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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION ISSUES FACING TECH COMPANIES

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EXECUTIVE COMPENSATION

SEC Proposed Pay Versus Performance Disclosure Rules

Background to Proposed Rule

- The rules will implement Section 953(a) of the Dodd-Frank Act that directed the SEC to require companies to disclose, in annual proxy statements and other filings, the relationship between compensation actually paid to executives and the financial performance of the company.
- As proposed, the rules would apply to all reporting companies except, among others, emerging growth companies (EGCs).
- The objective of the proposed rules is for companies to provide disclosure of:
 - The relationship between the compensation paid to the named executive officers (NEOs) and the cumulative total shareholder return (TSR) of the company and a peer group; and
 - The relationship between the company's TSR and the TSR of a peer group over each of the five most recently completed fiscal years (or less for transition period or if public for a shorter period of time).

Proposed Pay Versus Performance Table

Year	Summary Compensation Table Total For Principal Executive Officer (PEO)	Compensation Actually Paid to PEO	Average SCT Total for Non-PEO NEOs	Average Compensation Actually Paid to Non-PEO NEOs	Company TSR	Peer Group TSR
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“Total Compensation” is the same number included in the Summary Compensation Table (SCT).

“Compensation Actually Paid” will be calculated using the Total Compensation from the SCT except it will include the value of awards vesting in the year (not the grant date fair value).

SEC Proposed Pay Versus Performance Disclosure Rules

- For companies other than smaller reporting companies and EGCs, three years will be required in the first proxy statement in which this disclosure is required and then two additional years.
- For smaller reporting companies, two years, and then one additional year.
- The Jumpstart Our Business Startups Act amended the Exchange Act to exclude registrants that are “emerging growth companies” from the pay-versus-performance disclosure requirements. The Exchange Act defines an “emerging growth company” as an issuer with total annual gross revenues of less than \$1 billion during its most recently completed fiscal year.

SEC Proposed Pay Versus Performance Disclosure Rules

- Additional Proposed Disclosure Following the Pay Versus Performance Table
 - A company must provide a clear description of the relationship between:
 - the executive compensation actually paid, and
 - the company's cumulative TSR and further compare the company's cumulative TSR to that of the peer group over the same period
 - Disclosure may be described as a narrative, graphically, or as a combination of the two. It is likely most companies will use a performance graph format for this information
 - Disclosure must be electronically formatted using XBRL
 - This may not be easy to pull together based on existing data-gathering methods, so companies should begin to assess ability to gather the applicable data

Equity Grants – Recent Director Litigation

- Lawsuits against the directors and the company alleging that executive compensation was excessive and inadequately disclosed, including director compensation (Seinfeld v. Slager; Espinoza v. Zuckerberg, et al.)
- The court on April 30, 2015 denied a motion to dismiss in the matter of Calma v. Templeton, stating that the generic approval of a shareholder plan did not approve “any action bearing specifically on the magnitude of compensation for the Company’s non-employee directors”
- Lawsuit against the directors and the company focusing more generally on director compensation that is excessively high in light of profits (Cambridge Retirement System v. Bosnjak)
- Many companies are including separate equity plan limits for director awards, creating separate director plans, or returning to formula-based plans
- Question of whether companies should focus more on benchmarking director compensation

Equity Grants – Important Issues

- Terms
 - Approval process
 - Board/Committee approval
 - Must set exercise price at not less than fair market value (FMV) for options
 - Private companies should get 409A valuations every 12 months
 - Must bring down valuation for interim grants
- Date of grant – Not prior to employment/service
 - No backdating!
 - Can provide credit for vesting (prior to date of grant)
 - Importance of contemporaneous documentation
- Share counting provisions – make sure share counting provisions are carefully drafted so that it is clear how shares come out and are added back to the share pool

Equity Grants – Plan Terms

- It is worth the investment to have the equity plan and procedures set up correctly
- Financing transactions, M&A transactions, IPOs, IRS audits – it is important to keep accurate, contemporaneous board of directors minutes documenting equity grants
- Important to provide flexibility in the plan document
- Plan should include provisions to allow the company to structure the treatment of equity in a transaction as it chooses without needing to obtain the consent of the holder, e.g., the plan should provide the ability to cash out and/or cancel equity awards

Equity Grant Design Trends – Extended Post-Termination Exercise Periods

- Consider length of post-termination exercise periods
- Typically, private company stock option terms give employees three months after employment ends to exercise vested stock options. Under an extended option approach, employees will be given a longer period of time (e.g., seven years) after employment ends to exercise vested stock options
- Pinterest announced it will offer employees an extended period of time to exercise stock options after employment ends (but not beyond the end of the original term)
- Potentially provides a valuable recruiting and retention tool especially as to “mature” tech companies where options have a high exercise price
- May result in a bigger accounting cost

Equity Grant Design Trends – Clawback

- Reasons to Have a Clawback Policy
 - Provides disincentive against fraud and/or ethical misconduct.
 - Discourages actions that could potentially harm the financial position of a company.
 - Reinforces commitment to pay-for-performance alignment.
 - Is part of an overall compensation philosophy that embraces sound risk management.
 - Is seen as a best practice.
 - Is soon to be required for all public companies.

