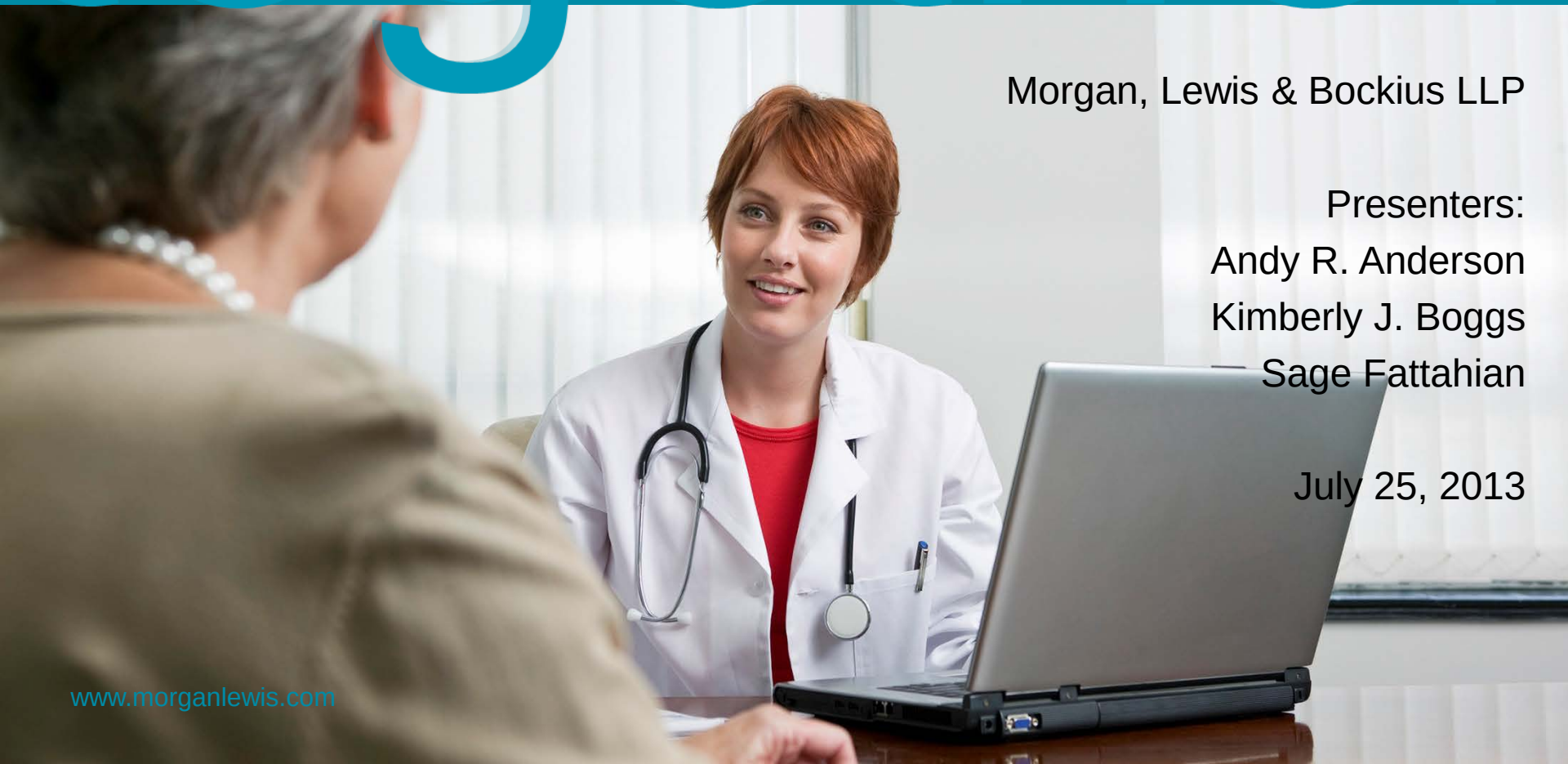
Morgan Lewis

After the Delay: Remaining ACA Employer and Group Health Plan Considerations for 2013 and 2014



