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November 5, 2019

His Excellency, Christopher T. Sununu
Governor
107 North Main Street
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Honorable Donna Soucy
President, New Hampshire Senate
107 North Main Street
Concord, NH 03301

Honorable Stephen Shurtleff
Speaker, New Hampshire House of Representatives
107 North Main Street
Concord, NH 03301

Honorable Dan Feltes
Chair, Senate Committee on Ways and Means
107 North Main Street
Concord, NH 03301

Honorable Susan Almy
Chair, House Committee on Ways and Means
107 North Main Street
Concord, NH 03301

Tammy Wright
Clerk, New Hampshire Senate
107 North Main Street
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Paul C. Smith
Clerk, New Hampshire House of Representatives
107 North Main Street
Concord, NH 03301

Michael York
State Librarian
20 Park Street
Concord, NH 03301

Re: Annual Report on the Implementation on RSA Chapter 78-E

Dear Senator Feltes:

Enclosed, please find the Department of Justice's Annual Report on the Implementation of RSA Chapter 78-E submitted pursuant to RSA 78-E:10. This report covers the period from July 19, 2019, when most of the relevant provisions of RSA Chapter 78-E went into effect, and October 31, 2019, the end of the annual reporting period.

I am prepared to respond to any questions you may have. I can be reached at (603) 271-3650 or samuel.garland@doj.nh.gov.

Thank you.

Sincerely,



Samuel R.V. Garland
Attorney
Civil Bureau
New Hampshire Department of Justice

Enclosure

**DEPARTMENT OF JUSTICE'S ANNUAL REPORT
ON THE IMPLEMENTATION OF RSA CHAPTER 78-E**

I. Introduction

New Hampshire Revised Statutes Annotated (“RSA”) Chapter 78-E is designed to address uncertainty surrounding efforts by foreign taxing authorities, both state and local, to collect sales and use taxes from New Hampshire businesses in the wake of the United States Supreme Court’s decision in *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018). The New Hampshire Department of Justice (“DOJ”) is responsible for implementing many of Chapter 78-E’s provisions. On or before November 1 of each year, the DOJ is required to provide a report on the status of its implementation efforts to the President of the New Hampshire Senate, the Speaker of the New Hampshire House of Representatives, the Chairs of the Senate and House Ways and Means Committees, the Senate and House Clerks, the Governor, and the State Library. RSA 78-E:10. The following is the DOJ’s report for the period between July 19, 2019, when most of Chapter 78-E’s provisions went into effect, and October 31, 2019.

II. Background

On July 19, 2019, the Governor signed into law Senate Bill 242 (“SB 242”), a bill passed by the General Court in response to the *Wayfair* decision. In *Wayfair*, the Supreme Court overruled a longstanding requirement that an out-of-state seller have a physical presence in a taxing jurisdiction before that jurisdiction can require the seller to collect and remit sales or use tax. The General Court passed SB 242 to address concerns, in the wake of *Wayfair*, that foreign taxing authorities would attempt to collect sales or use tax from New Hampshire businesses that have no physical presence within those

jurisdictions. SB 242 is designed to address uncertainty surrounding this practice and to ensure that any such collection efforts are bona fide and non-fraudulent and comport with the United States and New Hampshire Constitutions.

SB 242 amended Title V of the RSA to add Chapter 78-E, “Protection of Private Customer Information and Rights of New Hampshire Remote Sellers in Connection with Certain Foreign Sales and Use Taxes.” Chapter 78-E includes numerous provisions designed to address uncertainty post-*Wayfair*.

First, Chapter 78-E requires that the DOJ develop a system to facilitate confidential, voluntary information sharing and collaboration with New Hampshire remote sellers. RSA 78-E:3, I. This system should encourage and enable New Hampshire remote sellers to confidentially share information with the DOJ regarding tax collection or remission actions undertaken by foreign taxing authorities or by other persons. RSA 78-E:3, III. The DOJ is also authorized to work in collaboration with the New Hampshire Department of Revenue Administration (“DRA”) to transmit periodic bulletins to New Hampshire businesses providing information about the provisions of Chapter 78-E and about developments relating to the collection of sales and use taxes by foreign taxing authorities. RSA 78-E:3, II.

