

**Morgan Lewis**

# **NAVIGATING THE NEXT.**

## **The Defense Production Act and the New Administration**

Sheila Armstrong, Stephen Ruscus, and Katelyn Hilferty  
February 4, 2021

# Presenters



**Sheila Armstrong**



**Stephen Ruscus**



**Katie Hilferty**

**Morgan Lewis**

# Agenda

**1** Overview of the DPA

**2** Rated orders

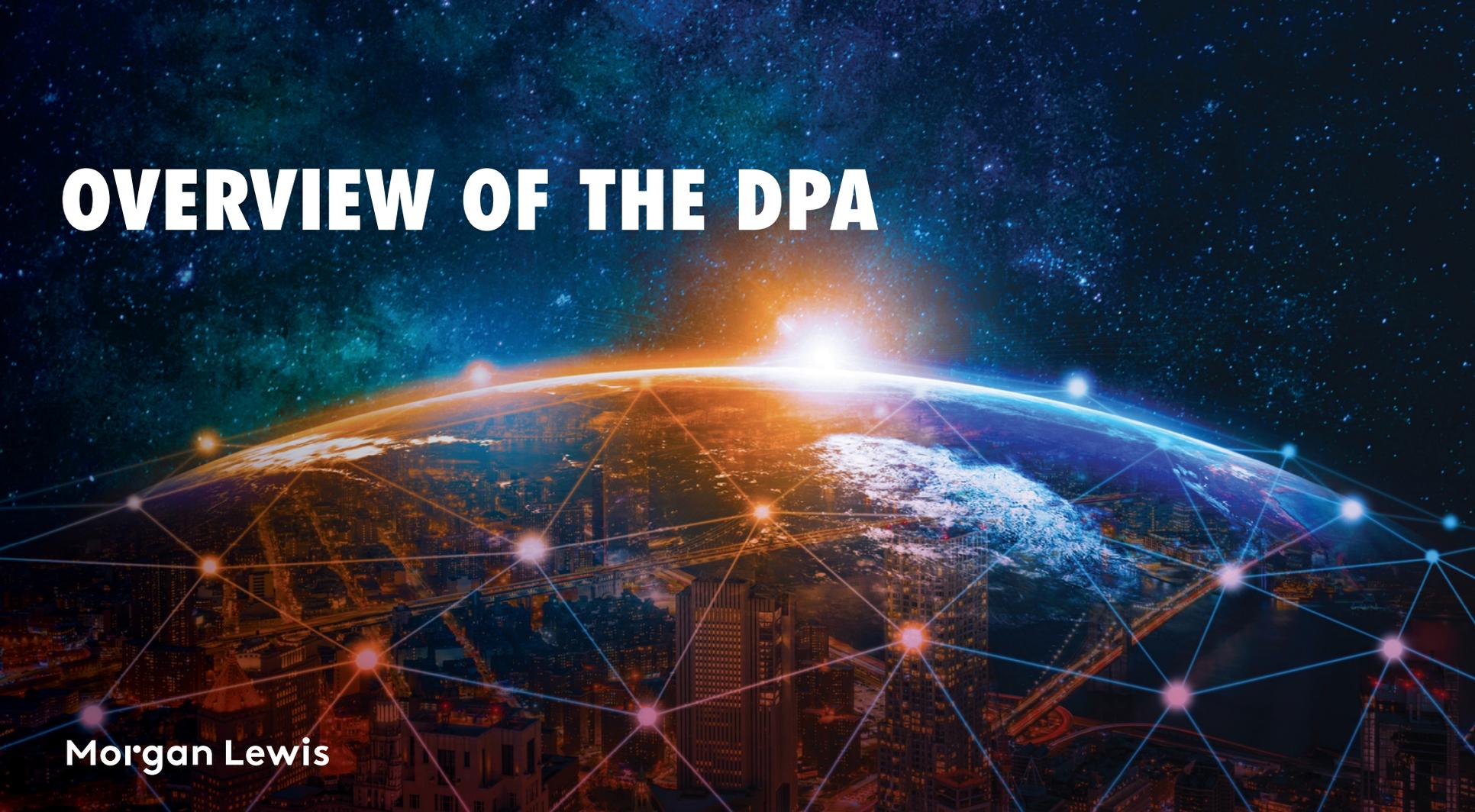
**3** What companies should do if they receive a rated order