Morgan, Lewis & Bockius LLP

Presenters:
Andy R. Anderson
Kimberly J. Boggs
Sage Fattahian

July 25, 2013

Today's Material

- The Delay
- 2013 Tasks
- 2014 Tasks

Additional Material

- 2/28/2013 – **The Road to 2014: ACA Considerations for Employers**
  http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/8cd8f0a9-4f6b-4170-a73a-3451008094d6
- 3/12/2013 – **The Road to 2014: ACA Considerations for Group Health Plans**
  http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/f5c8601d-373c-4e4a-9850-671bb3b82499
- 3/21/2013 – **The Road to 2014: ACA Considerations for Individuals**
  http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/04845943-61b7-49de-bb0e-baf9d3403d4e
- 6/11/2013 – **The ACA and Collective Bargaining: Smart Negotiations**
  https://morganlewisevents1.webex.com/morganlewisevents1/lsr.php?AT=pb&SP=EC&rID=6998772&rKey=fc98358ff9f634b7
- 6/13/2013 – **Wellness Programs: Are They on Life Support? Responding to the Final Regulations**
  http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/378a37ea-c639-4f05-94f0-ff916829e179

The Delay

The Delay

- Surprise!
  - "Subregulatory" Treasury blog post announcing delay in employer reporting and Shared Responsibility requirements until 2015 effectively delays employer mandate for a full 12 months
  - Followed by Notice 2013-45
    - *"…employers and other affected entities are encouraged to voluntarily comply for 2014 with the information reporting provisions (once the information reporting rules have been issued) and to maintain or expand health coverage in 2014."*

The Delay

- Unclear what happens to transition rules for determining 50-employee threshold, full-time status, affordability, etc.
- Unclear whether delay extends into 2015 for qualifying non–calendar year plans
- Unclear whether Administration has the authority to delay the mandate
  - *House thinks legislation necessary*
  - *House attempting to also delay individual mandate until 2015*

The Delay

- Don’t squander the opportunity provided by the delay
  - Begin counting hours this October
  - Consider workforce realignment
    - *ERISA Section 510*
    - *ACA Whistleblower*
  - Address collective bargaining issues
    - *Reopen?*
    - *Ask for assurances?*
    - *Provide fail-safe coverage as a backstop?*

The Delay

No Coverage Penalty	Inadequate Coverage Penalty
If employer does not offer Minimum Essential Coverage to 95% of its FT employees	If employer offers coverage to its FT employees, but the coverage is not Affordable and/or does not provide Minimum Value
AND One FT employee enrolls in an Exchange and receives a subsidy	
Employer must pay penalty of: $2,000 for all FT employees (less 30) (including those receiving coverage)	Employer must pay penalty of: $3,000 for each FT employee receiving a subsidy (capped at the maximum No Coverage penalty)

2013 Tasks

2013 Tasks

All Plans

Plan Mandates

- Age 26 dependent coverage
- No lifetime limits and restricted annual limits
- No rescissions
- No preexisting-condition exclusions (under age 19)
- No reimbursement from FSAs/HSAs/HRAs for OTC drugs

2011

- Uniform explanation of coverage (SBCs)
- 60-day advance notice of material modifications
- W-2 reporting of value of health coverage

2012

- $2,500 cap on employee contributions to FSAs
- PCORI fee - $1 per member/$2 subsequent years
- Notice of exchange/premium assistance (10/1)

2013

- Waiting periods limited to 90 days
- No preexisting-condition exclusions
- No annual limits
- Test employer reporting to IRS
- Reinsurance fee - $63 per member

2014

- Automatic enrollment
- Nondiscrimination requirements for insured plans (2014?)

