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CARES ACT

UNDERSTANDING THE PAYCHECK PROTECTION PROGRAM

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CORONAVIRUS COVID-19

ADDRESSING TODAY'S CRISIS, TOMORROW'S LEGAL CHALLENGES

As the coronavirus COVID-19 crisis rapidly evolves, global companies are looking for resources to protect their people and their businesses. Morgan Lewis lawyers are providing guidance on healthcare provider issues, business supply chain disruption, data privacy concerns, employer questions, energy and environmental industry ramifications, financial services guidelines, immigration status requirements, life sciences protocols, tax implications, and ongoing government guidance from around the world.

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PRIMARY CONTACTS



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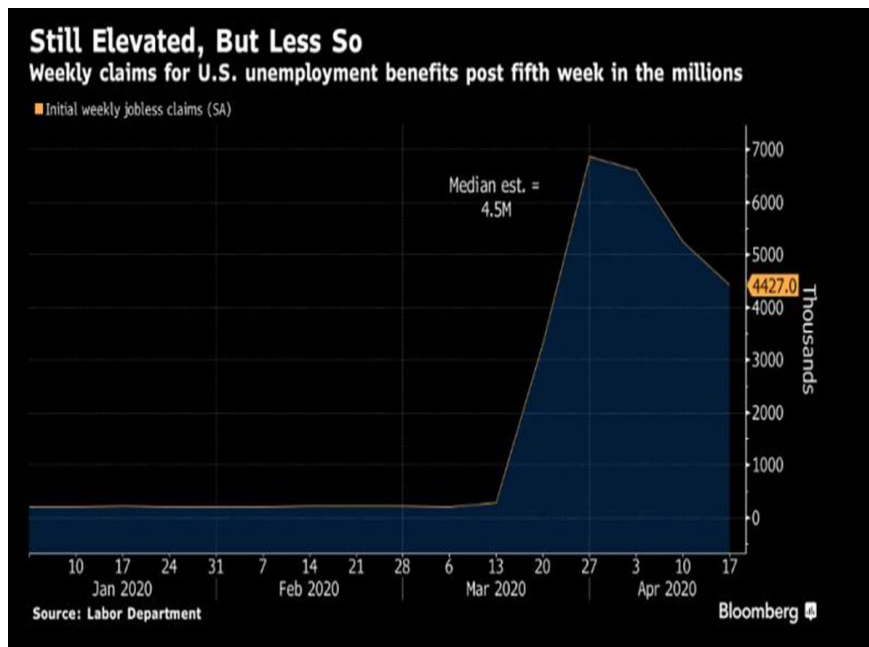
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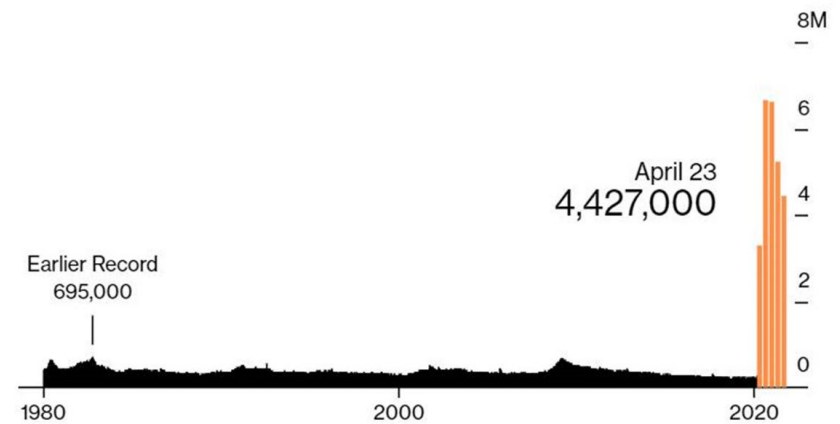
PAYCHECKS & UNEMPLOYMENT

LAY OF THE LAND



26.5 Million Out of Work

U.S. jobless claims hit 4.43 million last week, the fifth of the lockdown



Source: Bureau of Labor Statistics

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PAYCHECK PROTECTION PROGRAM

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| Loan Count | Net Approved Dollars | Lender Count |
|------------|----------------------|--------------|
| 1,661,367 | \$342,277,999,103* | 4,975 |

*Net Approved Dollars do not reflect the amount required for reimbursement to lenders per statute within the CARES Act.

