability. If any provision of this chapter or the application thereof to any agency,
person, or circumstances is held invalid, the invalidity does not affect other provisions or
applications of the chapter which can be given effect without the invalid provisions or applications,
and to this end the provisions of this chapter are severable.

280:2 Repeal of Commission. RSA 78-E:11, relative to the establishment of a commission, is
repealed.

280:3 Effective Date.

   I. Section 2 of this act shall take effect November 1, 2020.

   II. The remainder of this act shall take effect upon its passage.

Approved: July 19, 2019
Effective Date:
I. Section 2 shall take effect November 1, 2020.
II. Remainder shall take effect July 19, 2019.