

SB 242-FN - AS INTRODUCED

2019 SESSION

19-0176

10/01

SENATE BILL

242-FN

AN ACT

requiring notice and approval of certain actions to commence audits of collection liabilities arising under certain sales and use tax statutes and prohibiting New Hampshire remote sellers from disclosing private customer information to foreign taxing authorities in connection with the collection of certain sales and use taxes.

SPONSORS:

Sen. Bradley, Dist 3; Sen. Birdsell, Dist 19; Sen. Feltes, Dist 15; Sen. Giuda, Dist 2; Sen. Gray, Dist 6; Sen. Morse, Dist 22; Sen. Starr, Dist 1; Sen. Watters, Dist 4; Rep. Major, Rock. 14; Rep. Hinch, Hills. 21

COMMITTEE:

Ways and Means

ANALYSIS

This bill prohibits foreign taxing jurisdictions from requesting information from, conducting examinations of, or imposing sales and use tax collection obligations on sellers in New Hampshire, unless the foreign taxing jurisdiction registers with and provides notice to the New Hampshire department of justice. This bill also prohibits sellers in New Hampshire from providing private customer information to any foreign taxing authority for purposes of determining liability for collection of certain sales or use taxes unless the seller has provided a written notice of the request for such information to the 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 study ways to protect the New Hampshire advantage for New Hampshire businesses as a result of the uncertainty created from the United States Supreme Court decision in *South Dakota v. Wayfair*, which changed the long held view of the physical presence rule.

Explanation:

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

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

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nineteen

AN ACT requiring notice and approval of certain actions to commence audits of collection liabilities arising under certain sales and use tax statutes and prohibiting New Hampshire remote sellers from disclosing private customer information to foreign taxing authorities in connection with the collection of certain sales and use taxes.

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

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

4 CHAPTER 78-E

5 PROTECTION OF PRIVATE CUSTOMER INFORMATION AND
6 RIGHTS OF REMOTE SELLERS IN CONNECTION WITH
7 CERTAIN FOREIGN SALES AND USE TAXES

8 78-E:1 Findings and Purpose. The general court finds that:

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

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

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

24 IV. On June 21, 2018, the United States Supreme Court issued its decision in *South Dakota*
25 *v. Wayfair, Inc., et al.* By a 5-4 majority, the Court overturned over 50 years of precedent that a
26 retail seller must be physically present in a state before the state could impose its sales and use tax
27 collection requirements. This decision potentially exposes remote retail businesses, including those
28 located within New Hampshire, to assertions by thousands of foreign taxing jurisdictions of various
29 collection and remission requirements on remote retail businesses that were previously protected by

1 the longstanding physical presence rule.

2 V. The majority decision in *Wayfair* did not finally adjudicate that the assertion of sales tax
3 collection liability against all remote retail businesses was constitutional and valid, but rather
4 remanded the case for further proceedings. For example, the majority decision states: “The
5 question remains whether some other principle in the Court’s Commerce Clause doctrine might
6 invalidate the [South Dakota] Act.”

7 VI. New Hampshire’s decision not to enact a traditional broad-based sales and use tax law
8 reflects a compelling governmental interest to encourage the establishment and expansion of small
9 and “micro-businesses” that represent a particularly valuable segment of New Hampshire’s
10 economy and comprise a majority of employers in the state. The high cost and practical difficulty of
11 compliance with sales and use tax requirements would disproportionately and negatively impact
12 these businesses and discourage other aspiring entrepreneurs from starting new businesses in New
13 Hampshire.

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

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

21 IX. Any foreign taxing jurisdiction that attempts to require a remote out-of-state business
22 to collect a sales or use tax imposed on persons of such jurisdiction without having its own use tax
23 or first seeking actively to enforce its use tax against its own persons is unfairly avoiding taxing its
24 own persons while effectively imposing a direct tax on the remote out-of-state business in a manner
25 that unlawfully discriminates against such out-of-state transactions in violation of the Commerce
26 Clause of the United States Constitution.

27 X. The purpose of this chapter is to (a) ensure that no foreign taxing jurisdiction or
28 authority imposes or attempts to impose sales and use tax collection obligations on a New
29 Hampshire remote seller in a manner that violates the United States or New Hampshire
30 Constitution and (b) protect New Hampshire remote sellers and the private, personal information
31 they possess from consumers from persons who may attempt to steal money or sensitive information
32 from remote sellers by impersonating a foreign taxing jurisdiction or foreign taxing authority.

