Navigating the Post-*Wayfair* World

Tim Smith, Godfrey & Kahn, S.C.
Jennifer Ardrey, Grant Thornton LLP

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Presentation overview

- Recap of *Wayfair* case and sales and use tax nexus
- Recent developments and trends with economic nexus post-*Wayfair*
- Recent marketplace facilitator developments
- COVID-19 developments relating to sales and use taxes
- Impact of *Wayfair* on taxpayers
- Things to consider going forward
- Engaging team, processes and technology through technical tools
- Using technology and data to assess risk and compliance requirements

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Recap of the *Wayfair* case and sales and use tax nexus

Recap of sales and use tax nexus

- Nexus is the minimum connection with a state necessary for the state to require a seller to collect and remit the state's sales and use taxes

- Nexus is a constitutional doctrine that has evolved over the years as interpreted by the courts

- The U.S. Supreme Court's 1992 *Quill* decision made clear that physical presence within a state was required for sales and use tax nexus under the Commerce Clause of the U.S. Constitution
  - Presence of employees in-state
  - Real estate or tangible assets within the state
  - Inventory held within state

Recap of the *Wayfair* case

- U.S. Supreme Court overturned the physical presence requirement for sales and use tax nexus in the 2018 *Wayfair* case

- The case upheld the constitutionality of South Dakota's economic nexus law for sales and use tax purposes

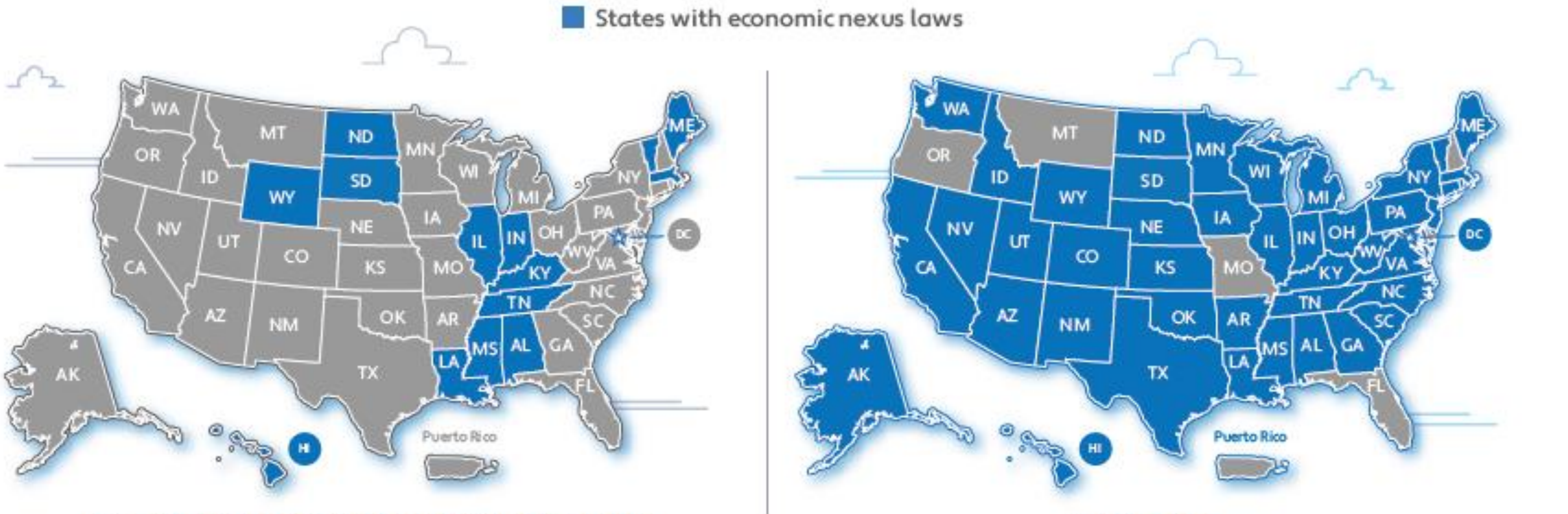
- South Dakota could constitutionality require remote sellers to register and collect and remit South Dakota sales and use taxes if either threshold is met:
  - $100,000 gross receipts **or**
  - 200 transactions