PAYCHECK PROTECTION PROGRAM LAY OF THE LAND

Industry by NAICS Subsector

| NAICS Subsector Description | Approved Loans | Approved Dollars | % of Amount |
|--|----------------|------------------|-------------|
| Construction | 177,905 | \$44,906,538,010 | 13.12% |
| Professional, Scientific, and Technical Services | 208,360 | \$43,294,713,938 | 12.65% |
| Manufacturing | 108,863 | \$40,922,240,021 | 11.96% |
| Health Care and Social Assistance | 183,542 | \$39,892,493,481 | 11.65% |
| Accommodation and Food Services | 161,876 | \$30,500,417,573 | 8.91% |
| Retail Trade | 186,429 | \$29,418,369,063 | 8.59% |
| Wholesale Trade | 65,078 | \$19,489,410,472 | 5.69% |
| Other Services (except Public Administration) | 155,319 | \$17,707,077,167 | 5.17% |
| Administrative and Support and Waste Management and Remediation Services | 72,439 | \$15,285,814,286 | 4.47% |
| Real Estate and Rental and Leasing | 79,784 | \$10,743,430,227 | 3.14% |
| Transportation and Warehousing | 44,415 | \$10,598,076,231 | 3.10% |
| Finance and Insurance | 60,134 | \$8,177,041,995 | 2.39% |
| Educational Services | 25,198 | \$8,062,652,288 | 2.36% |
| Information | 22,825 | \$6,675,630,276 | 1.95% |
| Arts, Entertainment, and Recreation | 39,670 | \$4,939,280,138 | 1.44% |
| Agriculture, Forestry, Fishing and Hunting | 46,334 | \$4,374,343,877 | 1.28% |
| Mining | 11,168 | \$3,894,793,207 | 1.14% |
| Public Administration | 5,570 | \$1,197,353,586 | 0.35% |
| Management of Companies and Enterprises | 3,211 | \$1,170,748,130 | 0.34% |
| Utilities | 3,247 | \$1,027,575,137 | 0.30% |

PAYCHECK PROTECTION PROGRAM

LAY OF THE LAND

Loan Size

| Loan Size | Approved Loans | Approved Dollars | % of Count | % of Amount |
|------------------|----------------|------------------|------------|-------------|
| \$150K and Under | 1,229,893 | \$58,321,791,761 | 74.03% | 17.04% |
| >\$150K - \$350K | 224,061 | \$50,926,354,675 | 13.49% | 14.88% |
| >\$350K - \$1M | 140,197 | \$80,628,410,796 | 8.44% | 23.56% |
| >\$1M - \$2M | 41,238 | \$57,187,983,464 | 2.48% | 16.71% |
| >\$2M - \$5M | 21,566 | \$64,315,474,825 | 1.30% | 18.79% |
| >\$5M | 4,412 | \$30,897,983,582 | 0.27% | 9.03% |

- Overall average loan size is \$206K.