Equity Grant Design Trends – Clawback

- Legally required clawbacks for public companies
 - Sarbanes-Oxley (only CEO and CFO)
 - Dodd-Frank

Equity Grant Design Trends – Clawback

- Implementing Clawback/Recoupment Requirements
 - Make sure all incentive plans and award agreements provide that awards are subject to clawback
 - Even if do not have a policy now, reference future policies, “as may be amended from time to time”
 - Consider including offset language in all compensatory plans or agreements (but remember 409A)
 - For public companies, under the new ISS EPSC approach you get points for clawback policies, so focusing on the disclosure is key
 - Potential for liability accounting if policy provides too much discretion

Equity Grant Design Trends – Clawback

- If clawback applies:
 - Forfeit outstanding awards
 - Return shares of common stock received in settlement of the award (or FMV of such stock)
- Enforceability and collectability issues
 - State law concerns
 - Collectability issues for former executives and key employees (cost of suit v. potential recovery)
 - US tax issues (repayment in same or subsequent year of payment)

Equity Grant Design Trends – Restrictive Covenants

- Which employees should be bound by restrictive covenants?
 - Senior-level employees v. all employees receiving equity grants
 - Lawyers generally cannot be subject to noncompetition
- Consideration for restrictive covenants
- Scope of restrictive covenants
- Recent litigation – generally found enforceable if scope/consideration for noncompete is reasonable

Equity Grant Design Trends – Restrictive Covenants

- Importance of:
 - Notice to grantee
 - Review and acceptance by grantee
 - Ability to decline grant
- Remedies:
 - Forfeiture and recoupment of equity grant
 - Employee choice doctrine
 - Injunctive relief

Equity Grant Design Trends – Restrictive Covenants

- Note compliance with local law:
 - CA law does not allow (other than in deal buyouts and partnerships)
 - Other states raise varying issues
 - May not be enforceable outside United States

Equity Grant Design Trends – Other

- Limiting payment of unvested dividends/dividend equivalents
- Double-trigger vesting acceleration/payment
- Performance vesting
- Electronic disclosure issues
- Statute of limitations

PRESENTER: ZAITUN POONJA

GLOBAL COMPENSATION

Implementation of Global Equity Plans

- Plan Design
 - Global plan
 - Discretion to modify for local compliance
- Compliance with US Law
- Country-Specific Analysis of Local Compliance
- Administration

Compliance Issues

- Tax
- Securities Law
- Exchange Control
- Employment Law
- Data Privacy

Tax Consequences

- Taxation event
 - Options: generally, tax at exercise
 - RSUs: generally, tax at vesting
 - Restricted shares: may be tax at grant
 - Characterization of income
 - May be unclear

Tax Consequences

- Withholding and reporting
 - Who withholds and reports
 - Effect of recharge
- Social insurance
 - Employer and employee contributions
- Mobile employees
 - Tax in multiple jurisdictions
 - Tracking issues
 - Effect of tax treaties

Securities Law Compliance

- Vary by country
 - Registration/Prospectus
 - Exemptions for employee offerings or small offerings
 - Notice filing requirements

Exchange Control

- Regulates foreign currency flows
- Approval
 - China
 - SAFE approval
 - Requires repatriation
 - Cash alternative
- Reporting requirement
 - By employer
 - By employee

Employment Laws

- Plan entitlement/acquired rights
 - Clauses to protect employer
- Agreements with employee representative

Employment Laws

- Clawback/penalty clauses
 - Enforceability
 - Effect on taxation
- Restrictive covenants
 - Enforceability
 - Effect on taxation

Employment Laws

- Governing law
- Translation

Data Privacy

- Data privacy laws restrict processing and transfer of personal data
 - Consent
 - Third-party administrator

Deferred Compensation

- Deferred delivery of shares
- Section 457A impact on US taxpayers

Practical Tips

- Review local compliance
- Prepare securities filing if necessary
- Prepare form agreements
 - Entitlement
 - Data privacy
- Analyze tax withholding/reporting
 - Establish process
 - Track mobile employees

