

Morgan Lewis

# NAVIGATING THE NEXT.

**What We're Seeing: Hot Topics in Employee Benefits – *What to Expect from the Biden Administration***

Dan Salemi, Julie Stapel, Sage Fattahian, Claire Bouffard, and Sam Bryant  
January 21, 2021

# Presenters



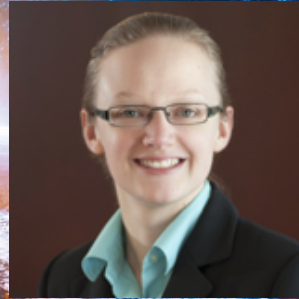
**Dan Salemi**  
Chicago



**Julie Stapel**  
Chicago



**Sage Fattahian**  
Chicago



**Claire Bouffard**  
Pittsburgh



**Sam Bryant**  
Philadelphia

**Morgan Lewis**

# AGENDA

- Plan Sponsor Considerations

**Claire Bouffard**

- ACA Nondiscrimination Rules for Fully Insured Health Plans

**Sage Fattahian**

- ERISA Fiduciary Issues

**Julie Stapel**

- Multiemployer Pension Plan Reform Efforts – 2021 Outlook

**Dan Salemi**

- Executive Compensation Under the Biden Administration

**Sam Bryant**

# **PLAN SPONSOR CONSIDERATIONS**

**Morgan Lewis**

# Administering the SECURE Act

Changes effective in 2021 and outstanding questions

The IRS and DOL issued guidance around SECURE Act changes during 2020. However, a number of questions about the SECURE Act remain outstanding, including the timeline for repayment of child birth or adoption distributions and service crediting for long-service part-time employees.

For the changes effective in 2021, plan sponsors will need to work with recordkeepers to determine how the changes will be administered.

Starting in 2021, defined contribution plans will need to begin crediting eligibility to long-service part-time employees (500 or more hours of service in three consecutive years) for purposes of eligibility to make deferrals.

In Notice 2020-68, the IRS confirmed that service must be credited for vesting purposes prior to 2021. The IRS requested comments on this given the burden on plan sponsors.

The DOL's lifetime income disclosure rule is effective September 18, 2021. This is in connection with the SECURE Act requirement for the provision of an annual (or more frequent) statement that shows the account balance as of the last day of the statement period converted to fixed income life annuity. The DOL rule describes required assumptions. It also provides model disclosures to describe these assumptions and fiduciary protection for their use.

# Continued DOL Audits

## Missing Participants and Uncashed Checks

For half a decade and counting, the DOL has pursued its missing participants initiative.

- Focuses on participants over 65 that plan has not been able to locate, as well as steps taken to locate these participants.
- Some audits have examined records of uncashed checks and the plan's processes and procedures for following up with participants with uncashed checks.

## Possible Actions

The DOL recently issued subregulatory guidance regarding how plans should deal with missing/unresponsive participants. Plans might consider reviewing lists of missing participants and uncashed checks to determine whether additional steps are necessary or desirable, which might include the use of additional search firms or more frequent searches for missing participants or participants on an uncashed check list.

# Implementing the New DOL Electronic Safe Harbor Rules

The DOL published an electronic disclosure safe harbor rule for certain required plan communications



## New Safe Harbor

This allows for electronic delivery to employees even if they are not “wired at work” if the employee provides a valid email address or has been assigned one by the employer. Among other requirements, an initial paper notice must be provided.



## Prior Safe Harbors

The prior electronic disclosure safe harbors (i.e., “wired at work” or affirmative consent) remain in place and plans can continue to rely on these safe harbors if applicable.



## Other Disclosures

This rule only applies to retirement plan disclosures that are required by the DOL under Title I of ERISA. It may not apply to other disclosures, including those required only by other agencies (e.g., IRS, SEC) and non-retirement plan disclosures.

# Retirement Reform as Legislative Priority

Consolidated Appropriations Act of 2021 (the Act)



## Disaster Relief

The Act provides for disaster relief similar to CARES (and prior disaster relief) for disasters, other than COVID-19, that occurred between January 1, 2020 and February 25, 2021.



## Partial Plan Termination

The Act provides that a plan will not have a partial plan termination if the number of active participants under the plan on March 31, 2021 is at least 80% of the number of participants covered on March 31, 2020.