33 78-E:2 Definitions. In this chapter:

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

37 II. “Foreign taxing jurisdiction” means a state, territory, the District of Columbia, a local
38 government, political subdivision, or any other entity which assesses retail sales tax or use tax on

1 its persons with respect to the use, storage, and consumption of goods and services.

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

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

9 (b) For purposes of this paragraph, a person has a "physical presence" in a foreign
10 taxing jurisdiction only if such person's business activities within the jurisdiction include any of the
11 following:

12 (1) Maintains its commercial or legal domicile in the foreign taxing jurisdiction;

13 (2) Owns, holds a leasehold interest in, or maintains real property for business
14 purposes such as a retail store, warehouse, distribution center, manufacturing operation, assembly
15 facility, or any other facility in the foreign taxing jurisdiction;

16 (3) Leases or owns tangible personal property for business purposes (other than
17 computer software) of more than de minimis value in the foreign taxing jurisdiction;

18 (4) Has one or more employees based in the foreign taxing jurisdiction or has
19 independent sales persons in the foreign taxing jurisdiction actively soliciting sales;

20 (c) For purposes of this paragraph, the term "physical presence" shall not include:

21 (1) Entering into an agreement under which a person, for a commission or other
22 consideration, directly or indirectly refers potential purchasers to a person outside the foreign
23 taxing jurisdiction, whether by an Internet-based link or platform, Internet Website or otherwise;

24 (2) Any presence in a foreign taxing jurisdiction, as described in this paragraph, for
25 less than 15 days in a taxable year (or a greater number of days if provided by foreign taxing
26 jurisdiction law);

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

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

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

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

38 (7) Business activities directly relating to such person's potential or actual purchase

SB 242-FN - AS INTRODUCED
- Page 4 -

1 of goods or services within the foreign taxing jurisdiction if the final decision to purchase is made
2 outside the foreign taxing jurisdiction.

3 (8) The placement of an order by a customer from a foreign taxing jurisdiction by
4 any means.

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

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

16 VII. "Streamlined Sales and Use Tax Agreement" means the Streamlined Sales and Use
17 Tax Agreement as adopted and amended from time to time by the Streamlined Sales Tax Governing
18 Board.

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

22 78-E:3 Registration.

23 I. A foreign taxing authority shall register with the department of justice at least 120 days
24 prior to taking any action to determine or impose sales or use tax liability against a New Hampshire
25 remote seller.

26 II. The registration required in paragraph I shall be accompanied by a fee determined by
27 the department of justice to be sufficient to cover the reasonable costs incurred by the department of
28 justice in completing the administrative duties required by RSA 78-E:5 and RSA 78-E:6. All fees
29 collected by the department of justice under this section shall be for the exclusive use of the
30 department of justice in complying with the requirements of this chapter. The department of justice
31 shall establish procedures for a foreign taxing authority's registration and the establishment of
32 these and any other necessary procedures or policies under this chapter, together with the
33 determination of a registration fee, in rules adopted by the attorney general under RSA 541-A.
34 Such rules may be adopted through emergency rulemaking under RSA 541-A:18.

35 78-E:4 Prohibitions; Notice.

36 I. No foreign taxing authority shall request from a New Hampshire remote seller any
37 private customer transaction information for use in the determination of sales or use tax liability of
38 the customer or for use in the determination, collection, and remittance of sales or use tax by the

1 seller with respect to a customer transaction, nor shall a foreign taxing authority proceed with
2 conducting such an examination or imposing sales and use tax collection obligations, unless the
3 foreign taxing authority has first registered with the department of justice pursuant to RSA 78-E:3
4 and provided the department of justice with written notice of its intent to request such information
5 or conduct such an examination from a particular New Hampshire remote seller and 120 days from
6 the date of such written notice have elapsed. The written notice regarding a particular New
7 Hampshire remote seller shall state that it is a "RSA 78-E Notice," shall provide the full legal name
8 and address of the sellers, shall contain the reasons for the request or examination, shall cite the
9 legal authorities that authorize imposition of a tax collection obligation on the seller, and shall
10 explain why the seller is subject to those laws. A foreign taxing authority may not commence any
11 action to determine or impose sales or use tax liability against a New Hampshire remote seller
12 unless and until the department of justice has determined, pursuant to RSA 78-E:5, that the laws of
13 the foreign taxing jurisdiction meet the requirements of the United States and New Hampshire
14 Constitutions and, if they do, that they can be applied to the New Hampshire remote seller or
15 sellers based on the reasons provided in the required written notice.

