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A PRACTICAL GUIDE TO IMPLEMENTING COMPLIANT CLAWBACK POLICIES

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April 26, 2023

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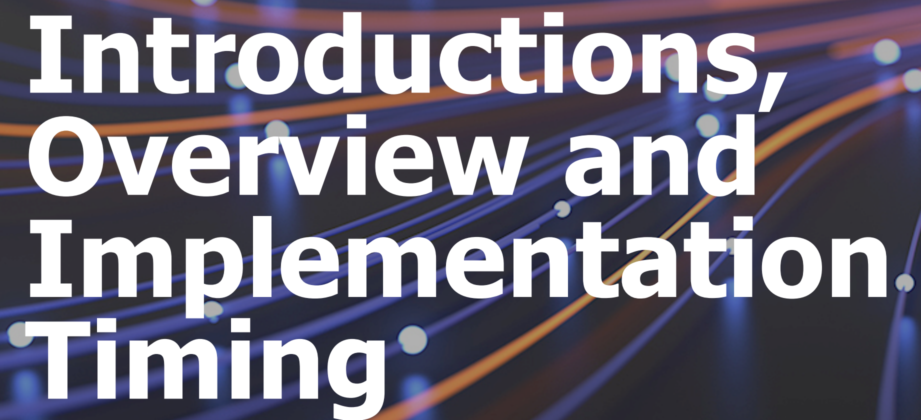

Introductions, Overview and Implementation Timing

Agenda

- Overview and Implementation
  - Timeline to the Final Rule
  - Timing and Transition
- Details of the Final Rule
  - Key Definitions
  - Disclosure Requirements
- Tax Implications of Clawbacks
- Practical Implications

The Long Road to Final Rule 10D-1

- ✓ **October 26, 2022 –** the SEC issued the final Rule 10D-1 (the "**Final Rule**") directing listing exchanges to adopt new listing standards
- ✓ **November 28, 2022 –** SEC's Final Rule was published in the Federal Register
- ✓ **March 13, 2023 –** The NYSE and Nasdaq proposed clawback listing standards were published in the Federal Register, beginning comment period (which ended April 3, 2023)
  - → The proposals contemplated that the SEC would approve in 45 days (April 27, 2023) or up to 90 days (June 11, 2023), but…
- ✓ **April 24, 2023 –** SEC announced that it would designate a longer period for taking action on the proposed listing standards
- ❑ **Effective Date TBD –** Must be on or before November 28, 2023; could be much sooner
  - – Per the SEC's final rule, the deadline for the national exchanges to finalize their listing standards for clawback policies is November 28, 2023; however, either or both may be adopted at an earlier date, which would accelerate the compliance date
  - – Both Nasdaq and NYSE proposals indicate that an effective date for the rules will be the date approved by SEC
- ❑ **General compliance date, TBD**, but will be within 60 days of the preceding date

Timing and Transition

Action	Timing
Companies must adopt a clawback policy	As noted above, the compliance date could be as late as if the listing standards become effective on November 28, 2023, then the 60-day deadline for companies to adopt compliant clawback policies is January 27, 2024; however as noted above, this could be accelerated (i.e., August 10, 2023)
Companies must comply with the required clawback policy and recover all excess incentive- based compensation resulting from an accounting restatement	For any compensation received after the effective date of the applicable listing standard
Companies must comply with the new disclosures in proxy or information statements and Exchange Act annual reports	For all filings on or after the effective date of the applicable exchange's rules

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Overview of Final Rule 10D-1 (and applicable exchange standards)

Final Rule requires **each issuer** to develop and implement a **required policy** providing for the recovery, in the event of a **required accounting restatement**, of **incentive-based compensation** received by **current or former executive officers** during **the coverage period** where that compensation is based on the erroneously reported **financial information**.

As a note on this presentation, throughout these materials we refer to the SEC's final rule, which is intended to encompass the SEC's final rule directing the exchanges to implement listing standards as well as the standards that the NYSE and Nasdaq have proposed, which are substantially similar to the SEC's proposed rule.

