

Morgan Lewis

GLOBAL SPONSOR FORUM

Hot Topics in Disclosures

November 22, 2022



Speakers



Christopher J. Dlutowski
+1.212.309.6046
[christopher.dlutowski@
morganlewis.com](mailto:christopher.dlutowski@morganlewis.com)



Lance C. Dial
+1.617.341.7727
[lance.dial@
morganlewis.com](mailto:lance.dial@morganlewis.com)



Kelly L. Gibson
+1.215.963.5121/
+1.212.309.6287
[kelly.gibson@
morganlewis.com](mailto:kelly.gibson@morganlewis.com)



Erin E. Martin
+1.202.739.5729/
+1.212.309.6000
[erin.martin@
morganlewis.com](mailto:erin.martin@morganlewis.com)

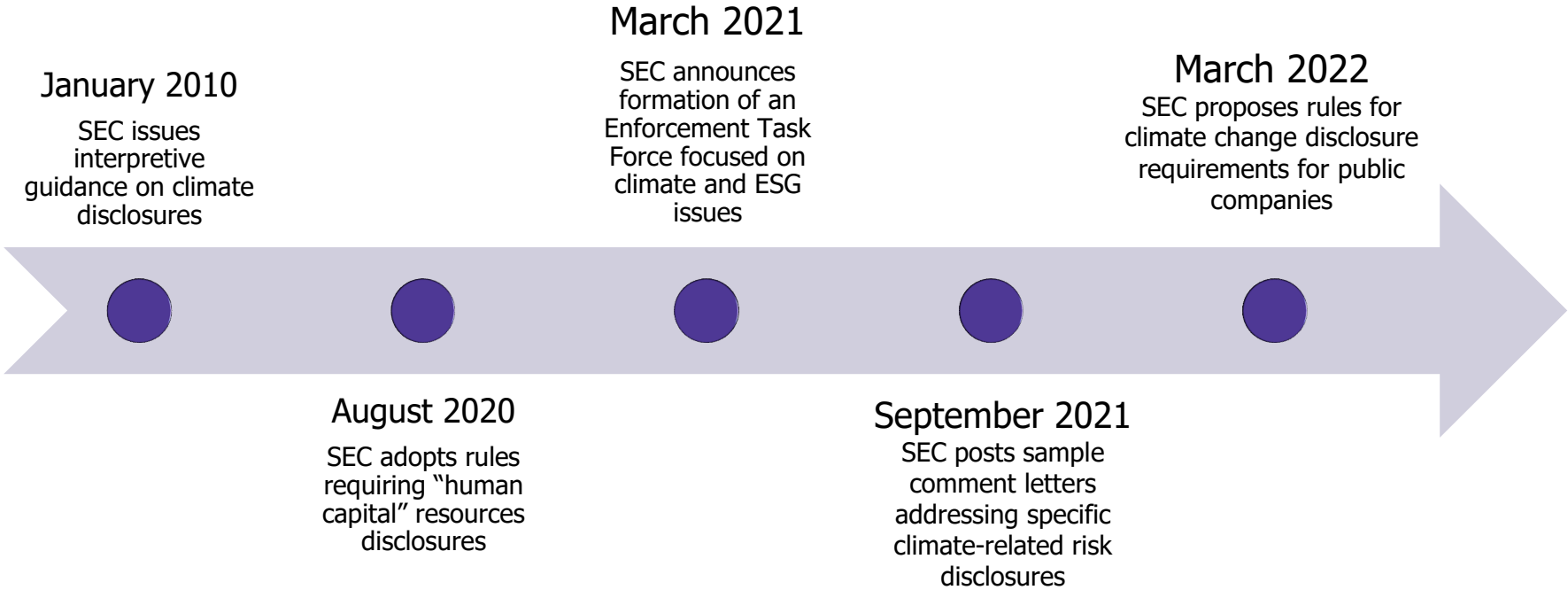
Agenda

- Environmental, social, and governance (ESG) Disclosure Requirements for Issuers
- SEC Enforcement/Examinations in ESG Space
- What Fund Sponsors Should Do
- Time Permitting: ESG-Related Musings