16 II.(a) A New Hampshire remote seller should provide to the department of justice notice of
17 a foreign taxing authority's first request for any private customer transaction information for use in
18 the determination of sales or use tax liability of the customer or for use in the determination,
19 collection, and remittance of sales or use tax by the seller with respect to a customer transaction, to
20 insure that the foreign taxing authority is registered under RSA 78-E:3.

21 (b) Notwithstanding the provisions of subparagraph (a), a New Hampshire remote seller
22 may elect immediate compliance with a request or directive of a foreign taxing authority if the seller
23 determines that such compliance is in its best interests. If a New Hampshire remote seller elects
24 immediate compliance, that seller should remit notice to the department of justice after such
25 compliance to insure that the foreign taxing authority is registered under RSA 78-E:3. Immediate
26 compliance by a New Hampshire remote seller shall not relieve a foreign taxing authority's
27 obligation to comply with the registration and notice requirements contained in RSA 78-E:3 and
28 RSA 78-E:4.

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

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

35 IV. No person shall impersonate or attempt to impersonate a foreign taxing jurisdiction,
36 foreign taxing authority, or any other government agency for any reason and, any person who does
37 shall be deemed to have committed an unfair or deceptive act or practice within the meaning of RSA
38 358-A:2. Any right, remedy, or power set forth in RSA 358-A, including those set forth in RSA 358-

SB 242-FN - AS INTRODUCED
- Page 6 -

1 A:4, II, may be used to enforce the provisions of this section. The exemptions provided for in RSA
2 358-A:3, I shall not apply to this paragraph.

3 78-E:5 Determination of Minimum Protections.

4 I. Upon registration of a foreign taxing authority and receipt of a written notice of a foreign
5 taxing authority's intent to request private customer information from, conduct an examination of,
6 or impose sales and use tax collection obligations on one or more New Hampshire remote sellers, the
7 department of justice shall determine within 120 days of receipt of such notice whether the laws of
8 the foreign taxing jurisdiction meet the requirements of the United States and New Hampshire
9 Constitutions and, if they do, whether they can be applied to the New Hampshire remote seller or
10 sellers based on the reasons provided in the required written notice. In conducting the review
11 required by this paragraph, the department of justice shall consider all laws and regulations
12 existing as of the time of the review, and all applicable principles of the United States and New
13 Hampshire Constitutions, including but not limited to: whether or not the foreign taxing
14 jurisdiction's laws provide a satisfactory safe harbor for New Hampshire remote sellers that conduct
15 only limited business within the jurisdiction; whether or not the laws ensure that no obligation to
16 remit sales or use tax may be applied retroactively; whether or not the foreign taxing jurisdiction
17 has adopted the Streamlined Sales and Use Tax Agreement or otherwise adopted laws that are
18 substantially compliant with each of the requirements set forth in the Streamlined Sales and Use
19 Tax Agreement; whether or not the foreign taxing jurisdiction's laws provide for deduction,
20 reimbursement, or exemption for the cost of compliance of the New Hampshire remote seller in
21 collecting, accounting, and remitting the foreign taxing jurisdiction's sales or use taxes; whether or
22 not the laws require substantial compliance and enforcement of the entirety of such laws, including
23 whether or not the laws include a use tax and the requirement that persons report and pay use tax
24 liability; whether or not the foreign taxing jurisdiction or authority is actively seeking to enforce its
25 own requirement that persons report and pay use tax liability; and whether or not the application of
26 such laws in practice are fairly related to the tangible benefits provided by such state to the New
27 Hampshire remote seller.