Second, Chapter 78-E requires that foreign taxing authorities provide written notice to the DOJ at least 45 days prior to taking any action to determine or impose sales or use tax liability against a New Hampshire remote seller. RSA 78-E:5, I. This notice must identify the remote seller in question, must contain the reasons for the request or examination, must cite the legal basis for imposing a tax collection obligation on the remote seller, and must explain why the remote seller is subject to those laws. *Id.* Upon

receipt of such a notice from a foreign taxing authority, the DOJ must conduct a review to determine whether the laws of the foreign taxing authority meet the requirements of the United States and New Hampshire Constitutions and, if so, whether those laws can be applied to the remote seller identified in the notice based on the reasons provided in the written notice. RSA 78-E:6, I. If, after conducting this review, the DOJ determines that the foreign taxing authority's actions constitute an undue burden on interstate commerce under the Federal Constitution or otherwise violate the Federal or State Constitutions, then the DOJ is authorized to bring a civil action in any court of competent jurisdiction seeking injunctive relief, declaratory relief, or both, and may petition the court for an order of restitution. RSA 78-E:6, II. Chapter 78-E likewise authorizes remote sellers to seek relief against foreign taxing authorities in any court of competent jurisdiction. RSA 78-E:6, II. If a remote seller is ultimately determined to be obligated to collect and remit a sales or use tax on behalf of a foreign taxing authority, then Chapter 78-E authorizes a remote seller to recover or deduct from any taxes collected the reasonable costs, including reasonable compliance costs, incurred in the collection or remission of such taxes. RSA 78-E:7.

Third, Chapter 78-E encourages remote sellers to contact the DOJ whenever a foreign taxing authority requests information for use in determining sales or use tax liability. RSA 78-E, III(a). A remote seller may contact the DOJ by email, phone, letter, or other method established by the DOJ. RSA 78-E, III(c). A remote seller may nevertheless elect to comply with a request or directive from a foreign taxing authority if the seller determines that compliance is in its best interests, but should inform the DOJ after such compliance. RSA 78-E, III(b). A remote seller's compliance does not relieve

a foreign taxing authority of its own, independent obligation to provide the DOJ with written notice, as described in the preceding paragraph. *Id.*

Fourth, Chapter 78-E establishes a commission to monitor changes at the federal or state level that could affect the collection of sales or use taxes from New Hampshire remote sellers. RSA 78-E:11. The commission is composed of members of the General Court, the Attorney General or his designee, and the Commissioner of the DRA or her designee. RSA 78-E:11, I. The commission shall issue preliminary and final reports. RSA 78-E, 11, V. The commission will automatically be repealed on November 1, 2020, per 2019 N.H. Laws 280:1.

Finally, Chapter 78-E contains several additional provisions that do not fit comfortably within any of the above categories. Chapter 78-E places limits on the information a foreign taxing authority can collect from a remote seller and when that information can be collected. RSA 78-E:5, II. Chapter 78-E also prohibits a person from impersonating or attempting to impersonate a foreign taxing jurisdiction, a foreign taxing authority, or any other governmental agency for any reason, and subjects any person who does so to liability under the New Hampshire Consumer Protection Act, RSA 358-A. RSA 78-E:5. Additionally, the DOJ is authorized to adopt rules through emergency rulemaking under RSA 541-A:18 to facilitate implementation of the provisions of Chapter 78-E. RSA 78-E:8. And, as noted above, the DOJ is also required to issue an annual report on or before November 1 of each year detailing the implementation of the provisions of Chapter 78-E and recommending any proposed legislation. RSA 78-E:10.

III. Implementation of Chapter 78-E

The DOJ has made significant efforts to implement Chapter 78-E since it went into effect on July 19, 2019. These efforts are ongoing. The following is an overview of the steps the DOJ has already taken, and those it intends to take in the short term, to implement Chapter 78-E.

A. Personnel

The Attorney General has appointed Attorney Sam Garland as point person on matters relating to the *Wayfair* decision and the implementation of Chapter 78-E and as his designee on the legislative commission established under RSA 78-E:11. Attorney Garland is a member of the DOJ's Civil Litigation Unit, where his work involves, among other things, litigation of complex federal and state constitutional issues. Attorney Garland works in collaboration with other DOJ attorneys and staff, including members of the Civil Bureau and the Consumer Protection and Antitrust Bureau ("CPAB"), to facilitate the implementation of Chapter 78-E's provisions.

B. Procedures for Communications with New Hampshire Businesses

The DOJ has implemented working procedures to facilitate communications with New Hampshire businesses in the wake of the *Wayfair* decision. The DOJ is currently in the process of formalizing these procedures in a single written document.

Any communications with a New Hampshire business regarding a foreign taxing authority's efforts to collect sales or use tax from that business are directed to the CPAB through the Consumer Protection Hotline. The CPAB has developed a checklist to collect relevant information from remote sellers about those collection efforts. Using this checklist, the CPAB collects information from remote sellers by phone, either when a

remote seller calls the Consumer Protection Hotline or, if a remote seller contacts the DOJ through some other method, by having a CPAB representative call the remote seller directly.