Corporate Issuer Disclosure

Morgan Lewis

The SEC on ESG



Update on Climate Change Rules

- On March 21, 2022, the SEC proposed long-awaited rules that would require public companies to provide climate-related disclosure in registration statements and periodic reports
- The SEC has signaled to public companies and stakeholders its position that climate-related information is material disclosure necessary to make an informed investment decision
- Comment period for public input on the proposed rules was open through June 17, 2022 (having been extended)
- Comment period was reopened in October 2022 for many rulemaking proposals, including climate-related disclosure, due to a technological issue with comment submissions and closed again on November 1, 2022
- The proposing release included phase-in periods for the rules based on filer status and provided sample compliance dates based on an effective date of December 2022
- Final rules are not expected before calendar year-end based on recent media reports
- Legal challenges to the rules, if adopted as proposed, are expected

Key Aspects of the Proposed Rules

- Separately captioned “Climate-Related Disclosure” section in registration statements and reports
- Discussion of climate-related targets, goals and transition plans
- Oversight and governance of climate-related risks
- Process for identifying, assessing and managing climate-related risks and their impact
- Location of properties, processes or operations subject to physical climate-related risks
- Disaggregated climate-related impacts on existing financial statement line items and related disclosure

Key Aspects of the Proposed Rules (cont.)

- Disclosure of Scopes 1, 2 and 3 greenhouse gas (GHG) emission data
 - All public companies will be required to disclose Scope 1 and Scope 2
 - Certain public companies will be required to disclose Scope 3 to the extent material or otherwise subject to an emissions reduction target or goal
- Accelerated and large accelerated filers must also obtain an attestation report from an independent attestation service provider covering Scope 1 and Scope 2 GHG emissions disclosure

"Scope" of Disclosure

Scope 1	Scope 2	Scope 3
<p data-bbox="92 295 459 341">"What you burn"</p> <p data-bbox="92 400 546 891">Scope 1 emissions are direct GHG emissions that occur from sources that are controlled or owned by an organization (e.g., emissions associated with fuel combustion in boilers, furnaces, vehicles)</p>	<p data-bbox="589 295 938 341">"What you buy"</p> <p data-bbox="589 400 966 742">Scope 2 emissions are indirect GHG emissions associated with the purchase of electricity, steam, heat, or cooling</p>	<p data-bbox="1004 295 1387 341">"Everything else"</p> <p data-bbox="1004 400 1875 641">Scope 3 emissions are the result of activities from assets not owned or controlled by the reporting organization and include all sources not within an organization's scope 1 and 2 boundary</p> <ul data-bbox="1004 700 1875 1045" style="list-style-type: none"><li data-bbox="1004 700 1875 843">➤ The Scope 3 emissions for one organization are the scope 1 and 2 emissions of another organization (e.g., a supplier)<li data-bbox="1004 902 1875 1045">➤ Scope 3 emissions, also referred to as value chain emissions, often represent most of an organization's total GHG

Corporate Issuer Disclosure Trends and Developments

- Why is this relevant to fund sponsors?
 - Insight into what public issuers are facing
 - Buyers/investors increasingly conducting ESG due diligence
- ESG risk areas for public issuers:
 - Lack of measurability and reporting standards
 - No equivalent of GAAP for ESG measurement and reporting
 - Greenwashing concerns
 - The SEC is focused on companies that tout ESG commitments but provide limited (or no) information as to how they plan to accomplish such commitments
 - Proxy contests over ESG issues
- What's next for public issuers to consider?
 - The "S" in ESG

Examinations/Enforcement Trends

SEC Examinations and Enforcement Divisions



- How are the divisions structured?
- Examinations vs. enforcement
- Enforcement investigations: What are they and should I be worried?
- What do they look for?
- Data, data, data!
- Life cycle of a matter

SEC Focus on ESG Matters

- SEC focus on ESG:
 - Examination priorities and risk alert, warning against “greenwashing” and misstating sustainability practices
 - Division of Enforcement’s Climate and ESG Task Force
 - Recent examinations
 - Recent enforcement cases