What Is the Required Compensation Recovery Policy?

- A **compensation recovery policy** will be required
- Commonly called a "clawback policy"
- Many listed companies have implemented clawback policies even absent a final rule, often in response to shareholder feedback
- Even listed companies that have voluntarily implemented clawback policies should revisit those policies, as the requirements of the Final Rule may be more onerous than current policy

Which Companies Are Covered by the Final Rule?

The Final Rule broadly applies to most listed companies, including:

- ✓ Emerging growth companies
- ✓ Smaller reporting companies
- ✓ Foreign private issuers
- ✓ Controlled companies
- ✓ Companies listing only debt and other non-equity securities

The Final Rule does not apply to:

- ❑ Listed registered investment companies that have not awarded incentive-based compensation to any executive officers within the last three fiscal years
- ❑ Unit investment trusts
- ❑ Companies listing securities futures products and standardized options cleared by a clearing agency

Which Executives Are Covered by the Final Rule?

- Rule 10D-1 applies to any current or former **executive officer** of a covered company
  - Relies on the same definition as for Section 16 officers
  - Does not apply only to named executive officers that are the subject of compensation disclosure in the Company's annual proxy statement
- Any person who was an executive officer during the "performance period" is subject to clawback
- It applies to any compensation received after becoming an executive officer

Includes the current and former:

- president;
- principal financial officer;
- principal accounting officer or controller;
- any vice-president in charge of a principal business unit, division, or function; and
- any other officer who performs a significant policymaking function for the company, whether such person is or was employed by the company, the issuer's parent, or the issuer's subsidiary(ies)

What Types of Compensation Are Covered By the Final Rule?

Incentive-based Compensation	Any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure
Financial Reporting Measure	A measure determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, any measure derived wholly or in part from such a measure, and stock price and total shareholder return (TSR) A financial reporting measure need not be presented within the financial statements or included in a filing with the SEC
Excess compensation	The amount of erroneously awarded incentive-based compensation subject to recovery Equals the amount received by an executive officer that exceeds the amount that otherwise would have been received had the incentive-based compensation been determined based on the accounting restatement
"Received" Compensation	Compensation is deemed "received" in the fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period

What Is Included in Incentive-Based Compensation? (cont.)

- The inclusion of **stock price and TSR** within the definition of "financial reporting measures" raises significant challenges (administrative and financial) in determining what constitutes recoverable incentive-based compensation
  - Issuers would be permitted to use estimates to determine excess compensation in connection with incentive-based compensation tied to stock price or TSR in order to address the "confounding factors" that make it "difficult to establish the relationship between an accounting error and the stock price"
  - Estimates must be reasonable and the company must maintain documentation of the determination of the estimate and provide it to its exchange

When Is Incentive-Based Compensation Subject to Recovery?

- Incentive-based compensation is deemed to be **received**, and therefore recoverable, in the fiscal period when the financial reporting measure specified in the incentive-based compensation award is attained
- The actual payment date does not matter

Type of Award	When Received
Equity award that vests upon satisfaction of a financial reporting measure and subsequent service	Deemed received in the fiscal period when the financial reporting measure is satisfied
Cash award earned upon satisfaction of a financial reporting measure	Deemed received in the fiscal period when the financial reporting measure is satisfied

➢ Because incentive-based compensation awards may have both service and performance conditions, an incentive award may be deemed to be “received” before payment is made

When Is the Final Rule Triggered?

- The Final Rule requires that the clawback policy adopted be triggered by both "Big R" and "little r" restatements.
  - The **three-year look-back period** starts on the earlier of (i) the date the company's board of directors, committee and/or management concludes (or reasonably should have concluded) that a restatement is required or (ii) the date a regulator, court or other legally authorized entity directs the company to restate previously issued financial statements.
- Application of the clawback policy will be triggered **before** the accounting restatement is actually filed.
- Three year look-back period is the **three completed fiscal** years prior to the trigger discussed above.