TBD

Nongrandfathered Plans

Additional Plan Mandates

- No cost-sharing for preventive care
- Choice of primary care physician in network
- Direct OB/GYN services without referral
- Internal and external claims review procedures
- Emergency services without pre-authorization at in-network rates

- Limits on cost-sharing/deductibles
- Coverage required for clinical trials

2013 Tasks

- All Plans
  - Adult child dependent coverage
  - No lifetime or annual limits on EHB (subject to phase-in)
  - No rescissions of coverage
  - No preexisting-condition exclusions (under age 19)
  - No reimbursement for OTCs by HRA/FSA/HSA
  - **$2,500 limit on health FSAs**
- Nongrandfathered Plans Only
  - No cost-sharing for preventive care (check for updates annually)
  - Choice of primary care physician in network (if applicable)
  - Direct OB/GYN services without referral
  - Internal and external claims review procedures
  - Emergency services without preauthorization at in-network rates

2013 Tasks

- Patient-Centered Outcomes Research Institute Fee (PCORI, also known as PCORTF)
  - $1 times average number of covered lives
  - IRS Form 720—first due 7.31.2013
- October 1, 2013 Exchange Notice
  - "One and done" for current employees
  - Ongoing for new employees
    - *14 days after hire*

2013 Tasks

- SBC Update
  - Two new questions on page 4
    - *Does plan provide Minimum Essential Coverage?*
      - "Plan with a pulse"
    - *Does plan meet Minimum Value standard?*
      - 60% standard
  - No other changes

2014 Tasks

2014 Tasks

- All Plans
  - Eligibility waiting period based solely on the lapse of time may be no more than 90 days
    - *Other conditions generally permissible unless designed to avoid 90-day restriction*
    - *Special seasonal and part-time rules*
  - No preexisting-condition exclusion regardless of age

2014 Tasks

- Final wellness regulations issued (June 3, 2013)
  - Apply to plan years after January 1, 2014
  - Apply to grandfathered plans
- Participatory wellness program
  - Based on participation
  - No conditions for obtaining reward
  - Available to all similarly situated individuals regardless of health status

2014 Tasks

- Health-contingent wellness program
  - Requires an individual to perform or complete an activity related to a health factor in order to obtain a reward
  - Two types:
    - *Activity-based wellness programs*
    - *Outcome-based wellness programs*

2014 Tasks

- All health-contingent wellness programs must meet five requirements:
  1. Frequency of opportunity to qualify
     - *Once per year*
  2. Size of reward
     - *Up to 30% cost of coverage*
     - *Tobacco cessation (up to 50%)*
  3. Reasonable design
     - *To promote health*

2014 Tasks

4. Uniform availability and reasonable alternative standard

- *Must be available to all similarly situated individuals (allow reasonable standard or waive the standard)*
- *Reasonable alternative standard need not be determined in advance*
- *Full reward must be uniformly available even if an alternative standard is satisfied later during the year*
- *If wellness standard is not medically appropriate, must provide standard that accommodates recommendation of an individual's personal physician*

2014 Tasks

5. Notice of availability of reasonable alternative standard

- *Must be disclosed in all plan materials describing terms of health-contingent program*
- *Must provide contact information for individuals to request reasonable alternative standard*
- *Sample language provided and also woven into regulation examples*

2014 Tasks

- Activity-based wellness program
  - Must provide reasonable alternative for individuals if standard is unreasonably difficult due to a medical condition or if it is medically inadvisable
  - May seek verification from an individual's personal physician that health factor makes it unreasonably difficult or medically inadvisable
  - Waiver as an alternative

2014 Tasks

- Outcome-based wellness program
  - Must provide reasonable alternative for any individual who asks
    - *Waiver as an alternative*
  - Reasonable alternative required regardless of medical condition
    - *However, must provide another reasonable alternative (or waiver) if standard is unreasonably difficult due to a medical condition or if it is medically inadvisable*