**4** Financing

**5** How we can expect the new administration to use the DPA

**6** Implications of the president's executive order on a sustainable public health supply chain

# OVERVIEW OF THE DPA



Morgan Lewis

# The Defense Production Act of 1950

- Wartime statute passed in 1950 at outset of Korean War
- Provides the President with “an array of authorities to shape national defense preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base”
- Congress gradually expanded the term “national defense” as used in the DPA so that the scope of DPA authorities has expanded beyond wartime effort
- The DPA is now also used to enhance and support domestic preparedness, for response and recovery from natural hazards, terrorist attacks, and other national emergencies

# Selected DPA Authorities

## Title I, Priorities and Allocations

Allows the President to require companies to prioritize and accept contracts for materials and services as necessary to promote the national defense

## Title III, Expansion of Productive Capacity and Supply

Allows the President to incentivize the domestic industrial base to expand production and supply of critical materials and goods through loans, loan guarantees, direct purchases and purchase commitments

## Title VII, General Provisions

Including the authority to establish voluntary agreements with private industry

# Priorities and Allocations Authority

- Authorizes the President to:
  - Require that performance under contracts or orders which he deems necessary or appropriate to promote the national defense take priority over performance under any other contract or order
  - Require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person found capable of their performance
  - Allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as deemed necessary or appropriate to promote the national defense
- DPA provides this authority to the President, who in turn has delegated these authorities to department and agency heads – Executive Order 13603 (March 16, 2012)

# Priorities and Allocations Authority

Title I (Priorities and Allocations) authority delegated to:

## Department of Agriculture

Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and domestic distribution of farm equipment and commercial fertilizer

## Department of Energy

All forms of energy

## Department of Health & Human Services

Health resources (drugs, biological products, medical devices, materials, facilities, health supplies, services and equipment)

## Department of Transportation

All forms of civil transportation

# Priorities and Allocations Authority (cont'd)

Title I (Priorities and Allocations) authority delegated to:

**Department of  
Defense**

Water resources

**Department of  
Commerce**

All other materials, services, and facilities, including construction materials

# Priorities and Allocations Authority

- Authority implemented through the Federal Priorities and Allocations System (FPAS)
- Body of five (5) regulations that establishes standards and procedures for implementing the President's priorities authority by agencies under the DPA
  - Agriculture Priorities and Allocations System (APAS)
  - Energy Priorities and Allocations System (EPAS)
  - Health Resources Priorities and Allocations System (HRPAS)
  - Transportation Priorities and Allocations System (TPAS)
  - Defense Priorities and Allocations System (DPAS)

# **RATED ORDERS AND HOW TO RESPOND**

The background of the slide is a composite image. At the top, a bright sun or star is on the horizon, casting a glow over a dark, starry space. Below this, a night view of a city is shown, with a network of glowing lines and nodes overlaid on it, suggesting a global network or data flow. The lines are primarily blue and orange, connecting various points across the city and extending towards the horizon.

**Morgan Lewis**

# Priority-Rated Contracts and Orders (“Rated Orders”)

Rated orders are prime contracts, subcontracts, and purchase orders in support of an approved program. Must include four (4) required elements:



**(1) A priority rating**

**(2) Specific delivery quantities and date(s)**

**(3) Statement identifying governing FPAS regulation**

**(4) Signature of the contracting officer, certifying the rated order**

# Priority-Rated Contracts and Orders (“Rated Orders”)

- Priority rating consists of rating symbol (DO or DX) and program identifier symbol (e.g., N1)
- Two (2) levels of priority: DO or DX
  - DO rated orders have equal priority with each other and must be prioritized over unrated orders (e.g., commercial orders or non-ratable government orders)
  - DX rated orders have equal priority with each other and must be prioritized over DO rated orders and unrated orders
- Most rated orders carry the DO priority rating
- DX ratings require senior-level approval (e.g., HHS Secretary)

# Response to Rated Orders

Must accept a rated order if you make/buy the item, normal terms of sale apply, and you can meet the required delivery dates

If you receive and accept a rated order, you should place rated orders with suppliers for the materials needed to fulfill that rated order

- Rated order status flows through to the entire supply chain, with each company responsible for extending the rating to suppliers at lowest level in order to obtain items needed to fulfill rated orders or obtain replacements of inventoried items
- Use same priority rating indicated on customer's rated order

May not "discriminate" against rated orders in any manner (e.g., charge higher prices, impose different terms or conditions)