- South Dakota's law was not retroactive

Recent developments and trends with economic nexus post-*Wayfair*

State adoption of *Wayfair* standards

- 43 of the 45 states that have a sales and use tax now have an economic nexus standard
- Florida and Missouri are the two holdouts



June 21, 2018 (day of South Dakota v. Wayfair, Inc. ruling)

June 21, 2020

Source: Avalara, 2020

Sales and use tax nexus after *Wayfair*

- All 43 states that have an economic nexus provision are now enforcing it
- Most states have based their economic nexus thresholds on the $100,000 gross receipts / 200 transaction standard that was approved in *Wayfair*
- Wisconsin has adopted the $100,000 gross receipts **or** 200 transaction standard with an enforcement date of October 1, 2018
- Don't forget about physical nexus after *Wayfair*
    - A seller who does not exceed the economic nexus thresholds in a state may still create nexus through physical presence alone
    - Both standards remain in effect

Trends with economic nexus triggers

- Most states require either test to be met, although some require both the sales threshold **and** the transaction threshold to be met
- States that require both triggers to be met:
  - Connecticut - $100,000 of sales **and** 200 transactions
  - New York - $500,000 of sales **and** 100 transactions

Trends with transaction thresholds

- General trend toward reducing or eliminating the transaction threshold
- Are these changes open to constitutional challenges as going beyond thresholds approved in *Wayfair*?
- Kansas has effectively dropped both thresholds – registration is required upon first sale into Kansas of any dollar amount
- A few states have dropped the threshold from 200 to 100 sales
  - Minnesota
  - New York

Trends with sales-only thresholds

- Some states have eliminated the transaction threshold entirely but have a higher sales threshold:
  - Alabama - $250,000 sales
  - California - $500,000 sales
  - Mississippi - $250,000 sales
  - Texas - $500,000 sales

Trends with sales-only thresholds

- Several states have retained the $100,000 sales threshold but have eliminated the transaction threshold entirely:
  - Arizona (beginning 2021)
  - Colorado
  - Iowa
  - Massachusetts
  - North Dakota
  - Oklahoma
  - Pennsylvania
  - South Carolina
  - Tennessee
  - Washington