2014 Tasks

- No physicians' notes necessary
  - *Unless reasonable alternative is activity based*
- Special rule if reasonable alternative is also outcome based
  - *Must provide additional time to comply*
  - *Must allow individual to request that the reasonable alternative comply with recommendation of personal physician*

2014 Tasks

- No annual limits on EHB (phase-in expires)
  - *Mainly impacts annual or lifetime limits*
  - *The end of mini–med plans and waivers*
  - *Impacts HRAs—particularly stand-alone HRAs*
    - May need to redesign, or eliminate, stand-alone HRAs
- Loss of ability to exclude adult dependents with other employer coverage
  - *Offer coverage to children of employees*
    - Try in 2014, must by 2015

2014 Tasks

- Nongrandfathered Plans Only
  - Limits on Cost-Sharing
    - *Must meet OOP limits across all benefits*
    - *Deductible limits only for Exchange or insured small group plans*
  - Plans must provide coverage for clinical trials
    - *Cannot deny, limit, or impose additional conditions*
    - *May not discriminate against any qualified individual who participates in a clinical trial*

2014 Tasks

- Mandatory automatic enrollment
  - Delayed for now, but employers with 200 or more employees must automatically enroll newly hired or newly eligible FTEs into a default health plan providing "affordable" coverage
  - Opportunity to opt out
- Nondiscrimination rules for insured plans
  - Delayed for now, but will bring an end to discriminatory insured benefits unless a plan only covered retirees or retains its grandfather status

2014 Tasks

- Proof of employee opt-out of employer coverage
  - Good idea, based on experience with MA
- Interface with Exchange/Government?
  - Offer customized on-demand worksheet for Exchange use?
- OOP max – who tracks OOP across multiple benefits?
  - Try in 2014, required in 2015

2014 Tasks

- Create and provide SBC at required events, including annual enrollment
  - 60-day advance notice of material modification
- W-2 reporting of value of health coverage
  - Rules will be stable for 2014

2014 Tasks

- Testing for coverage reporting
  - Terms and conditions of healthcare coverage provided to full-time employees (for 2015)
    - *Duration of waiting period*
    - *Monthly premium for lowest cost option and employer's premium share*
    - *List of employees (address, TIN, months covered)*
  - Copy to participant
    - *January of following year*

2014 Tasks

- Excise Tax on Noncompliant Plans
  - Nondeductible excise tax on plans that do not meet plan mandates
  - $100 per day "with respect to each individual to whom such failure relates" – may not apply:
    - *if it was not known (and, in exercising reasonable diligence, would not have been known) that there was a compliance failure or*
    - *if it was due to reasonable cause (rather than willful neglect) and was corrected within 30 days*

2014 Tasks

- Minimum excise tax for a compliance failure discovered after a notice of examination generally is $2,500; increased to $15,000 if violations are “more than de minimis”
- Maximum excise tax for “unintentional failures” is the lesser of 10% of the amount paid during the preceding tax year by the employer for all group health plans, or $500,000
- For multiemployer plans, the excise tax is imposed on the plan
- Self-reported on Form 8928

Questions?

DISCLAIMER

- This material is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It does not constitute, and should not be construed as, legal advice on any specific matter, nor does it create an attorney-client relationship. You should not act or refrain from acting on the basis of this information. This material may be considered Attorney Advertising in some states. Any prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change.