PUBLIC COMPANIES LAY OF THE LAND

| COMPANY (* WILL GIVE BACK LOAN) | MARKET CAP (MILLIONS) AS OF 4/20/20 | EMPLOYEES | PPP LOAN | ANNUAL REVENUE (MILLIONS) |
|--|--|------------------|-----------------|--|
| AutoNation, Inc.* | \$3,010.00 | 25,000 | \$77,000,000 | \$21,335.70 |
| Shake Shack Inc.* | \$1,744.26 | 7,603 | \$10,000,000 | \$594.52 |
| Accelerate Diagnostics, Inc. | \$534.62 | 275 | \$4,780,000 | \$9.30 |
| MiMedx Group Inc. | \$410.67 | 753 | \$10,000,000 | \$359.11 |
| DMC Global Inc. | \$401.70 | 741 | \$6,700,000 | \$397.55 |
| DURECT Corp. | \$385.76 | 90 | \$2,040,000 | \$29.56 |
| FuelCell Energy, Inc. | \$381.85 | 315 | \$6,500,000 | \$60.75 |
| TransMedics Group, Inc. | \$345.97 | 109 | \$2,250,000 | \$23.60 |
| Axogen, Inc. | \$307.98 | 394 | \$7,800,000 | \$106.71 |
| Wave Life Sciences Ltd.* | \$281.52 | 301 | \$7,234,890 | \$15.98 |
| MannKind Corp. | \$262.15 | 233 | \$4,872,860 | \$63.04 |
| Avid Bioservices Inc. | \$260.95 | 211 | \$4,380,000 | \$53.60 |
| Lindblad Expeditions Holdings Inc. | \$253.56 | 650 | \$6,600,000 | \$343.09 |
| Chembio Diagnostic Systems Inc. | \$248.99 | 324 | \$2,980,000 | \$34.46 |
| Adma Biologics Inc. | \$241.77 | 314 | \$5,400,000 | \$29.35 |
| Biolife Solutions Inc.* | \$235.00 | 54 | \$2,180,000 | \$19.74 |
| Ruths Hospitality Group Inc.* | \$232.03 | 5,740 | \$20,000,000 | \$468.03 |
| Cutera Inc. | \$227.94 | 447 | \$7,140,000 | \$181.71 |
| Limoneria Co. | \$224.65 | 260 | \$3,610,000 | \$171.40 |

SOURCE: Pacheco, Inti and Davis, Bob. "At Least 13 Public Companies Give Back \$170 Million in Small-Business Stimulus Money. Others Say They'll Keep It." *Wall Street Journal*, April 25, 2020

PUBLIC COMPANIES *LAY OF THE LAND*

- As of April 24, **more than 200 public companies had disclosed obtaining more than \$775 million in paycheck-protection loans**, according to a Wall Street Journal analysis of securities filings. While a few of the recipients were larger restaurant chains such as Ruth's Chris and Shake Shack, most were microcap companies. The median market value was about \$36 million and the median loan was \$2.4 million.¹
- So far 13 public firms, including AutoNation, will return a total of almost \$170 million, according to the Journal analysis. **The funds returned could provide roughly 825 loans, at the average loan size of \$206,000** reported by the Small Business Administration.¹
- Just 1.6 million companies — or about **26 percent of eligible small businesses** — received aid before the money was exhausted.²

¹Pacheco, Inti and Davis, Bob. "At Least 13 Public Companies Give Back \$170 Million in Small-Business Stimulus Money. Others Say They'll Keep It." *Wall Street Journal*, April 25, 2020

²The Editorial Board. "Failing to Help Those Who Need It Most." *The New York Times*, April 24, 2020.

PAYCHECK PROTECTION PROGRAM AND HEALTH CARE ENHANCEMENT ACT

- \$310 billion increase in PPP funding, bringing the total authorized amount to \$659 billion:
 - \$30 billion set aside for loans by insured depository institutions and credit unions with assets between \$10-50 billion
 - \$30 billion set aside for loans made by (i) community financial institutions, and (ii) insured depository institutions and credit unions with assets less than \$10 billion
- \$10 billion increase in Emergency Economic Injury Disaster Grants with expanded access for agricultural enterprises with not more than 500 employees

SMALL BUSINESS ADMINISTRATION GUIDANCE

- 75% Payroll Costs Rule
- Partnerships (K-1 income)
- Hedge Funds and PE Firms Ineligible
- Foreign Employees and 500 Person Headcount
- Affiliation Rules and Minority Shareholders
- \$100,000 Payroll Cost Threshold
- Professional Employer Organizations & Payroll Providers
- 12-Month Payroll Cost Calculation
- Bankruptcy Matters

AFFILIATION RULES & OTHER QUALIFICATION MATTERS

- **Traditional SBA Affiliation Rules**

- Ownership
 - Majority
 - Minority with negative control
- “Present Effect” of certain transactions
 - Stock options
 - Convertible Securities
 - Agreements to merge
- Common Management
- Identity of Interests