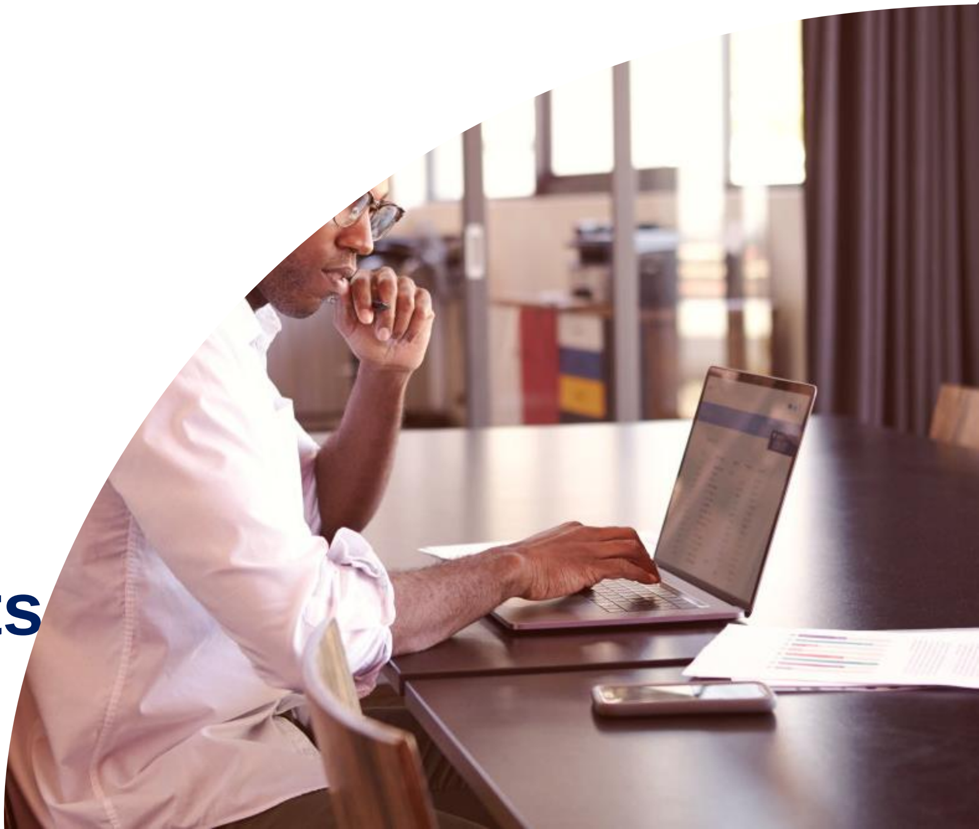
Trends with sales definitions

- The definition of what is included in “sales” for purposes of the sales threshold varies from state to state
- Broadening definitions of sales requires more sellers to register and collect, even those who make largely tax-exempt sales
- Exempt sales may or may not be included in sales threshold
    - Treatment of exempt sales for resale also varies
    - Some states include exempt sales in the sale threshold but do not include exempt sales for resale
- Exempt services may or may not be included in sales threshold
- Wisconsin – exempt sales and exempt services are included in threshold

Trends with evaluation period

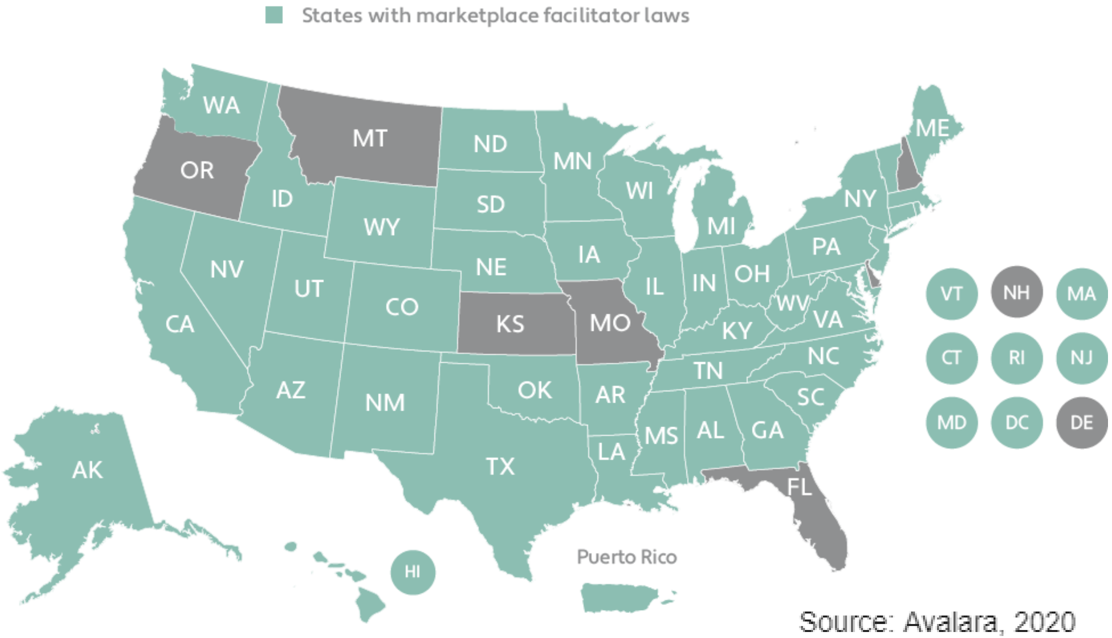
- What is the relevant period for determining economic nexus?
- Most states have adopted one of the following measurement periods:
    - Current year
    - Current year **or** immediately preceding year
    - Trailing 12-month period
- Wisconsin – previous **or** current taxable year evaluation period
- Broader evaluation period brings more taxpayers within scope of nexus
- Nexus may continue in a year even though sales levels have decreased in current year