What Is a Restatement?

- Under the Final Rule, clawback policies must mandate compensation recovery in the event a company is required to prepare an accounting **restatement** due to its material noncompliance with any financial reporting requirement under the securities laws
- The Final Rule applies to both “big R” and “little r” restatements.
- “**Big R**” restatements correct **material** errors to previously issued financial statements and require companies to file an Item 4.02 Form 8-K and amend their filings promptly to restate the previously issued financial statements
- “**Little r**” restatements correct errors that are **not material** to previously issued financial statements, but would result in a material misstatement if (1) the errors were left uncorrected in the current filing or (2) the error correction was recognized in the current period. As such, this includes any corrections made when filing the prior year’s financial statements and generally does not require an Item 4.02 Form 8-K

When Is a Restatement Required?

- The clawback policy must apply whenever a restatement is **required**
- An accounting restatement is deemed **required** as of the earlier of
  1. the date the company concludes, or reasonably should have concluded, that its previously issued financial statements may contain an error; or
  2. the date a court, regulator, or other legally authorized body directs the company to prepare a restatement to correct a material error

Are There Any Exceptions to the Final Rule?

- There are three incredibly narrow exceptions to the requirements of the Final Rule:
  1. recovery is **impracticable** due to costs, determined following an initial attempt to collect,
  2. recovery would **violate a home-country law** adopted before the publication of Final Rule 10D-1 (provided such conclusion is based on an opinion of home-country counsel), and
  3. recovery need not extend to any compensation contributed to **tax-qualified plans**
- Any determination must be made by an independent compensation committee
- Note that there is **no de minimis exception**, which the SEC said in its issuing release as carrying the risk that such exemption would be being over- and under-inclusive.

Impracticability exception is very limited

The direct expense paid to a third party to assist in enforcing recovery would need to exceed the amount to be recovered

Before reaching the conclusion that recovery is “impracticable,” a company must first “make a reasonable attempt to recover” the compensation, document its attempts, and provide the documentation to its exchange

May a Company Provide Indemnification to Executive Officers?

- The Final Rule **prohibits** a listed company from indemnifying or purchasing insurance for any executive officer or former executive officer against the loss of any erroneously awarded compensation
  - The SEC believes that such indemnification arrangements "fundamentally undermine the purpose of Section 10D"

- Executive officers could personally purchase **third-party insurance** (to the extent that such insurance is available) to fund potential recovery obligations
  - Listed companies are not permitted to pay, or reimburse the executive officer for, premiums

Reporting and Disclosure Obligations

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Reporting and Disclosure Obligations

- **New Annual Report Cover Page** must also disclose by check boxes on the cover page whether the financial statements included in the filings reflected correction of an error and whether such error corrections are restatements that require a recovery analysis
- **New Disclosure Rules** (under Regulation S-K Item 402(w) or applicable forms for issuers who don't rely on Regulation S-K) will require companies to disclose "recovery" policies and actions taken to recover erroneously awarded executive compensation during or following the end of the most recently completed fiscal year, including a requirement to provide:
  - The date on which the listed issuer was required to prepare an accounting restatement and the aggregate dollar amount of erroneously awarded incentive-based compensation attributable to such accounting restatement;
  - The aggregate amount of incentive-based compensation that was erroneously awarded to all current and former named executive officers that remains outstanding at the end of the last completed fiscal year;

Reporting and Disclosure Obligations (cont.)