AFFILIATION RULES

- **PPP Affiliation Exceptions**

- North American Industry Classification System (NAICS) Sector 72: Accommodation and Food Services
- Franchises assigned a franchise identifier code by the SBA
- Businesses that receive “financial assistance” from a licensed SBIC

- **Complicated Cases**

- Negative control cases
- “Present Effect” cases
- Identity of interest cases

- **Ineligible Businesses (120.11 Eligibility)**

- Private Clubs
- Non-501(c)(3) Nonprofits
- Financial Businesses

CERTIFICATION OF NECESSITY

QUESTION: *Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*

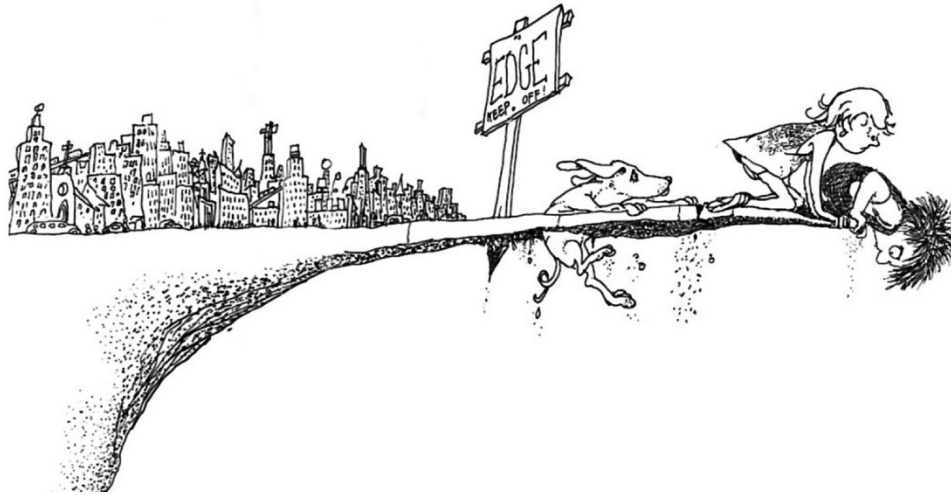
ANSWER: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” **Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.** For example, it is unlikely that **a public company with substantial market value and access to capital markets** will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

CERTIFICATION OF NECESSITY *PRIVATE EQUITY FOCUS*

Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control. However, in addition to applying any applicable affiliation rules, all borrowers should carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

CERTIFICATION OF NECESSITY *SEEKING A PATH FORWARD*



SOURCE: Silverstein, Shel. *Where the Sidewalk Ends: The Poems & Drawings of Shel Silverstein*. New York: Harper and Row, 1974.

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CERTIFICATION OF NECESSITY *TERMS EXPLORED*

- “...taking into account their current business activity...”
- “...and their ability to access other sources of liquidity...”
- “...sufficient to support their ongoing operations...”
- “...in a manner that is not significantly detrimental to the business.”
- “...a public company with substantial market value and access to capital markets...”

CERTIFICATION OF NECESSITY *HYPOTHETICALS*

"Small businesses" otherwise eligible for the PPP with "necessity" concerns.

1. A small public company experienced decreases in revenue, had furloughed certain employees, implemented salary reductions and had a cash runway through June. However, it knew it could secure a meaningful private placement on not significantly detrimental terms (i.e. common stock with some dilution). *Company returned funds.*
2. A small public company that had experienced a 30-50% drop in earnings as compared to last year knew it could amend its senior bank leverage covenants to access additional liquidity under its revolver for a year's time on the same terms at its existing credit. *Company will likely return funds.*
3. A mid-sized public pharmaceutical company with uncertain market prospects and 50% of its workforce unable to perform work, does not believe it can access liquidity without significantly detrimental interest rate or dilutive impact. *Company will keep the funds.*
4. Applicant was recently acquired by a private equity firm in a middle-market size transaction, applied for PPP 10-days before closing and also received an injection of liquidity at closing from the private equity firm. *Company will return funds.*