Recent Marketplace Facilitator Developments



Marketplace facilitator trends

- Most states with economic nexus provisions have also enacted marketplace facilitator laws



Source: Avalara, 2020

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Marketplace facilitator laws

- Marketplace facilitator laws build on economic nexus provisions by making remote marketplaces responsible for collecting sales taxes on sales made through their platforms
- Marketplaces such as Amazon were generally complying with economic nexus laws on direct sales made by them, they were not collecting tax on sales made by third parties through their platform
- The facilitator (i.e. Amazon) is responsible for sales tax registration and collection rather than the third-party selling through Amazon's website

Marketplace facilitator definitions

- Definitions of marketplace facilitator vary by state
- Narrower definitions include those who facilitate sales by listing or advertising property and collect payment, either directly or through a third party
- Wisconsin has adopted a similarly narrow definition

Marketplace facilitator definitions

- Broader definitions may include those who engage in one of the following activities with respect to the seller's products:
  - payment processing services
  - fulfillment or storage services
  - listing products for sale
  - setting prices
  - order taking
  - advertising or promotion
  - performing customer service or accepting returns or exchanges
- Broader definitions may be problematic in that they can include parties who are not directly involved in the financial or payment aspects of the transaction and who would practically be unable to collect sales taxes

Marketplace facilitator definitions

- Economic nexus threshold for marketplace facilitator
    - Generally follows the state's threshold for direct sellers
- Sales made by a third-party through a registered marketplace facilitator also may or may not count toward the third-party seller's **own** economic nexus threshold for purposes of determining whether the third-party seller is required to register and collect

Marketplace facilitator exclusions

- Some states are carving out those who exclusively advertise from the definition of a marketplace facilitator
  - For example, newspapers and websites that only advertise and that do not participate further in the sale are excluded from the definition
- Exclusions for those who act exclusively as a payment processor (credit cards and electronic payment apps)
- Exclusions for local delivery services such as local restaurant meal delivery

Marketplace transaction audits

- Who is subject to audit with marketplace transactions and who bears the ultimate risk of non-compliance?
- Most states protect sellers on marketplaces, unless they provide inaccurate data to the marketplace facilitator
- Wisconsin provides that only the marketplace facilitator may be audited and held liable for tax on the sale
- In Wisconsin, the third-party seller is generally not liable, unless it provided incorrect or inaccurate information to the facilitator and the facilitator seeks relief

COVID-19 Developments Related to Sales and Use Tax

COVID-19 developments

- At the beginning of the pandemic, a few states granted limited sales tax relief:
  - Extensions for filing returns
  - Penalty and interest relief on late sales tax payments
  - Most of these extensions and relief have expired by now
- Future sales tax rate increases to shore up revenue decreases due to pandemic?
- States broadening economic nexus standards?
  - Proposal in Wisconsin to eliminate transaction threshold proposed but failed to pass earlier this year
- Increasing the tax base to include more digital goods and services
  - Taxes on digital communications such as video conferences
- States will continue to be more aggressive in audits and seeking noncompliant sellers in light of budget shortfalls

Congressional action?

- Will Congress act to overturn or limit the application of the *Wayfair* decision?
- The *Wayfair* opinion left open the possibility that Congress could limit its application using its Commerce Clause authority
- Congress has had hearings this year on the impact of *Wayfair*, but uncertain whether hearings will lead to legislation

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How is this impacting taxpayers?

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- Increase in exemption certificate documentation requirements
  - Need to collect in more states
  - Varying state rules on customer exemptions and documentation requirements
  - Validation of certificates
  - Maintenance of documentation
- Potential need to automate sales tax process
  - Determination and maintenance of product taxability decisions
  - Maintenance of sales tax rates
  - Computation and collection of the sales tax
  - Tax remittance and filing of returns

How is this impacting taxpayers?

