

# The Way Forward: Wayfair and More





#### Wayfair falls in a rapidly changing landscape

- The digital economy, artificial intelligence, internet of things redefine our playing field
- New economy, sharing economy, gig economy
- How big? Apple, Alphabet, Amazon, Microsoft, Facebook on top 10 market cap
- On-line consumer spending up 15% 2018



# Summary of Digital Landscape Issues

- E-commerce and taxation
- Sharing economy and taxation
- Cyber crime
- Technology and service provision
- Harnessing technology for taxation blockchain
- Pressure on workforce (Al and more) at all levels – and taxation



# Back to the issue of Wayfair...

- Taxation of remote sales
- Quill and previous legislation supported physical nexus – sales tax via the use tax
- Over time, pressure builds as internet commerce increases
  - Estimates of sales tax loss 4-9%
  - Technology in support of collection
  - Defining economic nexus over physical nexus
  - Disadvantage to brick and motar



# Wayfair landscape

- Previous challenges:
  - National Bellas Hess v Illinois (1967)
  - Quill v North Dakota (1992)
- What happened in 1993?
  - Last Sears Catalog
  - Retail Archaeology
- What happened in 2018?
  - Supreme Court decision on Wayfair vs. South Dakota



# Wayfair Decision

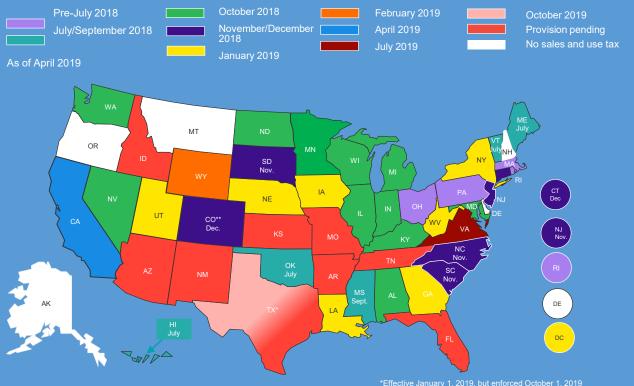
- June 21, 2018: 5-4, Justice Kennedy writing for the majority
  - The physical presence nexus standard articulated in Quill "is unsound and incorrect"
  - Court overturns both Quill and National Bellas Hess
  - Dissenting Justices agreed on substance (i.e., Quill was wrongly decided) but would have upheld Quill on stare decisis grounds, leaving it to Congress to overturn the decision.



### Basic guidelines

- Remote sellers should collect and remit sales tax based on economic nexus
- Not retroactive
- Safe harbor for small businesses (define economic nexus)
- Single tax administration at state level
- Simplified rate structure
- Uniform definitions
- Access to software provided by state; immunity for use of it

#### State Wayfair responses: enforcement of economic nexus provisions for remote retailers



Source: Authors and Ernst & Young LLP

Kioko, Mikesell and Mullins, 2019



# **Implications**

- Tax revenue increase
- Administrative burdens
- Change in competitive advantage (winners and losers)
  - Brick and mortar
  - Non-tax states
- Economic nexus may mitigate in-state advantage



# **Implications**

- Local sales tax simplification
- Level playing field for physical location
- Acknowledge that use tax not effective



# What are states seeing?

- Little evidence of sales tax revenue growth-yet
  - Future growth is the key
- Bits of confusion over nexus
- Cleaning up of previous "band-aid" legislation
- Concerns of businesses
- Local issues complications of the tax



#### What's next?

- Impact on e-commerce vs. brick and motar
- How quickly will innovation (evasion) happen?
  - Sales suppression technology and disappearing transactions
  - Increased digitization of consumption
- Demographic changes still huge
- Way forward for taxation?
  - Focus on simplification, immobile bases
  - Sounds familiar! But not quite