SEC ESG Areas of Focus

- Procedures to ensure that disclosures match the investment processes
 - RFP/RFI/DDQ response content and processes
- Evidence that the investment process is operating as described
 - Exclusionary screens/processes
- Proxy voting/engagement are happening as described
- Changes to products are implemented promptly

Looking Ahead

- Expect to see continued ESG-focused examinations and additional enforcement actions arising from SEC's use of data analytics
- Staff deploying what they have learned through examinations in guidance and additional examination focus
- ESG rulemaking momentum
 - ESG Rule is not ONLY about registered funds

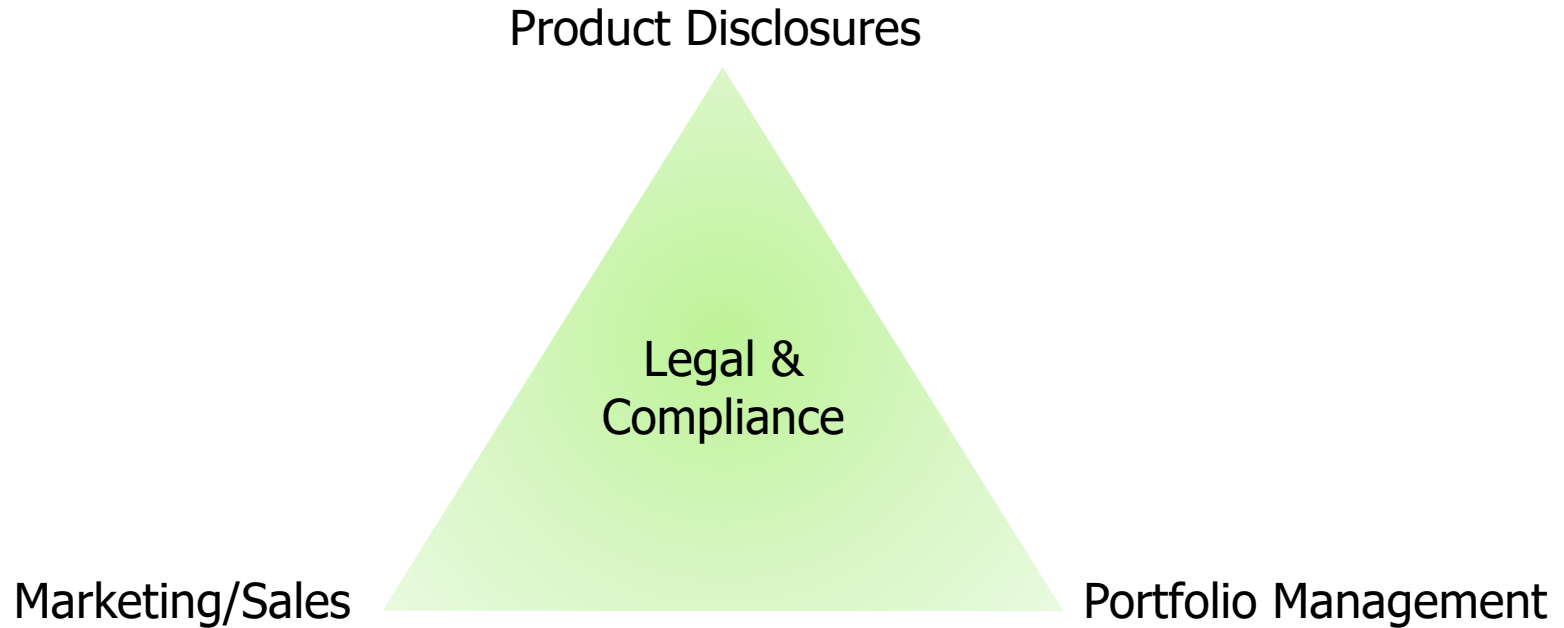
Anti-ESG Movement (as of 11/18/22)