PPP LOANS RISKS

- The government will be watching how these funds are spent. The Act funds extensive oversight mechanisms to prevent and uncover fraud and waste.
- Even if you win, government investigations can be time-consuming, expensive, and intrusive.
- If you are investigated and lose, there are serious risks associated with any fraud in connection with these funds:
 - Criminal fines and imprisonment for making false statements to the SBA to obtain a loan (for yourself or on behalf of any applicant);
 - DOJ can bring other fraud charges as well (wire / mail fraud); and
 - Civil liabilities could be significant; in a whistleblower False Claims Act case, damages would be calculated as **three times** the amount of a loan *plus* civil penalties.
 - A finding of fraud here can leave you open to questions about whether you should be excluded / debarred from working with the government.

ENFORCEMENT & PUBLIC RELATIONS RISKS

- Assistant Attorney General Jody Hunt explained, the government “will not hesitate to take action against [businesses that] fraudulently obtain contracts *intended for small businesses.*”
- DOJ Press Release: An attempt to fraudulently obtain disaster relief funds “is white collar . . . looting” that deprives relief from “people who actually need assistance.”
- Treasury Secretary Mnuchin: “On the big companies that are borrowing under the PPP . . . that there is a certification that these companies need to make and I think they need to look at it very carefully. I think a lot of these big companies, it is questionable whether they can make that certification. I think they should review it. **If they pay the money back quickly, there will be no liability to Treasury and the SBA. If they don’t, then they could be subject to investigation.**”

INVESTIGATIONS

- **Investigations 101**

- Likely invasive inquiry focused on certifications and basis for them;
- Scrutiny of the truthfulness of representations and knowledge at the time they were made at various time points: when the application was made, at the time loan proceeds were accepted and when seeking forgiveness;
- Scrutiny of financials - current business activity, access to other sources of liquidity, access to capital markets (will go beyond the certification to test actual conditions, balance sheets, investor presentations, etc.);
- Scrutiny regarding corporate structure and affiliations and / or size;
- Will likely involve requests for emails, texts, voicemails from individuals involved in certifications or involved in seeking PPP funds.

- **Scenarios that will not support a certification:**

- “Everyone else is doing it”
- But the money is free
- Steps to avoid knowledge

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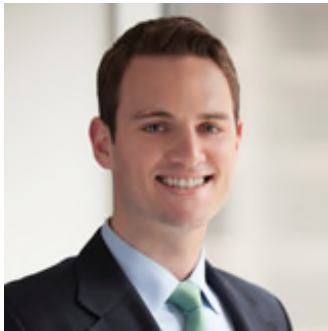
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COVID-19**



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Biography



Andrew T. Budreika

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Andrew T. Budreika is a Partner in the Finance practice. He advises clients on private equity transactions, domestic and cross-border public and private mergers and acquisitions, debt financings, strategic investments, and other corporate transactions. Andrew also regularly counsels clients on securities law, corporate governance, and other general corporate and finance matters.

Consistent with Morgan Lewis's core principles, Andrew is committed to providing exceptional client service and building long-term strategic relationships with clients focused on communication and collaboration. Andrew seeks first to listen and understand a client's goals and the business context and then to provide insightful, creative, and tailored solutions that enable the client to achieve those goals within the client's defined parameters for success. Andrew endeavors to bring together Morgan Lewis's intellectual and global talent and resources to construct elite legal teams that deliver the best overall results and experience to clients.

Andrew is also passionate about using technology, knowledge management, legal project management, and other innovations in legal practice to provide fast, reliable, and consistent service in a cost-effective and efficient manner.

Andrew has practical experience handling a full spectrum of transactions including buyouts; platform acquisitions; exit transactions; mergers; add-ons and roll-ups; carve-outs and spin-offs; leveraged recapitalizations; and management rollovers and equity incentive structures. He also regularly works on matters involving growth equity, minority, and strategic investments; co-investments; corporate restructurings and reorganizations; and founder liquidity transactions. Additionally, Andrew advises on acquisition financings; syndicated bank loans; investment grade and high-yield bond offerings; asset-based loans; mortgage loan warehousing and repurchase facilities; and capital call lending transactions.