## Money Purchase Pension Plans

The Act provides that coronavirus-related distributions permitted under the CARES Act were allowed to be made from money purchase pension plans.



## 420 Transfers

Under certain conditions, the Act permits plan sponsors to cancel transfers that may have been made of excess pension assets to the separate account established to fund certain retiree and life benefits.



# Fiduciary Governance Considerations Redux

2020 – the year of fee and expense litigation



**Unprecedented number of fee and expense cases filed in 2020**

**Recent cases focused on use of participant data and marketing to participants**

**Plan fiduciaries may wish to review and evaluate fees charged to participants**

**Plan fiduciaries may consider RFPs or other steps to confirm lower fees are not available or to restrict marketing to participants**

# **AFFORDABLE CARE ACT (ACA) NONDISCRIMINATION RULES FOR FULLY INSURED HEALTH PLANS**

**Morgan Lewis**

# ACA Nondiscrimination Rules for Fully Insured Health Plans

- Self-insured group health plans have been subject to nondiscrimination testing under Section 105(h) of the Internal Revenue Code (Code).
- Self-insured plans are prohibited from discriminating in favor of highly compensated individuals in terms of eligibility and benefits.
  - Fully insured plans have not been subject to this nondiscrimination testing.
- The ACA extends similar nondiscrimination rules to nongrandfathered fully insured health plans.
  - Originally slated to become effective for plan years beginning on or after September 23, 2010.

# ACA Nondiscrimination Rules for Fully Insured Health Plans

- Many fully insured health plans have traditionally offered richer benefits to highly compensated employees, such as executive plans as part of an overall compensation package.
- Some fully insured design elements include:
  - shorter waiting periods for the highly compensated individual
  - richer benefits for the highly compensated individual
  - lower contribution rates paid by the highly compensated individual
- There is great concern that employers could comply with this provision by its initial effective date.
  - Prior to the effective date, IRS issued Notice 2010-63 inviting public comment.

# Notice 2010-63

## Notice 2010-63

Noted that final regulations under Code Section 105(h) were issued in 1981.

Noted that Department of Treasury and the IRS are considering issuing guidance on the extension of the requirement of 105(h)(2) to fully insured group health plans.

## Notice 2010-63

Requested public comments on what additional guidance related to the application of Code Section 105(h)(2) would be helpful for fully insured group health plans.

## Notice 2010-63

If a fully insured plan is discriminatory, highly compensated individuals are not required to include all or a portion of the benefit in income as they are in a self-insured plan under 105(h).

# Notice 2010-63 Penalties

## Notice 2010-63

### Code Penalty

- \$100 per day per individual.
- Applies with respect to individuals who are discriminated against.
- Imposed on employer or, in the case of a multiemployer plan, on the plan.
- Reported on Form 8928.

## Notice 2010-63

### ERISA Penalty

- Ability to bring civil action to enjoin noncompliant act or practice or for appropriate equitable relief.

## Notice 2010-63

### PHSA Act Penalty

- Civil money penalty of \$100 per day per individual discriminated against for each day the plan does not comply with the requirement.

# Notice 2011-1

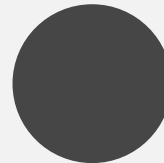
## After the comment period concluded, IRS published Notice 2011-1.

Noted that the comments submitted in response to Notice 2010-63 maintained that without guidance regulations or other administrative guidance, plan sponsors are uncertain how to apply the ACA nondiscriminatory provisions on fully insured plans.



### Notice 2011-1

Delayed the effective date of the ACA nondiscrimination rules on fully insured plans until after regulation or other administrative guidance has been issued.



### Notice 2011-1

In order to provide plan sponsors time to implement any changes required as a result of the regulations or other guidance, any effective date will likely not apply until plan years after the issuance of guidance.

# Nondiscrimination Requirements

Here we are 10 years later and no guidance has been issued. The Biden administration is likely to take up these nondiscrimination requirements.

What are the tests under 105(h)(2)?

Two nondiscrimination tests.

## 1) Benefit Test.

All benefits provided to the HCI who are participating in the plan must be provided to all other participants.

## 2) Eligibility Test.

The plan must benefit (a) 70% or more of all nonexcludable employees; (b) 80% or more of all nonexcludable employees who are eligible to benefit, if 70% or more of all nonexcludable employees are eligible to participate under the plan; or (c) a nondiscriminatory classification of employees (requires a bona fide business classification).