- Eight states have adopted anti-ESG legislation:
 - ID, KY, ND, OK, TN, TX, WV, WY
- Seven states (or state pension plans) have issued anti-ESG policy statements:
 - AZ, IN, FL, LA, MO, SC, UT
- Types of anti-ESG legislation:
 - “No boycott”/“No contracting”
 - No ESG investments
- Potentially countered by pro-ESG state actions:
 - Ten states (or state pension plans) have adopted some pro-ESG action
 - CT, HI, IL, MA, ME, MD, NV, NY, OR, RI
- Host of pending or dead legislation/regulation in other states

What Fund Sponsors Should Do

Morgan Lewis

Disclosure Process Triangle



General Best Practices

- Step 0: **Define Terms!**
- Understand firm's products
 - Do disclosures reflect what investment management is actually doing?
- Review marketing and offering disclosures
 - Consistency is key
- Responding to investor inquiries – do not oversell ESG approaches

Emerging Best Practices: ESG

- Disclosure = Marketing = Investment Processes
 - Define terms internally before including in investor-facing materials
 - Do not assume that a statement is immaterial
- Disclosure must not overstate ESG considerations
 - Assume disclosure will be read as applying to **every** investment
 - Watch out for overly permissive disclosure
- ESG Policy?
- Learnings from Proposed SEC Rules
 - ESG Rule proposal
 - Names Rule amendments proposal

Musings? Questions?

Morgan Lewis

Attorney Biographies

Morgan Lewis

Christopher J. Dlutowski



New York

T +1.212.309.6046

christopher.dlutowski@morganlewis.com

Christopher J. Dlutowski represents institutional investors—including public and private pension plans, family offices, sovereign wealth plans, universities, endowments, and funds of funds—on their investments in private equity, hedge, venture capital, private debt, real estate, infrastructure, hybrid, and other private funds, funds-of-funds, managed accounts, co-investments, and direct investments, and on governance and compliance issues. Christopher also counsels private investment funds—including US domestic and offshore private equity funds, hedge funds, and funds-of-funds—and investment management firms on the formation and structuring of funds, trading and other investment activities, capital raising, registration and other regulatory issues, and ongoing operations.

Christopher has more than 25 years of experience in customized investment products, including strategic partnerships, captive funds, and co-investment funds, in all asset classes.

Christopher has presented on private investment funds topics at numerous investment management conferences and training programs. Prior to re-joining Morgan Lewis, Christopher was vice president and corporate counsel at Prudential Financial, Inc. where he advised investment management clients on their hedge funds and other alternative investment products, US and foreign institutional investor mandates, trading activities (including securities, derivatives, lending, and financing transactions), marketing efforts, domestic and foreign registration, and other regulatory issues.

Christopher is the chair of the firm's institutional investors working group, a co-leader of the firm's education industry team, and a member of the New York office's recruiting committee.

Lance C. Dial



Boston

T +1.617.341.7727

lance.dial@morganlewis.com

With more than a decade of experience as senior in-house counsel with global investment managers, Lance Dial has a deep understanding of mutual fund law and operation and is fluent in the myriad regulations applicable to investment managers. He is well versed in the creation of investment products and environmental, social and governance (ESG) and sustainability matters. Lance works extensively on regulatory policy matters engaging with various financial services regulators, including the US Securities and Exchange Commission, US Department of Labor, Internal Revenue Service, and US Department of Treasury.

Kelly L. Gibson



Philadelphia/New York

T +1.215.963.5121

+1.212.309.6287

kelly.gibson@morganlewis.com

Kelly Gibson is the co-leader of the firm's securities enforcement practice and the firm's environmental, social, and governance (ESG) task force. She previously held numerous national and regional leadership roles at the US Securities and Exchange Commission (SEC), including serving as the acting deputy director of the Division of Enforcement, as leader of the Enforcement Division's nationwide Climate and ESG Task Force, and as director of the SEC's Philadelphia Regional Office. Kelly advises and defends public companies, financial services clients, and their executives in SEC, self-regulatory organization (SRO), and state enforcement matters, and in internal investigations.

Leveraging her government and private practice experience, Kelly works in collaboration with the firm's corporate and business transactions, investment management, white collar defense, and labor and employment practices to advise clients on regulatory and litigation matters.