# Limited Rejection of Rated Orders

## Mandatory Rejection

1. Unable to fill the order by the specific delivery date requested (but must offer to accept on earliest date on which delivery can be made)
2. Delivery of new DO-rated order would interfere with delivery of previously accepted DO or DX rated orders (but must offer to accept on earliest date on which delivery can be made)
3. Acceptance of new DX-rated order would interfere with delivery of previously accepted DX rated orders (but must offer to accept on earliest date on which delivery can be made)

## Optional Rejection

1. Customer is unwilling/unable to meet regularly established terms of sale/payment
2. Order is for item not supplied or service not performed
3. Order is for item produced/acquired only for supplier's own use for which no orders have been filled for 2 years prior
4. Customer makes the item or performs the service being ordered
5. Acceptance of order would violate another regulation, action or order issued under DPA

# Response to Rated Orders

Generally, must accept or reject a rated order, in writing, within 15 working days for DO rated orders and 10 working days for DX rated orders

Must accept or reject emergency preparedness rated orders within the specific time limit indicated in the order statement

- Can be as short as 6 hours after receipt

If rejecting an order, must give reasons, in writing, for the rejection

If delivery for an order will be delayed, must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date

# Scope

- Both government contractors and commercial suppliers can be required to comply with rated orders
- The DPA generally does not apply to foreign suppliers
  - Priority ratings have no legal authority outside the US
  - Possibility that US parent could be compelled to provide supplies or services because it has ability to direct foreign subsidiary
  - Defense priority ratings can be used for purchases from certain foreign suppliers in certain foreign countries (Canada, Australia, Finland, Italy, the Netherlands, Spain, Sweden, the UK) – special requirements apply to these requests
  - Contractors expected to understand their supply chain, including normal lead times for foreign purchases

# Liability

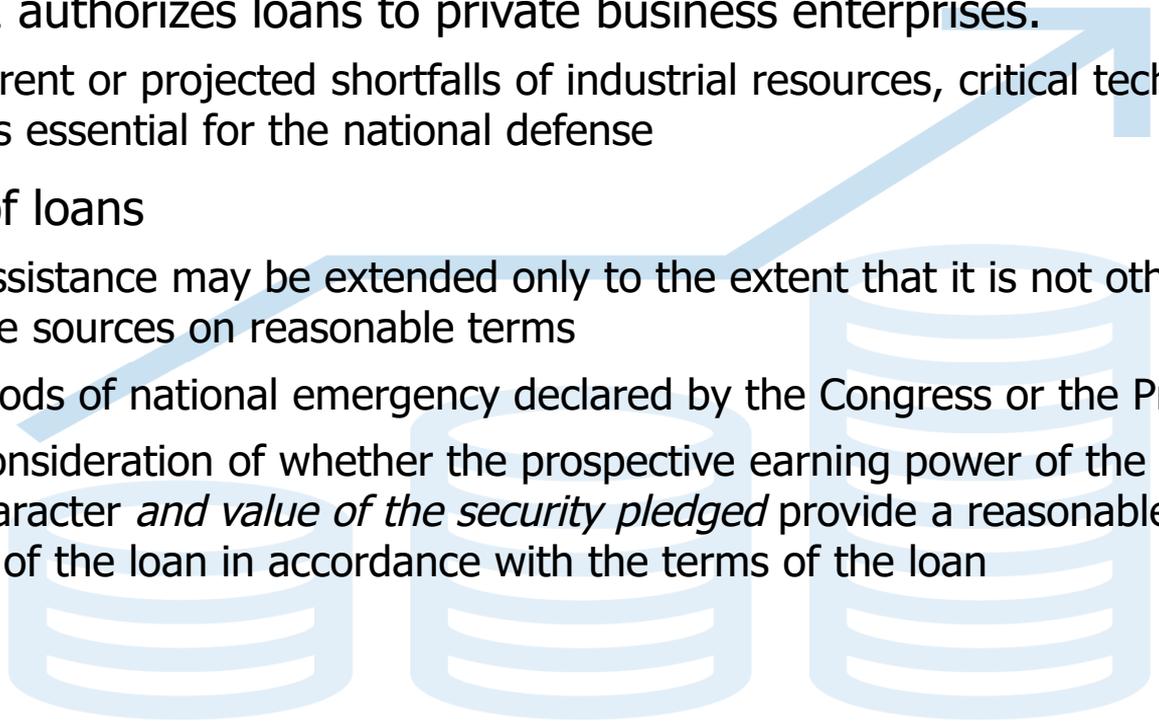
- Willful violations of the DPA may be penalized by a \$10,000 fine or one year in prison, or both
  - The government can also seek an injunction to enforce compliance with the DPA
- However, no person can be held liable for damages or penalties for acts or failures to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to the DPA
  - Provides legal protection when unable to meet commercial commitments in a timely manner

# FINANCING

The image is a composite graphic. The background is a deep blue space filled with stars. In the center, a glowing globe of the Earth is shown from a high angle, with a bright sun or star behind it creating a lens flare. Below the globe, a cityscape at night is visible, with lights from buildings and streets. Overlaid on the city and globe is a network of blue lines connecting various nodes, representing a global financial or technological network.