28 II. Upon completion of the determination made pursuant to paragraph I, the department of
29 justice shall send a letter to the New Hampshire remote seller and the foreign taxing authority
30 informing them of what, if any, action the department of justice may take under this chapter. A
31 foreign taxing authority shall comply with any applicable New Hampshire laws or rules in the
32 event the foreign taxing authority is permitted to proceed with determining or imposing sales or use
33 tax liability against a New Hampshire remote seller. Any determination made by the department of
34 justice shall not be read to preclude a New Hampshire remote seller from bringing its own action
35 under RSA 78-E:6, VII, or upon any other legal basis, and nothing in this chapter shall be construed
36 to require or permit the department of justice to act as legal counsel or provide legal advice to a
37 New Hampshire remote seller or any other person to whom the department of justice is not
38 otherwise authorized by law to provide legal counsel.

1 78-E:6 Administration; Enforcement.

2 I. Whenever the department of justice has reason to believe that any provision of RSA 78-
3 E:3 or RSA 78-E:4 has been, is being or is about to be violated by any person, including a foreign
4 taxing authority or foreign taxing jurisdiction, the department of justice may bring an action in the
5 name of the state against such person to restrain by temporary, preliminary, or permanent
6 injunction the prohibited conduct and may petition the court for an order of restitution of money or
7 property to any person or class of persons injured thereby. The department of justice may bring a
8 declaratory judgment action against any foreign taxing authority or jurisdiction to establish that
9 the proposed assertion of an obligation to remit sales tax by one or more New Hampshire remote
10 sellers violates applicable state or federal law. The action shall be brought in the superior court of
11 Merrimack County or any other court of competent jurisdiction. Any such action shall be deemed a
12 civil action within the meaning of RSA 491:7. The superior court shall act on such actions as
13 expeditiously as possible and such actions shall proceed with priority over any other action
14 presenting the same questions in any other venue. Nothing in this chapter shall be construed as
15 creating a cause of action against the state of New Hampshire or any of its officials or employees.

16 II. The department of justice shall have the power to subpoena and subpoena duces tecum
17 in the name of the department for the purposes of this chapter. Witnesses summoned by the
18 department of justice shall be paid the same fee and mileage that are paid witnesses in the superior
19 court of the state. A subpoena or subpoena duces tecum of the department of justice may be served
20 by any person designated in the subpoena or subpoena duces tecum to serve it. The department of
21 justice may administer an oath or affirmation to any person and conduct hearings in aid of any
22 investigation. The department of justice may also require any person to make a statement in
23 writing under oath concerning any matter under investigation provided that the due date for
24 receipt of such a statement shall be no sooner than 10 calendar days after receipt of such demand.
25 Any testimony or statement given by any person so sworn shall be subject to the pains and penalties
26 of perjury.

27 III. Without limiting the authority granted in paragraph IV, whenever the department of
28 justice believes any person to be or to have been in violation of this chapter, the department of
29 justice may examine or cause to be examined for that purpose any books, records, papers, or other
30 documentary materials, or may examine any person under oath and subject to the pains and
31 penalties of perjury that the department of justice thinks may have knowledge of such violation.
32 For such examination, the department of justice may require the person to appear at such person's
33 place of residence, place of business, or any place in this state.

34 IV.(a) The department of justice shall serve notice of the time, place, and cause of said
35 examination at least 10 days prior to the date of the examination. Service of any such notice may be
36 made by:

37 (1) Delivering a duly executed copy of the notice to the person to be served or an
38 agent authorized by law to receive service of process;

1 (2) Delivering a duly executed copy of the notice to the person's principal place of
2 business in this state, if any; or

3 (3) Registered mail, return receipt requested, to the person to be served, or an agent
4 authorized by law to receive service of process. These limitations do not apply to a written
5 statement required under paragraph II which can be required by a reasonable notice thereof.

6 (b) Such notice need not be given if the department of justice has reason to believe that
7 any potential recipient of such notice may move, conceal, alter, or destroy, or cause to be moved,
8 concealed, altered, or destroyed, any documents to which it refers, or move or conceal or cause to be
9 moved or concealed any person whose testimony is sought pursuant thereto. In any of such cases,
10 the notice served by the department of justice pursuant to this paragraph may require the
11 immediate production or examination of any document or person therein referred to.

12 V. At any time prior to the date specified in the notice, or within 21 days after the notice
13 has been served, whichever period is shorter, the superior court may, upon motion for good cause
14 shown, extend said reporting date, or modify or set aside the demand.