She also uses her broad ESG enforcement and policy experience to counsel public companies and registrants as they develop proactive ESG strategies, create investment products, consider disclosure requirements, and identify investment opportunities.

As acting deputy director of the SEC's Division of Enforcement, Kelly helped set enforcement priorities and assisted in supervising approximately 1,300 staff who investigate and litigate across a broad spectrum of nationwide securities matters, including issuer disclosure and accounting abuses; foreign bribery; investment advisory and broker-dealer violations; securities offering; market manipulation; insider trading; and crypto- and cyber-related misconduct. In this role, Kelly also oversaw the division's Office of Market Intelligence and Office of the Whistleblower.

In addition, Kelly served as leader of the Division of Enforcement's newly formed nationwide Climate and ESG Task Force, where she led task force members from across SEC headquarters, regional offices, and specialized units to evaluate tips, referrals, and whistleblower complaints on ESG-related issues, and to develop initiatives to proactively identify potential ESG-related misconduct involving public companies and registrants. Kelly also served as a resource for, and coordinated enforcement ESG efforts with, other SEC divisions and offices, and she met with other federal, state, and international officials regarding respective ESG priorities.

As director of the SEC's Philadelphia Regional Office, Kelly led a staff of approximately 160 enforcement lawyers, accountants, and industry specialists who investigate and litigate the federal securities laws nationwide, and examiners with oversight in the Mid-Atlantic region of nearly 1,200 investment advisers with more than \$13.5 trillion in assets under management, over 150 investment fund complexes, and more than 290 broker-dealers with over 14,275 branch offices.

Earlier in her tenure, Kelly served in the Division of Enforcement's Market Abuse Unit as an assistant regional director and then as associate regional director of the SEC's Philadelphia office, where she supervised enforcement efforts. Kelly began her career at the SEC in 2008 as a staff attorney and received the SEC's Analytical Methods Award in 2016. During her tenure at the SEC, Kelly supervised, investigated, and filed actions involving a wide range of securities violations, and she closely coordinated with state and federal criminal authorities on numerous parallel investigations. Before joining the SEC, Kelly was in private practice, advising clients on internal investigations and commercial litigation matters.

Erin E. Martin



Washington, DC/New York

T +1.202.739.5729

+1.212.309.6000

erin.martin@morganlewis.com

Erin Martin counsels public companies and their boards with respect to securities regulation, capital market transactions, and corporate governance matters, drawing on her long tenure at the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance. Erin regularly advises on complex SEC disclosure and compliance issues, including environmental, social, and governance (ESG) considerations and crypto asset matters.

Before joining Morgan Lewis, Erin served as legal branch chief in the SEC's Office of Real Estate and Construction, where she oversaw legal reviews of transactional filings and periodic reports filed by a wide range of public companies, including special purpose acquisition companies (SPACs), real estate investment trusts (REITs), real estate platforms, and real estate-related finance companies. Throughout her more than 13-year career at the SEC, Erin served in other leadership roles, which included oversight of disclosure filings made by financial institutions, including fintech, marketplace lenders, banks, and bank holding companies as well as offerings of crypto assets, including the first public offerings of tokens, and other crypto exchange-traded products.

As legal branch chief, Erin managed the disclosure review program related to filings by companies in a variety of industries, such as real estate, including equity REITs, mortgage REITs, and non-listed REITs; lodging; consulting services; and commodities, including '33 Act exchange-traded products. As the senior legal advisor in the office, she was ultimately responsible for the legal reviews of all securities transactions and required SEC filings, such as initial public offerings, secondary offerings, spinoffs, mergers and acquisitions, tender offers, annual and quarterly filings, proxy materials, and sales literature. In addition, she managed the division's review program for offerings of crypto assets and regularly participated in the SEC's cross-divisional Distributed Ledger Technology Working Group.