Morgan Lewis

# Financing

- DPA Title III authorizes loans to private business enterprises.
    - Reduce current or projected shortfalls of industrial resources, critical technology items, or materials essential for the national defense
  - Conditions of loans
    - Financial assistance may be extended only to the extent that it is not otherwise available from private sources on reasonable terms
    - During periods of national emergency declared by the Congress or the President
    - Requires consideration of whether the prospective earning power of the loan applicant and the character *and value of the security pledged* provide a reasonable assurance of repayment of the loan in accordance with the terms of the loan
- 

# Financing

- Executive Order 13922 issued on May 14, 2020 authorizes use of Title III to expand domestic production of strategic resources
  - Authority under Title III of the DPA to make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore the domestic industrial base capabilities
  - Limited to loans:
    - Necessary in response to COVID-19 outbreak, **or**
    - Supporting the resiliency of any relevant domestic supply chains
  - Authority delegated to Chief Executive Officer of the United States International Development Finance Corporation (DFC)
- DoD and the United States International Development Finance Corporation (“**DFC**”) have allocated between DoD and DFC certain responsibilities related to the origination, underwriting, and portfolio management of loans authorized to be made by the Executive Order

# HOW THE BIDEN ADMINISTRATION IS USING THE DPA



Morgan Lewis

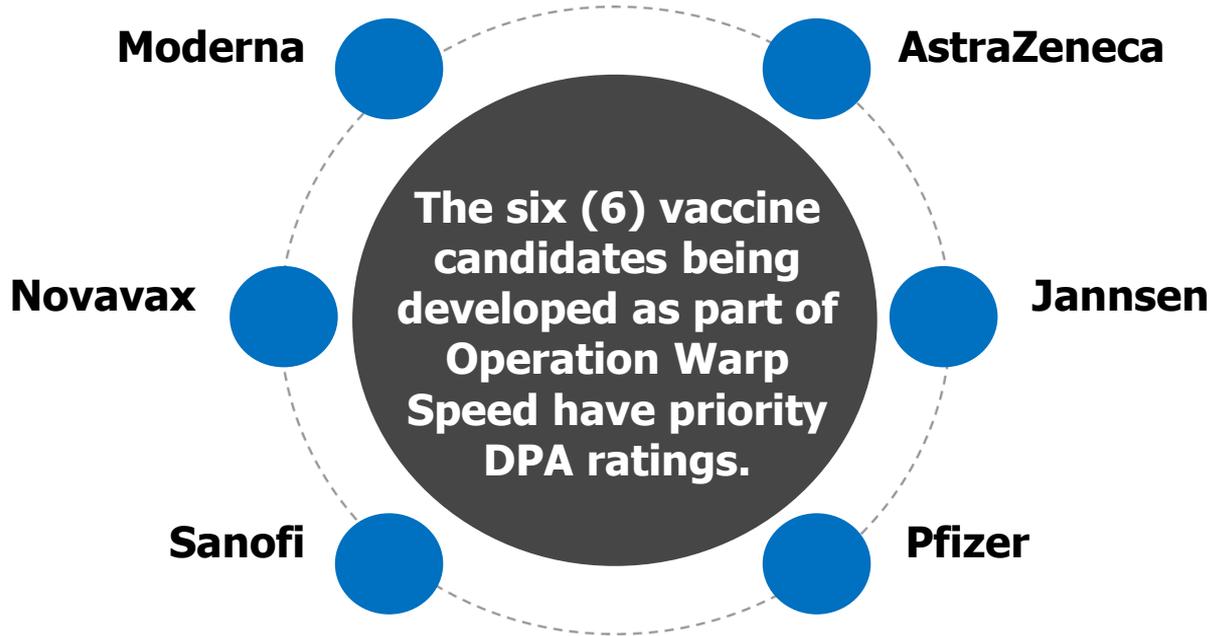
# Biden Administration's Expected Use of the DPA