# Next Steps?



## Review fully insured group health plans.

Determine if they are skewed in eligibility, enrollment, or benefits toward highly compensated individuals.



## Prepare for impact of ACA nondiscrimination rules on fully insured group health plans by considering plan design changes.



## Is your fully insured plan grandfathered?

- Review recent changes to grandfathering rules.
- Maintain grandfathered status.

# **ERISA FIDUCIARY ISSUES**

**Morgan Lewis**

# Today's Topics

## "Financial Factors" Regulation

- Colloquially referred to as the ESG regulation
- Became effective on January 12, 2021
- Addresses "pecuniary" vs. "non-pecuniary" factors in decisionmaking

## Proxy Voting Regulation

- Became effective on January 15, 2021
- Shares some themes with the Financial Factors Regulation
- Addresses fiduciary obligations and considerations in voting proxies and exercising shareholder rights

## The Once and Former Fiduciary Rule

- Replaces vacated Obama-era fiduciary rule
- Restores prior 5-part test
- Proposes class transaction exemption to allow for transaction-based compensation for fiduciary investment advice

# Financial Factors Regulation



## Key Points

- Fiduciaries may only consider “pecuniary factors” unless there’s a “tie.”
- Cannot subordinate interests of participants and beneficiaries to nonpecuniary objectives.
- Can offer an investment option that considers nonpecuniary factors if certain conditions are met, but NOT as QDIA.



## Additional Points

- “Pecuniary factor” = a factor expected to have a material effect on the risk and/or return of an investment.
- “Tie-breaker” rules apply when a fiduciary is unable to distinguish between two identical investments based on pecuniary factors alone.
- No “ESG” to be found.



## What Happens Now?

- This is a “notice and comment” rulemaking so can’t simply go ahead with the swipe of a pen.
- We might expect less DOL interest in enforcement activities on ESG.
- Could eventually see efforts to repeal or substantially revise this regulation . . . but there’s a lot else going on.

# Proxy Voting Regulation



## Key Points

- Significant departure from presumption that a fiduciary would vote proxies unless cost outweighed the benefit.
- Fiduciaries do not always have to vote proxies or take shareholder actions.
- The decision whether to vote must consider only economic interests and not subordinate interests of participants and beneficiaries to nonpecuniary objectives.



## Additional Points

- Fiduciaries may adopt policies and procedures to guide these decisions—those focus on benefit of voting on plan's position in the security.
- Investment managers and proxy voting firms have to engage in this deliberation too.
- It's not sufficient to simply rely on investment managers or the proxy voting firm.



## What Happens Now?

- Like the Financial Factors regulation—can't just go away.
- Perhaps even more than Financial Factors, the DOL may want to move away from this.
- The DOL Secretary nominee has a strong background in organized labor; union plans are historically active on proxies and shareholder rights.

# The New Fiduciary Rule



## Key Points

- Restored 5-part test to determine when nondiscretionary investment advice is fiduciary in nature (but with additional commentary).
- New class exemption that allows advice to affect the advisor's compensation if certain conditions are met (impartial conduct, disclosure, etc.).
- Rollover advice is fiduciary.



## Additional Points

- The new exemption does not require a contract (previously known as the "BIC" or "best interest contract") and does not include a private right of action.
- Seeks to align with the SEC's Reg BI.
- The DOL describes the Deseret Letter (rollover advice ≠ fiduciary) as an "incorrect analysis" and that the "better view" is that rollover advice is fiduciary.



## What Happens Now?

- Exemption will not be effective before Inauguration Day.
- Biden administration can be expected to stop all non-final regulations immediately after the inauguration.
- Thus, the effective date can be expected to be delayed and rule could be entirely reconsidered.
- May depend on who ends up at EBSA.