PRESENTER: PATRICK REHFELD

FRINGE BENEFITS AND PAYROLL TAXES

DE MINIMIS FRINGE
BENEFITS, CELL
PHONES, AND
COMPANY CAFETERIAS

De Minimis Fringe Benefits (Gifts and Gift Certificates)

- Many employers have gift and award policies that exempt items worth \$100 to \$250 per item, relying on the de minimis fringe exception.
- The term “de minimis fringe” means any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer’s employees) so small as to make accounting for it unreasonable or administratively impracticable.
- There are certain benefits that can never qualify as de minimis fringes (this includes cash and cash equivalents – think gift cards).
- The issue of what constitutes an acceptable dollar limit is a facts-and-circumstances determination based on three elements – i.e., the value, frequency, and administrative impracticability limitations.
- IRS position – Items must be both “of small value” and “administratively impracticable to account for” in order to be de minimis.

Items That Are Commonly Challenged by the IRS

- Awards and prizes
 - Gift cards (of all denominations)
 - iPod, iPad, raffle prizes
- Award trips
 - “President’s club, diamond club, century club”
 - Spousal/guest/family accompaniment
- Sports tickets
 - Occasional tickets are considered de minimis (nontaxable)
 - Valuable tickets still questioned

Recommendations

- Do not hand out cash gift cards that are AMEX or VISA cards; instead, keep gift cards, like a Starbucks card, to small values (e.g., under \$50).
- Consider adopting policies of taxing in-kind benefits and noncash, nontransferable gift certificates/vouchers that exceed a stated value (e.g., \$35 or \$50 per occurrence), particularly if they are provided to employees “frequently.”
- Do not operate prize-point programs that permit employees to accumulate points and purchase items as they are difficult to justify as “de minimis.”

Cell Phone Tax Issues

- Good news regarding company-provided mobile devices in IRS Notice 2011-72
 - De minimis personal use is nontaxable if there are business reasons for providing the device
 - Examples cite to after-hours client/supervisor calls
 - Taxable if providing device for goodwill of the employee or recruiting tool
- As for reimbursements for cell phones, employers should avoid:
 - Reducing salaries and substituting phone reimbursements
 - Paying for coverage not needed by the employee (e.g., international coverage for employees with only US clients), and
 - “Significant” increases in the reimbursed amounts
- When reimbursing the expectation is that less than 100% of the bill is reimbursed

Company Cafeterias and Snack Rooms

- Effects of the 2013 movie *The Internship* – IRS knows about the free meals and snacks!
- To meet exclusion test under IRC 119, meals must be furnished for the “convenience of the employer.” It should be okay to provide free food but it is a facts-and-circumstances analysis.
 - Need employees available during meal breaks to be on call for emergencies.
 - Employees must be restricted to short meal breaks due to nature of the business, and the employees cannot eat elsewhere during that period.
 - Insufficient eating facilities nearby during any reasonable meal period.
 - Don’t make the argument that free food is regarded by employees as a critical component of their compensation.
- If at least half the employees meet the IRC 119 exclusion, they all do.
- Meals provided by an employer dining facility may qualify as nontaxable fringe benefit if the facility is on or near the employer’s business and its revenue is equal to or more than the facility’s direct operating costs. IRC 132(e)(2).

Company Cafeteria Audits

- The IRS has commenced at least a dozen audits of company cafeterias, catered meals, and snack rooms.
- Some of these audits involve companies that are miles from any town, where the IRS is contending that the “convenience of employer” test of IRC 119 is not satisfied.
- In some of these audits, agents have contended that “bottled water” and “popcorn” are not on the regulatory list of de minimis fringes, and therefore are taxable.
- In other audits, agents have contended that delivered food is “effectively reimbursed” and thus IRC 119 does not apply.
- In one audit the agents have contended that an “eating facility” must be “a large square room in which hot and tasty meals are provided.”
- In most of these audits, the agents cite regulations that were overridden in 1978, but the IRS has never issued regulations to reflect the amended statute.

EMPLOYEE/ INDEPENDENT CONTRACT ISSUES

Employee or Independent Contractor?