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

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

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

28 VII. A New Hampshire remote seller who is subject to collection, audit, or examination by a
29 foreign taxing authority may file an action in the superior court of Merrimack County or any other
30 court of competent jurisdiction seeking immediate, emergency relief to enjoin any collection, audit,
31 or examination attempt that is occurring or will occur in violation of RSA 78-E:3 or RSA 78-E:4 or to
32 enforce any other rights provided by this chapter. Any New Hampshire remote seller who prevails
33 in such an action shall be entitled to recover any damages suffered as a result of the violation of
34 RSA 78-E:3 or RSA 78-E:4 and reasonable attorney fees and costs incurred in maintaining the
35 action. Nothing in this paragraph is intended to limit a New Hampshire remote seller's judicial
36 recourse to enforcement of this chapter.

37 78-E:7 Jurisdiction. A foreign taxing authority's registration with the department of justice
38 under RSA 78-E:3 shall constitute consent to the exclusive jurisdiction of New Hampshire state

1 courts for any and all claims, cases, or controversies related to any action brought under the
2 provisions of this chapter. New Hampshire state courts shall have jurisdiction over any claim, case,
3 or controversy brought under the provisions of this chapter even if a foreign taxing authority has
4 failed to register with the department of justice pursuant to RSA 78-E:3.

5 78-E:8 Waiver of Sovereign Immunity. A foreign taxing authority's registration with the
6 department of justice under RSA 78-E:3 shall constitute an affirmative waiver of sovereign
7 immunity for any and all claims, cases, or controversies related to an action brought under the
8 provisions of this chapter.

9 78-E:9 Reimbursement for Sales and Use Tax Collection. Notwithstanding the provisions of
10 this chapter, if a New Hampshire remote seller is determined to be obligated to collect and remit
11 sales or use tax on behalf of a foreign taxing jurisdiction or foreign taxing authority, then that New
12 Hampshire remote seller shall be entitled to recover or deduct from any taxes collected on behalf of
13 such foreign taxing jurisdiction or foreign taxing authority any costs, including any initial set up
14 costs, incurred in the collection and remission of sales and use taxes to that jurisdiction or
15 authority.

16 78-E:10 Supplement to RSA 78-D. The protections for New Hampshire remote sellers provided
17 by this chapter are intended to supplement, and not replace or supplant, protections provided to
18 retailers under and as that term is defined in RSA 78-D. Therefore, in any situation where a
19 provision of this chapter conflicts with the provisions of RSA 78-D, the provision that provides
20 greater protection from sales and use tax collection liabilities to a New Hampshire remote seller or
21 retailer, as that term is defined in RSA 78-D, shall control.

22 78-E:11 Commission Established. There shall be a commission to study ways to protect the
23 New Hampshire advantage for New Hampshire businesses as a result of the uncertainty created
24 from the United States Supreme Court decision in *South Dakota v. Wayfair*, which changed the
25 long held view of the physical presence rule.

26 I. The commission shall be composed of 13 members, as follows:

27 (a) The attorney general, or designee.

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

29 (c) The commissioner of the department of business and economic affairs, or designee.

30 (d) A member of the Business and Industry Association of New Hampshire, appointed
31 by the governor.

32 (e) A member of the New Hampshire Retail Association, appointed by the president of
33 the senate.

34 (f) A New Hampshire merchant, appointed by the speaker of the house of
35 representatives.

36 (g) A New Hampshire remote seller, appointed by the president of the senate.

37 (h) A tax attorney or tax accountant, appointed by the speaker of the house of
38 representatives.

SB 242-FN - AS INTRODUCED
- Page 10 -

1 (i) Three members of the house of representatives, one of whom shall be from the
2 minority party, appointed by the speaker of the house of representatives.

3 (j) Two members of the senate, one of whom shall be from the minority party, appointed
4 by the president of the senate.

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

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

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

12 (c) Studying the creation of a private right of action for violations of privacy in
13 transactions associated with any attempts to impose sales and use tax collection obligations on New
14 Hampshire remote sellers.

15 (d) Reviewing court cases regarding the Full Faith and Credit Clause of the United
16 States Constitution to determine how these cases impact New Hampshire's ability to protect New
17 Hampshire remote sellers from sales and use tax collection obligations, including but not limited to
18 the following decisions:

19 (1) *Franchise Tax Board of California v. Hyatt*, 136 S.Ct.1277 (2016).

20 (2) *Pacific Employers Ins. Co. v. Industrial Accident Commission of State of*
21 *California*, 306 U.S. 493 (1939).