In an effort to make information sharing with the DOJ more efficient, the DOJ is in the process of determining how best to facilitate businesses sharing relevant information electronically. The DOJ hopes that providing a secure electronic means of sharing relevant information will address concerns expressed by several remote sellers about the efficiency of requiring that information sharing occur by telephone. Ideally, the DOJ will be able to provide businesses with the ability to securely share information by means of the DOJ website. Alternatively, the DOJ will provide an electronic version of the CPAB checklist on the DOJ website, which businesses can fill out and email to the CPAB directly. The DOJ intends to provide businesses with an electronic means of securely providing information to the CPAB in the coming weeks.

Though the DOJ is only required under Chapter 78-E to conduct a review of a taxing authority's laws when it receives written notice from a taxing authority under RSA 78-E:4, I, the DOJ's current policy is to determine whether to conduct such a review on a case-by-case basis when informed of collection efforts by a remote seller under RSA 78-E:4, III(a). The DOJ cannot provide additional details about that process, other than to indicate that it is ongoing, in light of the protections afforded to information shared with DOJ by a remote seller under Chapter 78-E. *See* RSA 78-E:3, III.

In addition to sharing information regarding tax collection efforts by foreign taxing authorities, New Hampshire businesses have also contacted the DOJ with general questions regarding the *Wayfair* decision, Chapter 78-E, and other related issues. All

such communications are forwarded directly to Attorney Garland. Though not expressly contemplated by Chapter 78-E, these communications provide the DOJ with valuable insight into the questions and concerns New Hampshire businesses have in the wake of the *Wayfair* decision. This helps inform how the DOJ can best employ its resources in implementing Chapter 78-E. It is DOJ policy to make clear to all callers that DOJ attorneys and staff cannot provide legal or tax advice and are not authorized to represent or defend private businesses or entities potentially subject to a collection efforts by foreign taxing authorities.

C. Bulletins and Collaboration with the DRA

The DOJ and the DRA have collaborated since Chapter 78-E went into effect. Both agencies have shared information received from New Hampshire businesses regarding sales or use tax collection efforts or other related concerns; provided information and updates on events that DRA and DOJ representatives have been invited to or attended concerning the *Wayfair* decision, Chapter 78-E, or related issues; and collaborated on informational bulletins, as contemplated under RSA 78-E:3, II.

The Attorney General and the Commissioner of the DRA jointly released the first Chapter 78-E bulletin on August 29, 2019, which is attached to this report as Exhibit A. This bulletin provides an overview of: (1) the *Wayfair* decision and its potential impact on New Hampshire businesses; (2) Chapter 78-E and its provisions; and (3) certain resources that are available to New Hampshire businesses potentially subject to collection efforts by foreign taxing authorities. The DOJ and DRA disseminated this bulletin to New Hampshire businesses through the DRA listserv. The DOJ has also provided copies of the bulletin to, among others, members of the New Hampshire legislature,

representatives of the New Hampshire Small Business Development Center (“SBDC”), representatives at the Small Business Administration (“SBA”), members of the media, and individuals and entities that have contacted the DOJ regarding the *Wayfair* decision and Chapter 78-E. This bulletin is also available on the DOJ website at <https://www.doj.nh.gov/consumer/out-of-state-sales-tax.htm>. The DOJ is in the process of preparing additional bulletins on specific issues not addressed in the first bulletin.

D. Education and Community Outreach

The DOJ’s ability to effectively implement Chapter 78-E requires an understanding of both the challenges New Hampshire businesses face in the wake of the *Wayfair* decision and efforts at the state and federal level to address those challenges. In addition to the steps taken to disseminate the first Chapter 78-E bulletin, described in the preceding paragraph, the DOJ has engaged in certain education and community outreach efforts designed to foster communication between the DOJ and the New Hampshire business community. These efforts include:

- A presentation to the SBDC regarding the *Wayfair* decision and the implementation of Chapter 78-E;
- Attendance at a field hearing of the U.S. Senate Committee on Small Business and Entrepreneurship, which provided an opportunity to describe the DOJ’s efforts to representatives of the businesses community;
- An interview with the New Hampshire *Business Review* regarding Chapter 78-E and the DOJ’s efforts to implement its provisions; and
- Frequent contact with, among others, members of the SBA, the SBDC, members of the New Hampshire legislature, and members of the New Hampshire business community regarding the *Wayfair* decision, Chapter 78-E, and related issues.

These efforts have allowed the DOJ to cultivate relationships both with members of the New Hampshire business community and with other individuals and entities who

are acutely aware of the concerns and challenges New Hampshire businesses face post-*Wayfair*. The DOJ believes this has facilitated, and will continue to facilitate, information sharing between New Hampshire remote sellers and the DOJ, as contemplated in RSA 78-E:3, I, and will accordingly continue to prioritize similar education and outreach efforts going forward.