- Any outstanding amounts due from any current or former executive officer for 180 days or more, separately identified for each named executive officer (or, if the amount of such erroneously awarded incentive compensation has not yet been determined as of the time of the report, disclosure of this fact and an explanation of the reasons why); and
- If recovery would be impracticable, for each current and former named executive officer and for all other current and former executive officers as a group, the amount of recovery forgone and a brief description of the reason the listed registrant decided in each case not to pursue recovery.
  - Note that, if an amount is properly determined to be non-recoverable due to impracticality, such amount will not be considered to be outstanding at the last fiscal year for purposes of the disclosure requirements described above

- **New Exhibit Filing:** the new rules will require the clawback policy to be filed as an exhibit to the annual report on Form 10-K, 20-F or 40-F

Consequences of Non-Compliance

- An issuer will be subject to **delisting** if the issuer does not adopt and comply with its compensation recovery policy
- SEC enforcement interest

Income Tax Consequences For Executive Officer

Repaying Compensation in the Year Received- Easy

- General Rule: if compensation is repaid in the same year it was received (as defined for Internal Revenue Code purposes) the bonus is treated for tax and reporting purposes as if it were never paid
  - Principle of annual income tax accounting. Rev. Rul. 79-311, 1979-2 C.B. 2; *Couch v. Commissioner*, 1 B.T.A. 103 (1924), *acq.* 1925-1 C.B. 1 (1925), *Russel v. Commissioner*, 35 B.T.A. 602 (1937), *acq.* 1937-1 C.B. 22; 5.
  - Caution: This doctrine might not apply unless payment is required by contractual obligation. IRS GLAM 2009-006
  - In the alternative, may apply doctrine of rescission, but status quo ante requirement could be a hurdle. *Kechijian v. Comm'r (Estate of Kechijian*), 962 F.3d 800, 807 (4th Cir. 2020)

Repaying Compensation in the Year Received- EXAMPLE

- EXAMPLE
  - Executive officer is paid $100K performance bonus in 2025, subject to $22K income withholding taxes
  - Bonus is “received” for tax purposes in 2025, even though it was “received” for Rule 10D-1 purposes during performance period
  - Pursuant to Company’s recoupment policy, 2025 bonus is subject to clawback
  - As required by terms of bonus agreement, Executive officer repays entire $100K as excess compensation in 2025 either by writing a check or by having amount withheld from later-paid wages in 2025
  - Company does not report $100K on executive officer’s 2025 Form W-2, and $22K income tax withholding is restored to employee from later wages or as refund
  - Alternative mechanics: executive repays pretax bonus, company is credited for income withholding taxes. Result is the same, but not entirely clear if this is permitted under Rule 10D-1, even for same-year repayments

Repaying Compensation in Later Year – Harder

- EXAMPLE: Executive officer is paid $100K performance bonus in 2024, subject to $22K income withholding taxes
- Executive officer repays $100K bonus in 2025, either by writing a check or by having amount deducted from other compensation
  - Rule 10D-1 does not permit repayment only of after-tax bonus
  - Employee is not permitted to amend prior year's income tax return
  - Whether $100K is repaid in 2025 via check or being withheld from other wages, IRS says it may not be netted against taxable income reported on 2024 W-2. Rev. Rul. 79-311
  - Generally, itemized deduction under Code Section 162 would be available, BUT itemized deductions were suspended by TCJA through 2025
  - If repayment is in 2026 or later year, employee should be able to claim itemized deduction, subject to floor equal to 2% of Adjusted Gross Income (but cannot deduct against AMT)

Repaying Compensation in Later Year – Section 1341

- Section 1341 allows "make-whole" treatment of repaid amount.

- Section 1341 was not suspended by TCJA

- Taxpayer gets "better of" deduction or refundable credit:
  - Deduction for year of repayment (without 2% floor or AMT) or
  - Refundable credit equal to additional tax in year of payment

- Statute
  - Repayment over $3,000.
  - Deductible under another Code section.
  - **It appeared** that taxpayer had **unrestricted right** to payment in year of payment.
  - Established after close of year that **taxpayer did not have right to payment.**