# **MULTIEMPLOYER PENSION PLAN REFORM EFFORTS – 2021 OUTLOOK**

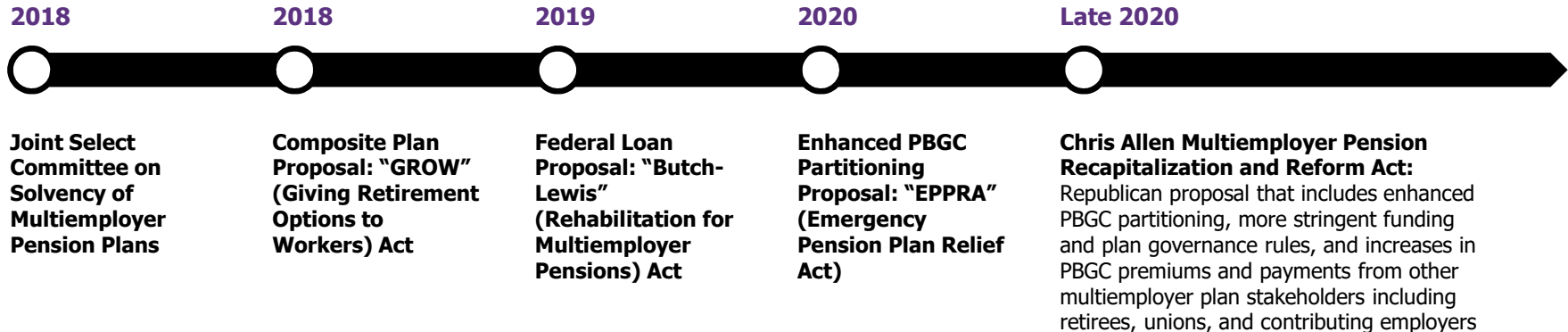
**Morgan Lewis**

# Troubled Multiemployer Pension Plans – What Is at Issue?

- More than 100 multiemployer pension plans in “critical and declining” status, many of which will be insolvent in the next 5-10 years
- The PBGC’s multiemployer insurance system will itself be insolvent in 2026
- Many of these plans have a diminished active employer/employee base that supports a disproportionately large retiree population, creating an unsustainable situation
- Plan mergers and other existing options are not enough to save these plans and the pensions they provide



# Recent Reform Efforts/Proposals



# GROW Act: Composite Plans

- Establishes a new kind of multiemployer pension plan that has certain attributes of both a defined benefit and defined contribution plan
- Composite plans provide an annuity benefit to plan participants, but limit a participating employer's financial obligation to a fixed, negotiated contribution level
- Benefit payments are only available to the extent of plan assets; designed to avoid unfunded vested benefit (withdrawal) liability

# Butch-Lewis Act: Federal Loans to Troubled Plans

- Establishes a loan program for plans in critical and declining status including:
  - Plans that implemented a suspension of benefits
  - Plans that have a modified funded percentage of less than 40% and a ratio of active to inactive participants that is less than two to five
  - Plans that are insolvent but not terminated
- Plans will have 30 years to pay back the loan
- Loans are backed by the Treasury

# Latest Republican Proposal (Chris Allen Multiemployer Pension Recapitalization and Reform Act)

- Establishes a special partition program authorizing PBGC to require eligible plans to separate their liabilities into two plans: an Original Plan and a Successor Plan
- The Successor Plan has no assets but liabilities are payable by the PGGC
- Eligible plans include:
  - Plans in critical and declining status
  - Plans in critical status below 40% funded on a current liability basis and an active-to-inactive participant ratio below 40%
  - Plans in critical status with an active-to-total participant ratio below 20% and more than 100,000 participants
  - Plans that became insolvent on or after December 16, 2014 but prior to the date of enactment and have not terminated; plans that implemented a suspension of benefits under MPRA

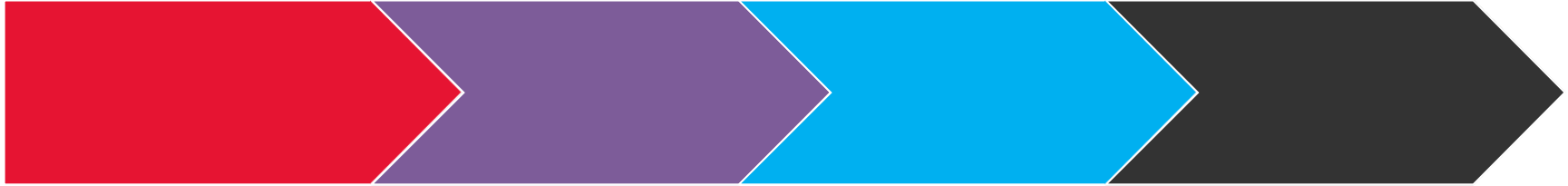
# Latest Republican Proposal: Increased PBGC Guarantee and PBGC Premiums