- Additional administrative burden on taxpayers:
    - Registration in additional states
    - Filing returns (generally on a monthly basis)
    - Addressing notices
    - Managing audits and state inquiries

- Organizations with multiple legal operating entities – potential planning opportunities to restructure?

- Implications of filing sales tax returns in states with no other state and local tax filings

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Things to consider going forward

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- *We're not in Kansas anymore!* Movement of states away from the transaction level thresholds
- Inbound sales from foreign entities – how will states administer/enforce?
- Locally administered sales taxes – do economic nexus rules apply?
- Impact of marketplace provider rules
- Taxpayer challenges to nexus provisions with enforcement dates prior to *Wayfair* decision issuance of 6/21/18 (i.e., Massachusetts)

Things to consider going forward

- States challenging taxpayer registration dates if registration occurs after effective date

- Convergence of economic market standards for sales/use and income/franchise taxes

- Needs of the taxpayer to be compliant
    - Internal personnel resources
    - System needs and/or system implementations to address
    - Monitoring state and local nexus changes (both sales and income/franchise taxes) and product taxability changes
    - Managing risk and exposures

- Impact of *Wayfair* on the sale or purchase of a business

- Impact of *Wayfair* within the financial statements (ASC 450/ASC 740)

Things to consider going forward: *Wayfair* readiness approach

What are the issues you identified resulting from the impact of *Wayfair* on your business?

What is your current process to assess risks and opportunities?

How are you engaging your current people, processes, and technology to address those risks?

How will *Wayfair* impact your other state tax filings?

How does *Wayfair* impact the future state of your business?

Engaging Team, Processes and Technology Through Technical Tools

Engaging Team, Processes and Technology Through Technical Tools

- Practical considerations for the Tax Department resulting from *Wayfair*
  - Reviewing company-wide activities
  - Calculating financial statement impact
  - Determining automation needs
  - Considering additional registration and compliance obligations and audit / VDA / amnesty implications
- Opportunity to implement innovative changes to modernize your tax department through RPA, data analytics and blockchain solutions

Engaging Team, Processes and Technology Through Technical Tools

- Now that we are a couple years in on the states' response to *Wayfair*, we have a better sense as to what to expect in these areas, and begin to develop the technical tools necessary for companies to respond to these challenges

- It's helpful to consider what areas will need to be examined in order to determine whether your company is ready to handle sales taxes post-*Wayfair*

Engaging Team, Processes and Technology Through Technical Tools

Asking the key questions:

- Does this even apply to your business?
- What are your primary issues or concerns resulting from the impact of *Wayfair* on your business, customers and competitors?
- What is your current process to address changing state standards, assess risk, and identify potential opportunities?
- How are you engaging your current team, processes and technology to address the risks that have been identified?
- How does *Wayfair* impact the future state of your business, customers and competitors?
- How does *Wayfair* impact other state taxes, including state income and franchise taxes?

Engaging Team, Processes and Technology Through Technical Tools

Where do you start?

- Determination of nexus and filing requirements
- Determination of business impact
- Determination of taxability of items and services
- Sales tax system selection and implementation
- Sales and use tax compliance and registration
- Managing documentation

Using Technology & Existing Data to Assess Risk and Compliance Requirements

Organizations are dealing with rapid administrative and legislative change and are trying to determine what the impact on their business will be. Many times they are doing so with limited resources and a lot of internal stakeholders.

- Ways technology can help deliver on a timely need:
  - Limited Data Need – may be in multiple formats or come from many sources, but for an initial review only high-level data is needed
  - Time to Delivery – with the appropriate inputs, usable information can be produced quickly
  - Usability – resulting analysis is user friendly for all members of an organization, from high-level reporting to underlying data availability