IRS's Application of Section 1341

- Regulation says Section 1341 is available only if it "appeared from all the facs available in the year of inclusion" the taxpayer had a right to the payment when received.
- IRS thinks the term "it appeared" means Section 1341 applies only to illusory rights and not "actual" rights. IRS's application of this test is confusing and unpredictable.
- Example: Executive officer receives performance-based compensation in Year 1 and repays excess compensation in Year 2 pursuant to accounting restatement. Can she claim Section 1341 relief? Based on previous IRS guidance, answer is:
  - **YES**. Her right under the original accounting statement was illusory, because the excess compensation was "erroneously awarded" according to the accounting restatement and Rule 10D-1. *See* Rev. Rul. 68-153, situation 3.
  - **NO**. She had an actual right to the bonus under the original financial statement. Her right was defeated by a subsequent event, namely, the restatement and application of clawback policy. *See* Rev. Rul. 67-437
  - **NO**. The original financials had arithmetic errors; had they been properly calculated, "all the facts available in the year of inclusion" would show that she had no right to the bonus. See Rev. Rul 68-153, Situation 2.

Section 1341 Relief – Other challenges

- IRS's narrow interpretation of Section 1341 relief may be even more challenging applied to other kinds of clawbacks
- Example: S. 1045, introduced by Senators Warren and Hawley, provides for FDIC clawback of certain compensation paid to executives of financial institutions in the event of subsequent insolvney "as is necessary to prevent unjust enrichment and assure that the party bears losses consistent with the responsibility of the party"
  - Is Section 1341 available? IRS might well say no, because executives had an actual right in the year of payment, defeated by a subsequent event
  - Courts generally do not follow the "apparent versus actual right" test. Majority case law: Section 1341 applies if original payment made because of specified "circumstances terms and conditions," and repayment was made because "circumstances, terms and conditions were not satisfied.
  - Federal Court of Claims in Nacchio v. United States: Taxpayer repaid illegal profits profits following criminal conviction for insider trading. Held: Section 1341 relief available because taxpayer pleaded "not guilty." It obviously "appeared" to taxpayer that he had an "unrestricted right" to the funds when received, even though it did not appear to the US government or a federal jury that he and an unrestricted right.
  -

Setoff or Netting

- Is setoff or netting available? Can repaid bonus be subtracted from other compensation payable to affected executives on a pre-tax basis?

- IRS in Revenue Ruling 79-311 says no.
- There is some authority for allowing repayment obligations to be offset against other income on a pretax basis
- But IRS might disagree, and employer is at risk for penalties for underwithholding

Practical
Implications

What Should Companies Do Now?

- Companies are not required to adopt clawback policies until the effectiveness of the exchange rules
  - Plan for 2023 implementation
- Ensure that employment agreements, equity plans, deferred compensation plans, and bonus/incentive arrangements contain appropriate provisions to enable implementation of the Dodd-Frank recovery policies.
  - Create a contractual link between the incentive compensation and the recovery policy
  - Specify remedy for clawback (e.g. required to return stock distributed pursuant to equity grants)

What Should Companies Do Now? (cont.)

- Identify financial measures that may cause incentive compensation to become subject to recovery and consider how the recovery process would work
  - This is especially important for stock price and TSR measures
- Consider a shift toward types of compensation that would not be covered by the clawback rules, such as:
  - Equity compensation that vests based on service
  - Incentive compensation using non-financial/non-stock price measures
  - Discretionary awards

What Should Companies Do Now? (cont.)

- Consider imposing mandatory deferrals or holding requirements on earned incentive awards to facilitate implementation of the recovery policy
  - Deferral plans require plan design and navigation of complex legal requirements (including timing requirements for elections of deferral), so if preferrable to follow this approach, planning early will benefit the process

What Should Companies Do Now? (cont.)

- Companies should review their existing clawback policies to determine what modifications will be needed to comply with the new rules. Potential revisions include:
  - Which officers are covered (including former officers)
  - The types of compensation covered
  - The kinds of restatements that trigger compensation recovery
  - The lookback period
  - The mandatory nature of clawbacks under the new rules (no discretion; no-fault)
  - The limited exceptions to compensation recovery

What Should Companies Do Now? (cont.)

- Consider whether to limit the company's policy to the Dodd Frank policy or to add other discretionary clawbacks such as:
  - Misconduct/breach of restrictive covenants
  - Clawback for broader group of responsible employees if the Dodd Frank clawback is triggered for executive officers

What Should Companies Do Now? (cont.)