22 (3) *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932).

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

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

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

31 V. The commission shall report its findings and any recommendations for proposed
32 legislation to the president of the senate, the speaker of the house of representatives, the senate
33 clerk, the house clerk, the governor, and the state library, in an initial report on or before
34 November 1, 2019, an interim report on or before March 1, 2020, and a final report on or before
35 November 1, 2020.

36 78-E:12 Severability. If any provision of this chapter or the application thereof to any agency,
37 person, or circumstances is held invalid, the invalidity does not affect other provisions or
38 applications of the chapter which can be given effect without the invalid provisions or applications,

1 and to this end the provisions of this chapter are severable.

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

4 3 Effective Date.

5 I. Section 2 of this act shall take effect November 1, 2019.

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

**SB 242-FN- FISCAL NOTE
AS INTRODUCED**

AN ACT requiring notice and approval of certain actions to commence audits of collection liabilities arising under certain sales and use tax statutes and prohibiting New Hampshire remote sellers from disclosing private customer information to foreign taxing authorities in connection with the collection of certain sales and use taxes.

FISCAL IMPACT: ☒ **State** ☐ **County** ☐ **Local** ☐ **None**

STATE:	Estimated Increase / (Decrease)			
	FY 2020	FY 2021	FY 2022	FY 2023
Appropriation	\$0	\$0	\$0	\$0
Revenue	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Expenditures	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Funding Source:	<input checked="" type="checkbox"/> General Revenue	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input checked="" type="checkbox"/> Other - Fee

METHODOLOGY:

The Department of Justice states this bill will prohibit foreign taxing jurisdictions from imposing sales and use tax collection obligations on New Hampshire sellers unless the foreign taxing jurisdiction registers with and provides notice to the Department. The bill prohibits sellers in New Hampshire from providing private customer information to any foreign taxing authority for the purpose of determining liability for collection of certain sales or use taxes unless the seller has provided notice to the Department. Foreign taxing authorities shall register with the Department at least 120 days prior to taking action to determine or impose sales or use tax liability against a New Hampshire seller and may not commence any action to determine or impose sales or use tax liability against a New Hampshire seller unless and until the Department has determined the laws of the foreign taxing jurisdiction meet the requirements of the United States and New Hampshire Constitutions.

This bill also states that whenever the Department has reason to believe that any provision of RSA 78-E:3 or RSA 78-E:4 have been violated, the Department may bring a declaratory judgment action against any foreign taxing authority or jurisdiction to establish that the proposed assertion of an obligation to remit sales tax by one or more New Hampshire sellers violates applicable state or federal law. The Department shall also have subpoena powers.

The bill allows for the Department to establish a fee sufficient to cover the reasonable costs

incurred by the Department to complete the administrative duties associated with this bill. The Department assumes it would need to hire a full time attorney to handle the review and litigation of the cases and a full time administrative assistant to assist with the workload. The Department has provided the following salary, benefits and other expenses associated with the positions:

Positions	FY 2020	FY 2021	FY 2022	FY 2023
Attorney	\$127,000	\$131,000	\$133,000	\$134,000
Administrative Assistant	65,000	66,000	70,000	73,000
Total	\$192,000	\$197,000	\$203,000	\$207,000

The Judicial Branch states the potential fiscal impact of the proposed bill on the Branch is in actions under the consumer protection act (RSA 358-A), and in numerous provisions that allow actions in the superior court for injunctive relief, for restitution, or for declaratory judgment. The Branch has no information to estimate the potential volume of cases that could arise under the consumer protection act or the number of superior court actions to determine the fiscal impact. The Branch does know that consumer protection cases are hard fought and carry the potential for enforcement actions by the Attorney General, criminal prosecution, and private actions with the potential of up to treble in damages. The Branch states that the superior court actions would be classified as complex equity cases and does have information on the cost of processing these types of cases. However it should be noted that average case cost estimates for FY 2020 and FY 2021 are based on data that is more than ten years old and does not reflect changes to the courts over that same period of time or the impact these changes may have on processing the various case types. The average complex equity case in the superior court will be \$783 in FY 2020 and \$788 in FY 2021. Appeals would increase the fiscal impact.

AGENCIES CONTACTED:

Department of Justice and Judicial Branch