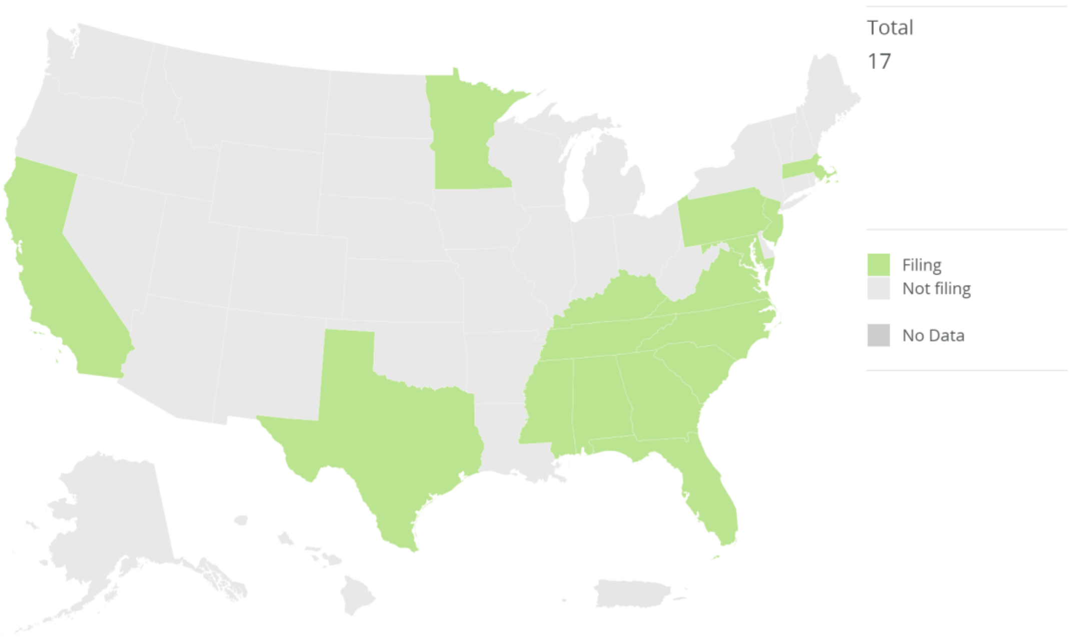
Using Technology & Existing Data to Assess Risk and Compliance Requirements

What data do I need to perform a directionally correct analysis?

Wayfair Service Offerings					
	CURRENT FILINGS	PHYSICAL PRESENCE	PAYROLL	RECEIPTS FROM SALES / SERVICES	
	File sales/use tax returns?	Lease or have ownership of real or personal property (including inventory)?	Payroll paid to employees in the state?	Amount of Revenue for the preceeding 12 months (or other period as you identify)	Number of sales transactions in state?
Alabama					
Alaska					
Arizona					
Arkansas					
California					
Colorado					
Connecticut					
Delaware					
District of Columbia					
Florida					
Georgia					
Hawaii					
Idaho					
Illinois					
Indiana					
Iowa					
Kansas					
Kentucky					
Louisiana					
Maine					
Maryland					
Massachusetts					
Michigan					
Minnesota					
Mississippi					
Missouri					
Montana					

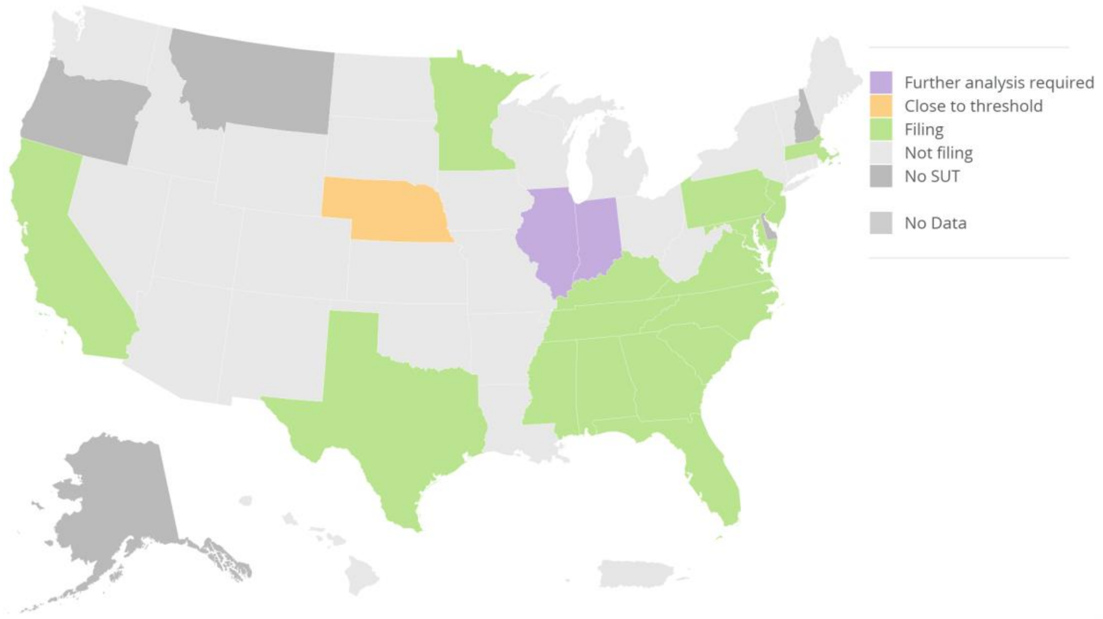
Using Technology & Existing Data to Assess Risk and Compliance Requirements