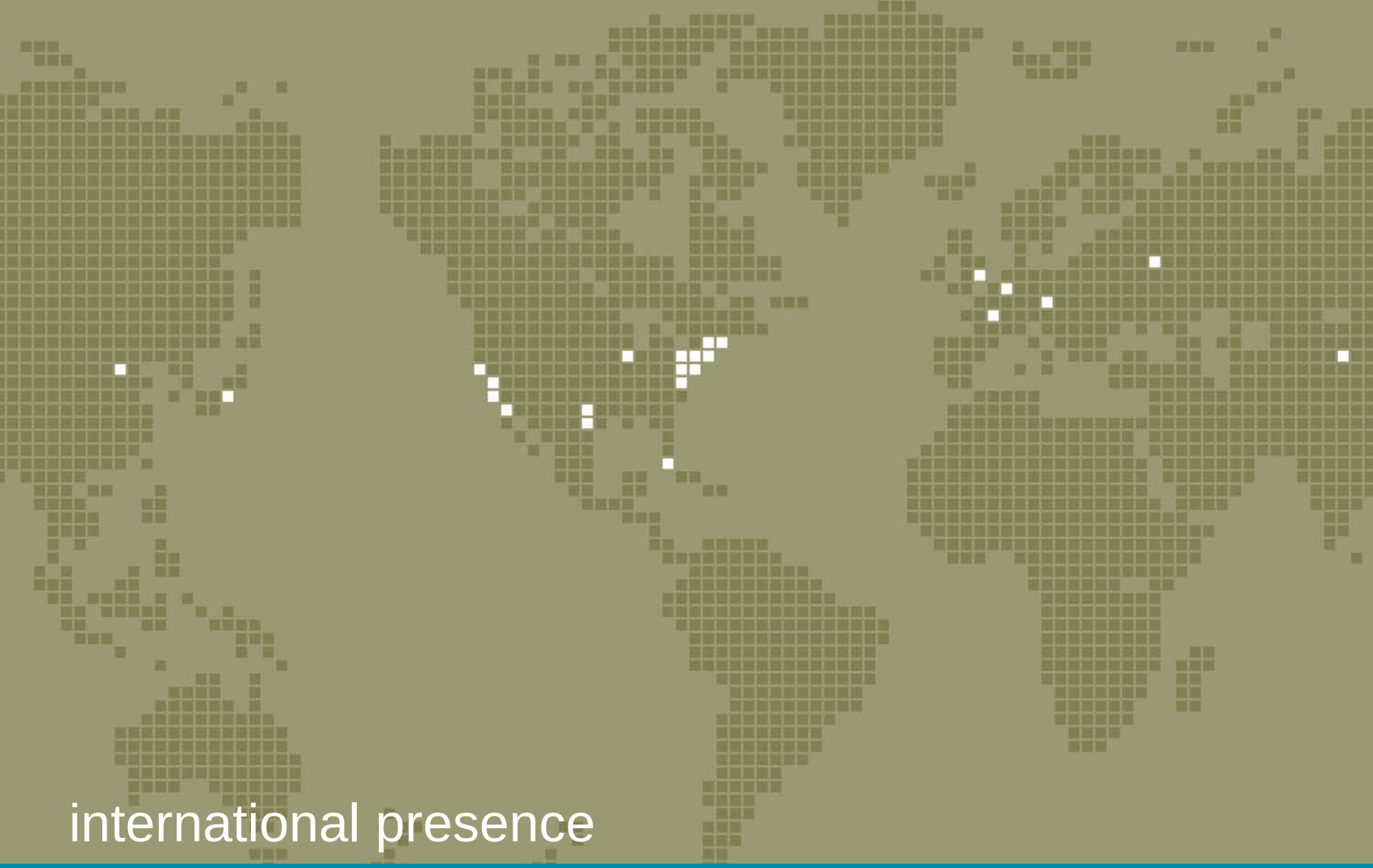
- **IRS Circular 230 Disclosure**
To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend, please see http://www.morganlewis.com/circular230.

Contact Information

Andy R. Anderson
312.324.1177
aanderson@morganlewis.com

Kimberly J. Boggs
312.324.1758
kboggs@morganlewis.com

Sage Fattahian
312.324.1744
sfattahian@morganlewis.com



international presence

Almaty Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine London Los Angeles Miami Moscow New York Palo Alto Paris Philadelphia Pittsburgh Princeton San Francisco Tokyo Washington Wilmington