During her tenure at the SEC, Erin also served as special counsel in the Office of Financial Services, where she led legal reviews of transactional filings and periodic reports filed by financial institutions, including systematically important financial institutions, and advanced the office's expertise on marketplace lending. Erin also served as a legal and policy advisor in the Division of Corporation Finance's Office of Chief Counsel, where she provided interpretative legal guidance concerning many aspects of the federal securities laws, including exemptive positions and requests for no-action relief. She also spent many proxy seasons as part of the Office of Chief Counsel's Rule 14a-8 Shareholder Proposal Taskforce and served as co-manager of the taskforce for the 2013-2014 proxy season.

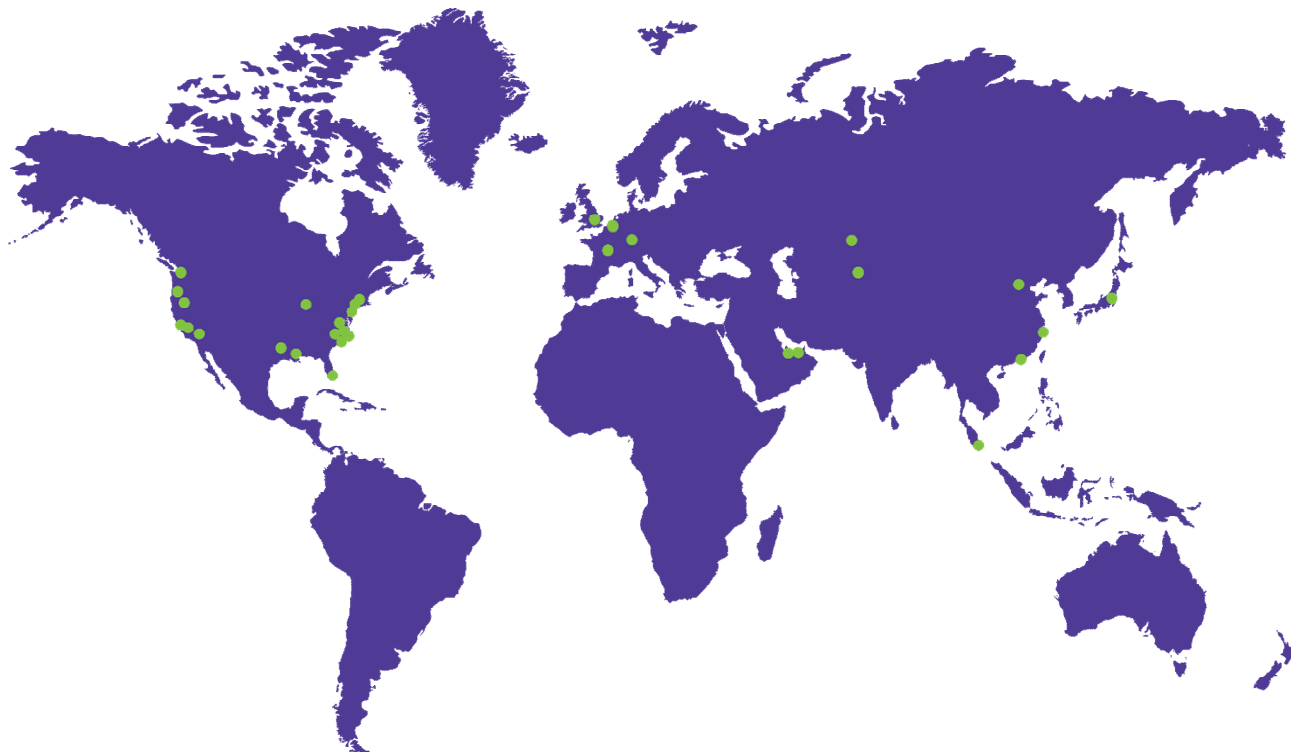
Erin also participated in numerous initiatives related to new rules and regulations, such as the JOBS Act and FAST Act. She has advised on numerous disclosure-related projects, such as disclosure modernization and proxy disclosure enhancements related to executive compensation and board diversity and qualifications, and regularly provided trainings to SEC staff on interpretative issues relating to the disclosure review program and other emerging areas of interest.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Seattle
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 & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2022 Morgan, Lewis & Bockius LLP
© 2022 Morgan Lewis Stamford LLC
© 2022 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 & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. 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.