- We are seeing some companies implement multi-pronged clawback policies, with one prong of the policy designed to be a no-fault Dodd Frank-compliant policy and another prong for discretionary fault-based use, which is applicable to a broader population of employees.
  - This has the added benefit of only needing one cross reference in employment agreements and compensation arrangements

- Other companies may elect to implement only a Dodd Frank-compliant policy or maintain separate policies.

What Should Companies Do Now? (cont.)

- Review committee charters and other relevant board documents to ensure that the responsibility for determining the Dodd-Frank recovery process is appropriately addressed
- Prepare to devote sufficient time and resources to develop a policy that is both compliant with the final rules and appropriate for the company’s compensation policies and governance programs
- Begin socializing the upcoming requirements with the board and compensation committee in upcoming meetings

Biography

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Celia is co-leader of the firm's capital markets and public companies practice and co-leads the firm's ESG & Sustainability Advisory Practice. She focuses her practice on counseling public companies and their boards with respect to corporate governance, federal securities, stock exchange, shareholder engagement, ESG, and executive compensation matters. Drawing on her previous tenure as an attorney-advisor with the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance, Celia has experience with securities disclosure issues that impact public companies' ongoing reporting obligations and proxy-related matters that impact public companies and their officers and directors. She also advises companies in connection with public capital raising transactions, including through IPOs, secondary offerings, and debt offerings.

In keeping with Morgan Lewis's commitment to serving the public good, Celia serves as chair of the Pittsburgh office pro bono committee. Celia also is actively involved in the local arts community, including through her service on the board of directors of the Pittsburgh Opera.

A central tenet of Celia's practice is ensuring that companies and their boards are abreast of the latest disclosure, governance, and regulatory issues and trends. To this end, Celia often presents at events and webinars on topics relating to SEC initiatives and corporate governance and executive compensation hot topics, and helps to lead the Morgan Lewis Public Company Academy.

While at the SEC, Celia received the 2011 Chairman's Award for Excellence, and was a member of the Rule 14a-8 Shareholder Proposal Taskforce.

Biography

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Rosina counsels clients on the Employee Retirement Income Security Act (ERISA), tax, and securities law aspects of their employee benefits and executive compensation plans. Her practice ranges from sophisticated defined benefit pension plan matters to complex executive compensation issues.

Rosina is a nationally known author on Internal Revenue Code Section 409A compliance, and numerous companies engage her specifically to provide counsel in this area. She has drafted and amended multiple equity, deferred compensation, and incentive pay plans for compliance with Code Sections 409A, 83, 162(m), 457A, and 280G, and she advises clients on the many tax, fiduciary, and governance issues arising from these plans.

Rosina frequently counsels clients on the benefits and executive compensation issues arising from mergers, divestitures, and other business reorganizations, and in the last year alone, she advised on corporate transactions totaling more than $13 billion.

She practices extensively with respect to large, innovative defined benefit plans and the novel issues they raise. She has advised on myriad derisking transactions ranging from several hundred million dollars to more than $50 billion, including annuity purchases, lump-sum offers, and plan terminations. Rosina obtained one of the first Internal Revenue Service (IRS) derisking private letter rulings (PLRs) that permit a defined benefit plan to offer lump-sum payouts to retirees in pay status. For a client with a uniquely complex cash balance plan design, she obtained a favorable determination letter and technical advice memorandum (TAM) reversing the IRS's initial adverse position, including the government's earlier, published position that the design violated ERISA and the qualification rules of the Internal Revenue Code. She represents clients before the IRS, US Department of Labor (DOL), and Pension Benefit Guaranty Corporation (PBGC) on major funding issues, including waiver applications, PBGC early warning negotiations, and DOL fiduciary audits.