- Increases the benefit guarantee amount to 100% of the first \$15 of the monthly benefit rate, plus 75% of the next \$54.67 of the monthly benefit rate, times the participant's years of service for plans that become insolvent after the date of enactment or for financial assistance provided pursuant to the special partitioning
- Increases the PBGC premium to \$83 per participant, adjusted annually for inflation
- Establishes a variable rate premium that is capped at \$250 per participant
- Requires a monthly \$2.50-per-employee fixed rate co-payment by each union and employer that participates in a plan that is in endangered, critical, or critical and declining status. The co-payment is reduced to \$1.50 for plans in stable status and \$1 for plans in unrestricted status.

# Latest Republican Proposal: Funding Rule Changes

- Regulates the interest rate used by actuaries to project the past service liabilities. The discount rate is limited by a phased-in cap. The cap may not exceed 7.5% for plan years beginning after December 31, 2020; 7.25% after December 31, 2023; 7.0% after 2027; 6.75% after 2031; and 6.5% after December 31, 2035.
- Creates two new funding statuses: “stable” and “unrestricted.” A “stable” plan is one that is not in endangered, critical, or declining status. An “unrestricted” plan is not in endangered, critical, or declining status and meets one of the following test: (1) the plan’s current liability funded percentage for the plan year is at least 80%; or (2) the plan’s projected actuarial liability funded percentage as of the first day of the 15<sup>th</sup> succeeding plan year is at least 115% and the plan’s current liability funded percentage for the plan year is at least 70%

# What's Next?



**Biden Administration and Democratic-controlled House and Senate** will likely push proposals that do not place additional burdens on retirees or healthy plans (including unions and employers in healthy plans)

**Although the Butch-Lewis loan proposal may come back to the forefront,** modifications to this proposal will be needed to obtain additional Republican support

**Reconciliation process provides a possible avenue** to push through some types of reforms that don't have Republican support

# **EXECUTIVE COMPENSATION UNDER THE BIDEN ADMINISTRATION**

**Morgan Lewis**



# Executive Compensation Under President Biden

## Expected Actions and Planning Opportunities

### Pay for Performance

Finalization of Dodd-Frank rules designed to allow shareholders to better assess executive compensation relative to the company's financial performance, such as total shareholder return.

### Clawback Policies

Finalization of Dodd-Frank rules providing that exchanges must require listed companies to have policies to recoup incentive-based compensation from executives in the event of a financial restatement to correct material errors.

### Tax Rate Increases

Expected increases in top marginal income tax rates, capital gains and dividend rates, and FICA rates.

### Design Changes

Reactions we expect to see in the marketplace to changes in the tax and regulatory environment.



# Pay-for-Performance Rules

## Requirement

- Dodd-Frank Act requires annual proxy disclosure showing relationship between executive compensation and financial performance.
- Rule proposed in April 2015 includes new tabular and narrative and/or graphical disclosure.

## Actions to Take

- Consider methods for presenting and explaining compensation design decisions that provide compliant disclosure in a compelling manner that addresses shareholder concerns.

# Clawback Rules

## Requirement

- Dodd-Frank Act provides that companies must require exchanges to recover erroneously granted compensation paid in the 3-year period preceding a restatement in excess of what would have been paid under the restated financials.
- Rule proposed in July 2015.

## Actions to Take

- Evaluate how current recoupment policies measure up to proposed rules.
- Consider what best practices to adopt while implementing a policy compliant with new regulations.

# Tax Rate Increases

Proposed increases under President Biden's tax plan

## *Top Marginal Tax Rates*

The Biden Administration has proposed raising the top individual income tax rate from 37% to 39.6%, which would revert to the pre-Tax Cuts and Jobs Act level.

Corporate income tax rates under the proposal would increase from 21% to 28%.

## *Capital Gains Rates*

The Biden Administration has proposed taxing long-term capital gains and qualified dividends as ordinary income at 39.6% for taxpayers earning more than \$1 million.

## *FICA Tax Rates*

The Biden Administration has proposed raising Social Security taxes by imposing an additional Social Security payroll tax of 6.2% on both the employer and employee for all earned income over \$400,000.

# Design Changes and Planning Opportunities

Anticipating and reacting to rate changes

## *Accelerating Payments*

Where current plans offer flexibility, companies are considering accelerating payments to avoid tax increases in future years.