E. Communications with Foreign Taxing Authorities

As of the date of this report, no foreign taxing authority has provided the DOJ with written notice of its intent to take actions to determine or impose sales or use tax liability against a New Hampshire remote seller, as required by RSA 78-E:4, I. The DOJ is in the process of determining how to best encourage foreign taxing authorities to comply with the notice requirement

IV. Communications Received by the DOJ

Since Chapter 78-E went into effect, the DOJ has received communications from four businesses concerning potential collection efforts by five different states. Several of these businesses have contacted the DOJ multiple times. The DOJ has also received communications from two businesses that have not been contacted by foreign taxing authorities, but are concerned about complying with sales and use tax requirements in the wake of the *Wayfair* decision. Because information received by the DOJ from remote sellers is confidential, *see* RSA 78-E:3, III, the DOJ cannot provide additional information about these communications in this report.

The DOJ has not received any reports of fraudulent or otherwise unauthorized attempts by individuals or entities to collect sales and use taxes from New Hampshire businesses.

As noted in the preceding section, the DOJ has not yet received a formal written notice from a foreign taxing authority intending to take an action to determine or impose sales or use tax liability against a New Hampshire remote seller, as required by RSA 78-E:4, I.

V. Recommendations for Proposed Legislation

At this time, the DOJ does not have any recommendations for proposed legislation.

VI. Conclusion

In the three-and-a-half months Chapter 78-E has been in effect, the DOJ has made considerable efforts to implement the provisions of that chapter. These efforts will continue.

EXHIBIT A

Reporting Out-of-State Sales Tax Requests for NH Businesses



Issued on: August 21, 2019

Issued by: Attorney General Gordon J. MacDonald
Department of Revenue Administration
Commissioner Lindsey M. Stepp

Introduction

On July 19, 2019, Governor Sununu signed into law SB 242, a bill passed by the General Court in response to the United States Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018). In *Wayfair*, the United States Supreme Court overruled a longstanding requirement that an out-of-state seller have a physical presence in a taxing state before that state can require the seller to collect and remit sales or use tax. In the wake of the *Wayfair* decision, it is possible that other states, or localities within those states, will attempt to collect sales or use tax from New Hampshire businesses that do not have brick-and-mortar facilities within those states or localities, but remotely sell goods to individuals or entities located there. SB 242 is designed to address uncertainty surrounding this practice and to ensure that any such collection efforts are bona fide and non-fraudulent and comport with the United States and New Hampshire Constitutions.

What does SB 242 do?

First, SB 242 requires that a state or locality provide written notice to the New Hampshire Department of Justice (DOJ) at least 45 days before taking any action to determine or impose sales or use tax liability on a New Hampshire business.

Second, SB 242 requires that the DOJ develop a system to facilitate confidential, voluntary information sharing and collaboration with New Hampshire businesses.

Third, SB 242 authorizes the DOJ to collaborate with the New Hampshire Department of Revenue Administration (DRA) to transmit periodic bulletins (like this bulletin) to New Hampshire businesses regarding the provisions of SB 242 and other related developments in this area of taxation.

Fourth, SB 242 encourages New Hampshire businesses to notify the DOJ whenever a state or locality requests information for use in determining sales or use tax liability.

Fifth, SB 242 establishes a temporary commission to monitor actions taken at the federal or state level that could affect the collection of sales or use tax from New Hampshire businesses. The commission will issue preliminary and final reports on its findings.

Resources Available to New Hampshire Businesses

The DOJ and the DRA cannot provide legal or tax advice to private parties potentially affected by SB 242 or the *Wayfair* decision. Accordingly, any New Hampshire business contacted by another state or locality regarding the collection or remittance of sales or use tax is strongly encouraged to alert their accountant, attorney, or other appropriate advisor to determine a course of action.

Any New Hampshire business contacted by a state or locality regarding the collection of sales or use tax is also encouraged to contact the DOJ's Consumer Protection Bureau.

Consumer Protection Hotline:

Phone: 1-888-468-4454 or (603) 271-3641

Email: DOJ-CPB@doj.nh.gov

By mail: Consumer Protection Bureau
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

A Consumer Protection representative will collect information from the business and provide that information to the appropriate DOJ official. The information collected will help the DOJ determine, among other things, the legitimacy of any attempt to collect sales or use tax from the business in question and the extent to which other states and localities are complying with the requirements of SB 242. Information shared with the DOJ through this process is confidential. *See* RSA 78-E:3, III.

The DOJ will provide updates on its website regarding important developments relating to the *Wayfair* decision and SB 242. This information will be available through a link on the DOJ's home page (www.doj.nh.gov) and will include, among other things, any bulletins sent by the DOJ to New Hampshire businesses, annual reports issued by the DOJ on how SB 242 is being implemented, and the preliminary and final reports of the temporary commission described above. Businesses are encouraged to periodically visit the DOJ's website to ensure they remain apprised of these developments.

The New Hampshire Department of Business and Economic Affairs, Division of Economic Development has also developed a website with *Wayfair*-related information and resources. It is available at www.nheconomy.com/nosalestax.