- Biden Administration has publicly stated that it intends to use the DPA to combat COVID-19 pandemic
- Will look for ways to further use the DPA to accelerate COVID-related supply chains

## Twelve (12) identified categories of critical supplies:

- N95 masks
- Isolation gowns
- Nitrile gloves
- Polymerase chain reaction (PCR) sample collection swabs
- Test reagents
- Pipette tips
- Laboratory analysis machines for PCR tests
- High-absorbency foam swabs
- Nitrocellulose material for rapid antigen tests
- Rapid test kits
- Low dead-space needles and syringes
- ***"All the necessary equipment and material to accelerate the manufacture, delivery, and administration of COVID-19 vaccine"***

# DPA Response to COVID-19



Companies manufacturing COVID-19 therapeutics also have priority ratings under the DPA

---

***January 21, 2021***

**Executive Order on  
a Sustainable Public  
Health Supply Chain**

---

Directs federal agencies (DOS, DOD, HHS, DHS) to use all available legal authorities, including the DPA, to fill supply shortfalls that are critical to the COVID-19 pandemic response

# Navigating the NEXT

We maintain a resource center with access to tools and perspectives on timely topics driven by current events such as the global public health crisis, economic uncertainty, and geopolitical dynamics.

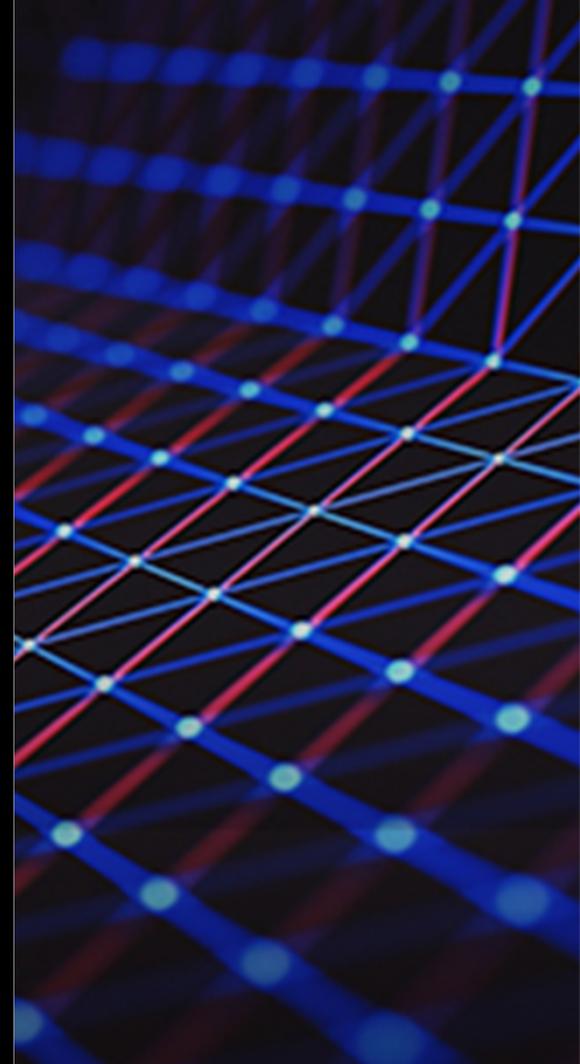
Find resources on how to cope with the globe's ever-changing business, social, and political landscape at [Navigating the NEXT](#), and [Coronavirus COVID-19](#) to stay up to date on developments as they unfold.

**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/navigating-the-  
next](http://www.morganlewis.com/topics/navigating-the-next)

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



# Biography



**Sheila Armstrong**

**Dallas**

+1.214.466.4175

**Washington, DC**

+1.202.739.5427

sheila.armstrong@morganlewis.com

Sheila represents a broad range companies in all aspects of government contracting including FAR-based contracts, grants and other financial assistance agreements and Other Transaction Agreements (OTAs). She routinely counsels both prime and subcontractors in a variety of contractual and civil settings. Sheila's experience includes proposal preparation, contract negotiation, subcontracting, teaming arrangements, intellectual property rights in government contracts, contract compliance, audits, investigations, mandatory disclosures, and procurement fraud. She also routinely provides support to clients on novation and due diligence issues. Sheila frequently advises clients with respect to General Services Administration (GSA) and Veterans Affairs (VA) Federal Supply Schedule contracts.