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Sheila A. Armstrong

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Sheila Armstrong is a Partner in the Litigation practice. She represents companies in all aspects of government contracting including investigations, compliance, and counseling matters. Sheila routinely counsels both prime and subcontractors in a variety of contractual and civil settings. She frequently advises clients with respect to General Services Administration (GSA) and Veterans Affairs (VA) Federal Supply Schedule contracts. 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.

Clients turn to Sheila for her knowledge of developing and maintaining corporate compliance programs. In this area, she conducts compliance reviews, training, and internal investigations, and advises clients on required disclosures under the Federal Acquisition Regulation (FAR) and 2 CFR Part 200. She has represented clients before defense and civilizational agencies, including the US Department of Justice (DOJ), the General Accountability Office (GAO), the US Department of Defense (DoD), the GSA, and various Suspension and Debarment Officials.

Complementing her contracting work, Sheila provides counsel on foreign sourcing issues and regularly advises on compliance with the Buy American Act, Trade Agreements Act, and other foreign sourcing restrictions applicable to federal contracts.

Sheila is an active member of the American Bar Association's Public Contracts Law Section, serving in a leadership role as council member, vice chair of Finance, and vice chair of the Commercial Products and Services Committee. She frequently assists with comment letters submitted on behalf of the American Bar Association relating to new and updated regulatory changes.

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Biography



Margaret E. Rodgers Schmidt

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Margaret Erin Rodgers Schmidt is a Partner in the Litigation practice. She represents clients in complex civil and criminal government investigations, internal investigations—including investigations involving alleged harassment and workplace misconduct, and civil litigation.

Clients rely on Erin to represent them in internal investigations, government investigations, and litigation arising under the False Claims Act, the Anti-Kickback Statute, the Foreign Corrupt Practices Act, the Medicaid Rebate Statute, the Federal Food, Drug, and Cosmetic Act, and various US federal and state civil and criminal fraud statutes. Erin also regularly counsels pharmaceutical, medical device and healthcare clients on the development and oversight of compliance programs and the negotiation, implementation, and monitoring of corporate integrity agreements involving healthcare entities, the US Department of Justice, and the Office of Inspector General (OIG) of the US Department of Health and Human Services (HHS). Erin co-leads the healthcare industry initiative.

Erin has also worked with clients in the media, nonprofit, and healthcare industries to conduct independent internal investigations and advise on remediation of potential workplace issues.

Erin maintains an active pro bono practice. As a child advocate, she represents young clients in dependency proceedings before the Family Division of the Philadelphia Court of Common Pleas. She has also conducted numerous internal investigations for nonprofit clients.

Prior to attending law school, Erin was a researcher on art and cultural property issues for the Presidential Advisory Commission on Holocaust Assets in the United States and a contributor to the report "Plunder and Restitution: The US and Holocaust Victims' Assets."

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Stephen E. Ruscus is a Partner in the FDA practice. 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.

With more than 25 years of experience, Stephen counsels clients in the defense, technology, life sciences, manufacturing, services and food industries on supplies and service indefinite delivery, indefinite quantity (IDIQ) task order contracts, fixed-price, and cost reimbursement contracts and related Federal Acquisition Regulation provisions, subcontract negotiations and compliance, government contracts disputes, and federal debarment and suspension.

Stephen conducts investigations and prepares reports under the US Department of Veterans Affairs (VA), the US Department of Defense (DOD), and the US Department of State voluntary disclosure programs. He appears before the US Court of Federal Claims, US Courts of Appeals, the Armed Services Board of Contract Appeals, and the Civilian Board of Contract Appeals. He also represents clients in bid protests before the GAO and the US Court of Federal Claims.

With respect to federal healthcare supplies and services, Stephen counsels clients on VA, DOD, and US Department of Health and Human Services (HHS) procurements. He also advises on government pricing laws and regulations governing manufacturer participation in the Medicaid Drug Rebate, Medicare, 340B, TRICARE, and Veterans Healthcare Act programs; VA FSS contracts; and public policy affecting these programs.