Biography

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Timothy advises public and private companies on a wide variety of executive compensation and employee benefits matters, both in ensuring compliance in the ordinary course of business and when engaging in corporate transactions, including M&A, spinoffs, initial public offerings, joint ventures, and restructurings. He regularly assists private equity clients with the negotiation of equity and cash-based compensation packages for executives of portfolio companies and advises public companies on compensation-related public disclosure rules, including drafting and reviewing their public filings.

Timothy designs, negotiates, and implements many forms of compensation and benefits packages including employment agreements, equity and equity-based compensation programs, severance plans and arrangements, performance incentives and management participation in corporate transactions, change in control protections, and deferred compensation.

Prior to joining Morgan Lewis, Timothy was an associate in the executive compensation practice group of a New York-based international law firm for over four years. During law school, he worked at the New York regional office of the US Department of Labor Employee Benefits Security Administration where he investigated retirement plans and plan service providers to ensure compliance with Title I of ERISA and correct ERISA violations.

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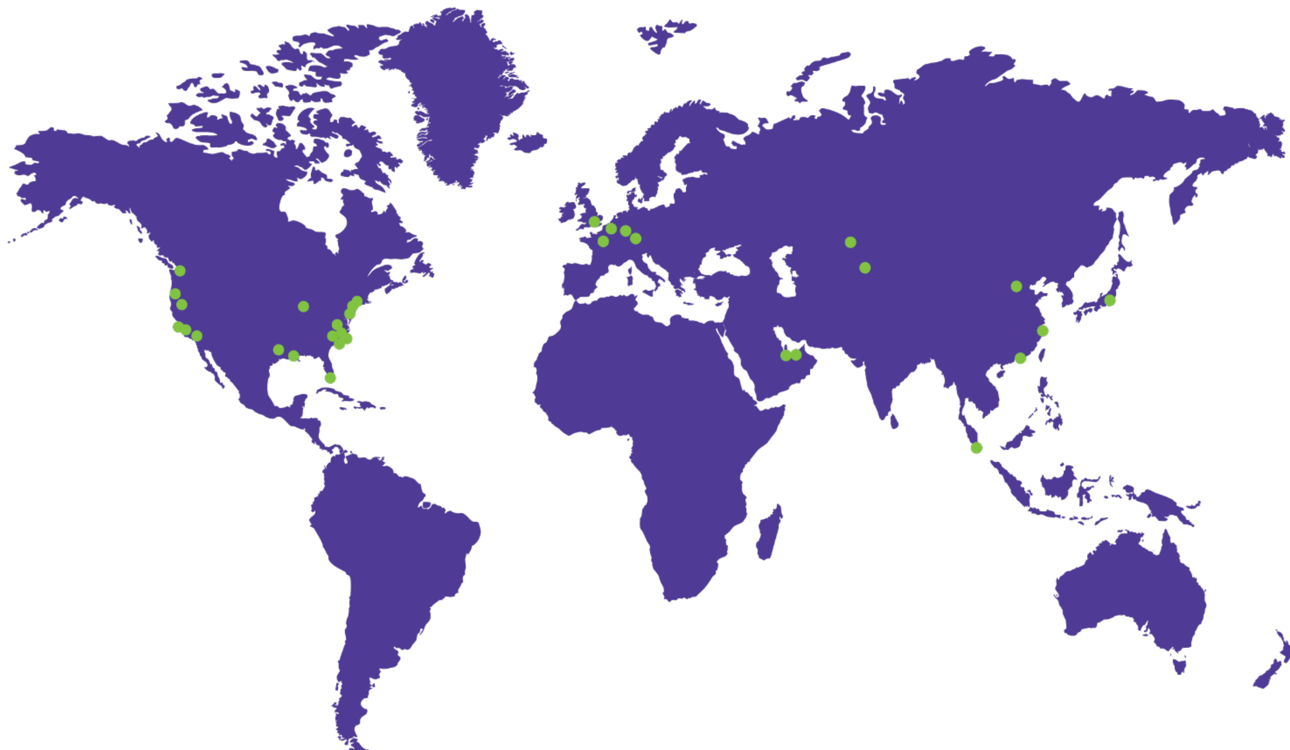

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