# Biography



**Stephen Ruscus**

**Washington, DC**

+1.202.739.5870

[stephen.ruscus@morganlewis.com](mailto:stephen.ruscus@morganlewis.com)

Stephen represents clients in government contracts procurement, US federal drug pricing programs, and in litigation before the Boards of Contract Appeals, the US Court of Federal Claims, and the US Government Accountability Office (GAO). He also advises in protest practice before the US Small Business Administration and in matters relating to federal procurement of commercial items and services, including those under Federal Supply Schedule contracts.

# Biography



**Katie Hilferty**

**Washington, D.C.**

+1.202.739.5674

[katelyn.hilferty@morganlewis.com](mailto:katelyn.hilferty@morganlewis.com)

Katie advises clients on all phases of government contracting, including bid preparation, subcontract negotiations, protests, and contract administration. She helps ensure compliance with the Federal Acquisition Regulation (FAR), Defense Federal Acquisition Regulation Supplement (DFARS), and other agency supplements. She has experience with both challenges to and defenses of contract awards before agency boards of contract appeals, the Government Accountability Office (GAO), and the Court of Federal Claims (COFC). Katelyn also advises clients on small business size issues.

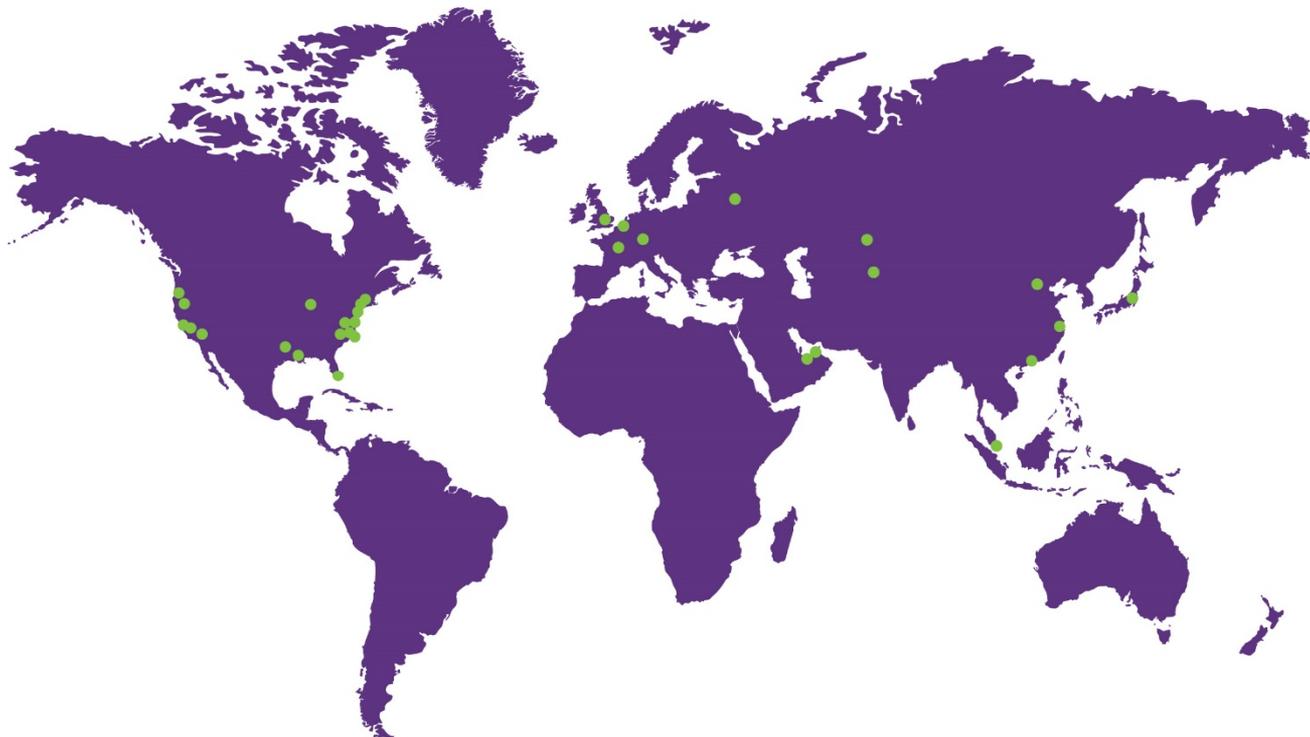
Separate from her government contracts practice, Katie helps companies navigate US export controls and customs laws, sanctioned country regulations, and national security issues.

## 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.