Additionally, Stephen counsels clients on the implementation and review of complex government pricing systems, providing strategic advice on the government pricing, fraud, and abuse implications of commercial pricing and patient benefit programs.

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Benjamin W. Stango is an Associate in the Corporate Business Transactions practice. He works with a team to counsel clients in business law matters, including mergers and acquisitions, joint ventures, financings, restructurings, and compliance with securities laws. He advises clients ranging from emerging and high-growth businesses to Fortune 500 companies. Ben also has experience in government, nonprofits, and political campaigns. With an M.B.A. from The Wharton School, Ben brings a unique perspective on business, law, and government to serve his clients' needs. Ben currently serves as the lead associate on the Morgan Lewis CARES Act Loan Program Task Force, leading a team that advises clients on all aspects of COVID-19 related federal loan programs.

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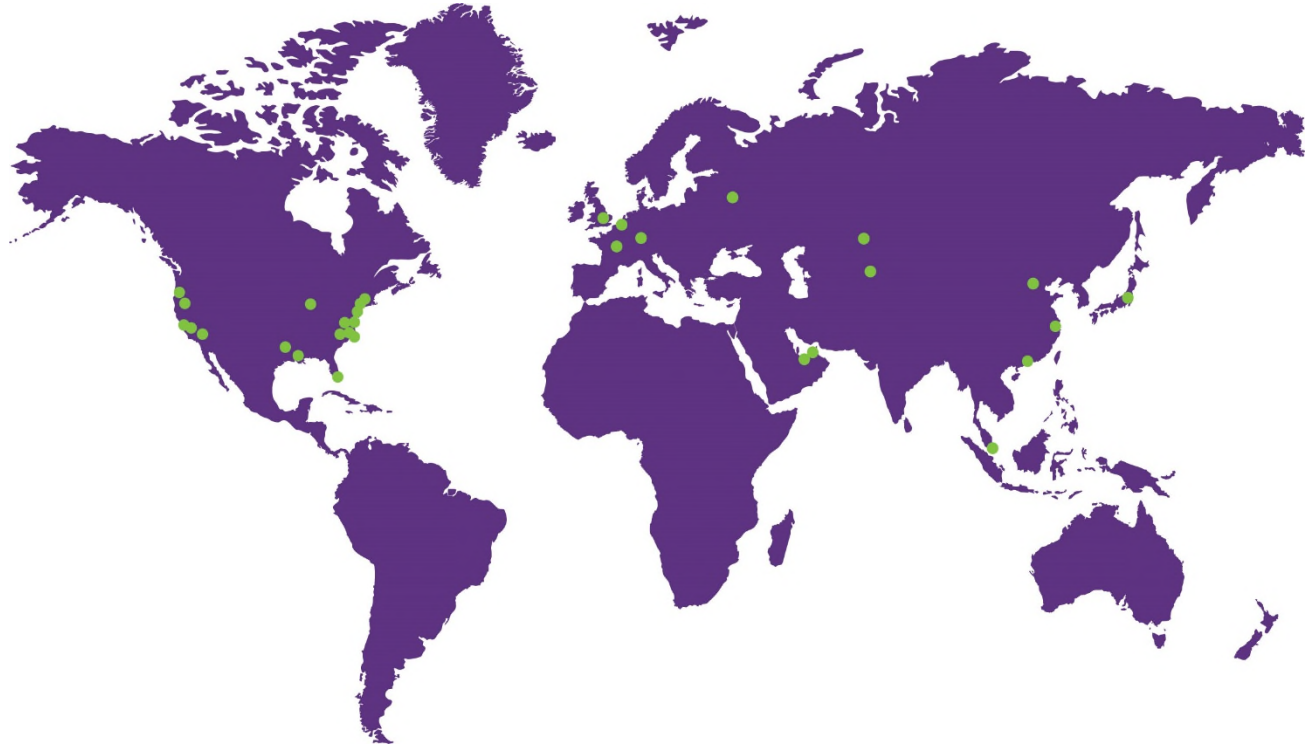
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