## *Option Resurgence*

Stock options, giving executives the opportunity to elect the year of taxation, may become a more attractive component of compensation programs, reversing past trends.

## *Deferral Opportunities*

Opportunities to defer compensation, including into executive nonqualified plans, may become increasingly valuable.

# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

**Morgan Lewis**

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at [www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19).

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.

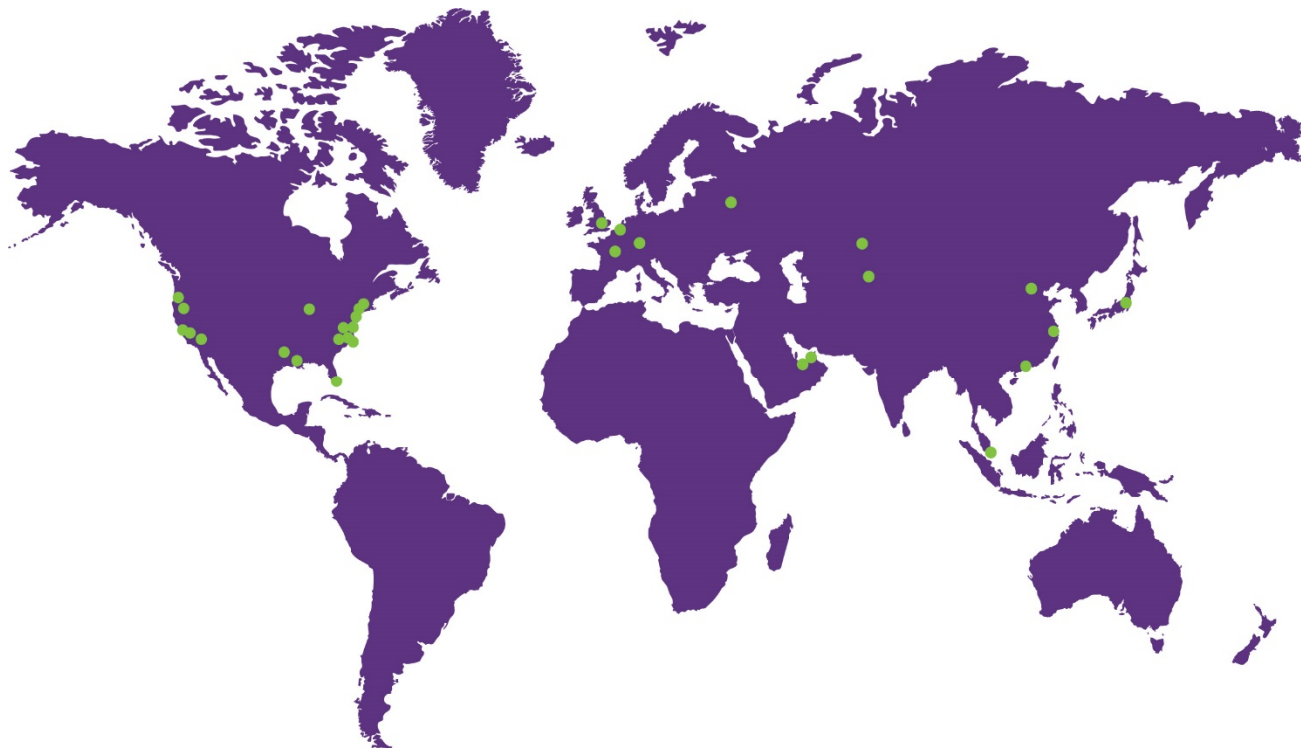


## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

Abu Dhabi  
Almaty  
Beijing\*  
Boston  
Brussels  
Century City  
Chicago  
Dallas  
Dubai  
Frankfurt  
Hartford  
Hong Kong\*  
Houston  
London  
Los Angeles  
Miami  
Moscow  
New York  
Nur-Sultan  
Orange County  
Paris  
Philadelphia  
Pittsburgh  
Princeton  
San Francisco  
Shanghai\*  
Silicon Valley  
Singapore\*  
Tokyo  
Washington, DC  
Wilmington



# Morgan Lewis

\*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

# THANK YOU

© 2020 Morgan, Lewis & Bockius LLP  
© 2020 Morgan Lewis Stamford LLC  
© 2020 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.