Where do I file now?



Using Technology & Existing Data to Assess Risk and Compliance Requirements

Where should I focus my attention given the recent changes?



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Using Technology & Existing Data to Assess Risk and Compliance Requirements

- After determining where nexus has been established, calculate exposure
- Considerations:
  - Date nexus established
  - Taxability
  - Special rates
  - Customer Exemptions
- Establish a remediation plan

Using Technology & Existing Data to Assess Risk and Compliance Requirements

How's my data analyzed?

State	Date Physical Presence Established	Wayfair Effective Date	Wayfair Threshold	Total Sales Aug 2018 - Aug 2019	Wayfair Threshold Met (Y/N)	Marketplace Provision	SaaS Taxable	Exemption for Sales to Certain Religious, Charitable or Educational Organizations (Y/N)	Combined Sales Tax Rate[1]	Total Estimated Liability	Action Plan
Alabama (AL)	-	10/1/2018	Annual sales >$250,000	**$64,780.82**	**N**	Yes - effective 1/1/2019 *(may elect to collect or report)*	**N**	Only specifically named exempt entities	9.14%	**$0.00**	
Alaska (AK)	-	9/1/2019	*local jurisdictions only -- no state-level tax.* **Nome AK:** (1) Gross revenue >$100,000; or (2) 100 or more separate transactions	**$25,818.47**	**-**	**Nome, AK only:** yes - effective 9/1/2019	**N**	-	0.00%	**$0.00**	
Arizona (AZ)	**11/7/2016**	9/30/2019	Annual gross proceeds: >$200,000 (calendar year 2019) >$150,000 (calendar year 2020) >$100,000 (calendar year 2021 and after)	**$314,595.67**	**Y**	Yes - $100,000 sales threshold applies to marketplace facilitators, effective 9/30/2019	**T**	Only specifically named exempt entities	8.37%	**$105,326.63**	**VDA**
Arkansas (AR)	**11/1/2018**	7/1/2019	(1) Gross revenue >$100,000; or (2) 200 or more separate transactions	**$47,709.73**	**N**	Yes - effective 7/1/2019	**N**	No	9.43%	**$0.00**	
California (CA)	**2/14/2011**	4/1/2019	Gross revenue >$500,000	**$1,404,538.37**	**Y**	Yes - effective 10/1/2019	**N**	No	9.00%	**$0.00**	
Colorado (CO)	**3/4/2019**	6/1/2019	Gross revenue >$100,000	**$317,528.23**	**Y**	Yes - effective 10/1/2020	**N**	Yes	7.63%	**$0.00**	
Connecticut (CT)	-	$250,000 threshold: 12/1/2018 $100,000 threshold: 7/1/2019	(1) Gross revenue >$100,000; ***and*** (2) 200 or more separate transactions	**$125,896.17**	**Y**	Yes - effective 12/1/2018	**T[5]**	Yes	1.00%	**$1,258.96**	**File prospectively**

Questions?