- Common Law Employee
- Independent Contractor
- Leased Employee
- Joint Employment/Co-Employment
- Dual-Status Worker

Employee Misclassification: Government Stakeholders

Federal and State Agencies Affected by Employee Misclassification

Agency	Areas potentially affected by employee misclassification
IRS	<ul style="list-style-type: none"> Federal income and employment (payroll) taxes
DOL	<ul style="list-style-type: none"> Minimum wage, overtime, and child labor provisions Job protection and unpaid leave Safety and health protections Immigration/Form I-9 issues
IRS, DOL, and PBGC	<ul style="list-style-type: none"> Pension, health, and other employee benefit plans
Department of Health and Human Services	<ul style="list-style-type: none"> Medicare benefit payments
EEOC	<ul style="list-style-type: none"> Prohibitions of employment discrimination based on factors such as race, gender, disability, or age
NLRB	<ul style="list-style-type: none"> The right to organize and bargain collectively
SSA	<ul style="list-style-type: none"> Retirement and disability coverage and payments
State Agencies	<ul style="list-style-type: none"> Unemployment insurance benefit payments State income and employment taxes Workers' compensation benefit payments

Employee or Independent Contractor: The Common Law Test

20-Factor Test

- | | |
|--------------------------------|--|
| • instructions | • order or sequences set |
| • integration | • reports |
| • payments | • expenses |
| • training | • investment |
| • services rendered personally | • tools and materials |
| • hiring assistants | • profit or loss |
| • continuing relationship | • works for more than one person or firm |
| • set hours of work | • offers services to general public |
| • full-time work | • right to discharge |
| • work done on premises | • right to quit |

Independent Contractor Tests: IRS Three-Factor Test

- For audit purposes, IRS auditors use a modified version of the 20-Factor Test that focuses on three factors:
 - Behavioral Control Factor
 - Financial Control Factor
 - Relationship of the Parties Factor
- IRS Three-Factor Test considers the work that is being performed and the business context in which it is being performed

Why Does It Matter?

Benefits and Business Expenses

Differences Among Benefits Responsibilities

Type of Benefits	Employees		Independent Contractors	
Retirement plans	Employers sponsor benefit plans	Employers and employees contribute	Contractors sponsor plans	Contractors bear the full financial cost of the plans
Healthcare	Employers sponsor on a tax-free basis	Employers and employees contribute	Contractors obtain coverage	Contractors bear the full financial cost, but receive a tax deduction
Reimbursed expenses/ accountable plans	Employers can reimburse expenses	Nontaxable to the extent they are paid under an accountable plan	Service recipient can reimburse, although expenses are generally unreimbursed	Reimbursed expenses are nontaxable if they are under an accountable plan
Unreimbursed expenses	Many employers don't fully reimburse expenses	Unreimbursed expenses are subject to a 2% floor and AMT	Businesses don't generally reimburse expenses	Not subject to a 2% floor or AMT

Why Does It Matter?

Payroll Taxes

Differences Among General Tax Responsibilities

Type of Tax	Employees		Independent Contractors	
	Businesses' general responsibilities	Workers' general responsibilities	Businesses' general responsibilities	Workers' general responsibilities
Federal Income Tax Withholding (FITW)	Withhold tax from employees' pay	Pay full amounts owed, generally through withholding	Generally, none	Pay full amounts owed, generally through estimated tax payments
Social Security and Medicare Taxes (FICA)	Withhold one-half of taxes from employees' pay and pay other half	Pay half of total amounts owed, generally through withholding	None	Pay full amounts owed, generally through estimated tax payments
Federal Unemployment Taxes (FUTA)	Pay full amount	None	None	None
State Unemployment Taxes (SUTA/SUI)	Pay full amount, except in certain states	None, except pay partial amount in certain states	None	None

Why Does It Matter?

Payroll Taxes

- Full-rate federal statutory liability equal to at least 40% of compensation payments to independent contractors
 - 25% FITW exposure
 - 15.3% Employer and Employee FICA (Social Security and Medicare)*
 - Social Security Taxable Wage Base (\$118,500 for 2015)
 - Interest-free adjustments and rarely impose penalties
- Full-rate state liability varies by state, UI experience rates, and taxable wage bases. In California, the following rates apply:
 - Unemployment Insurance (UI) – rate varies and is imposed on first \$7,000 of wages
 - Personal Income Tax Withholding (PIT) – 6.0% on all wages, but is generally eliminated if the company has issued Forms 1099 to the ICs
 - Supplemental Disability Insurance (SDI) – 1.0% on approximately first \$95,000 of wages
 - Impose interest and penalties
- * The rate varies due to the 2011 and 2012 payroll tax holiday that reduced employee Social Security taxes from 6.2% to 4.2%

Methods to Reduce Exposure from an IRS Independent Contractor Audit

DO:

- Conduct compliance reviews
- Conduct internal training to raise awareness
- Use incorporated independent contractors
- Monitor length of relationships and hours worked, but
 - Limit services to less than full time,
 - Limit services to a short-term nature, and
 - Avoid hourly fees
- Limit expense reimbursements to nonroutine expenses
- Require verification of tax payments
- Require a waiver of all employee benefits
- Develop and review standardized independent contractor agreements

Methods to Reduce IRS Independent Contractor Audit Exposure

DO NOT:

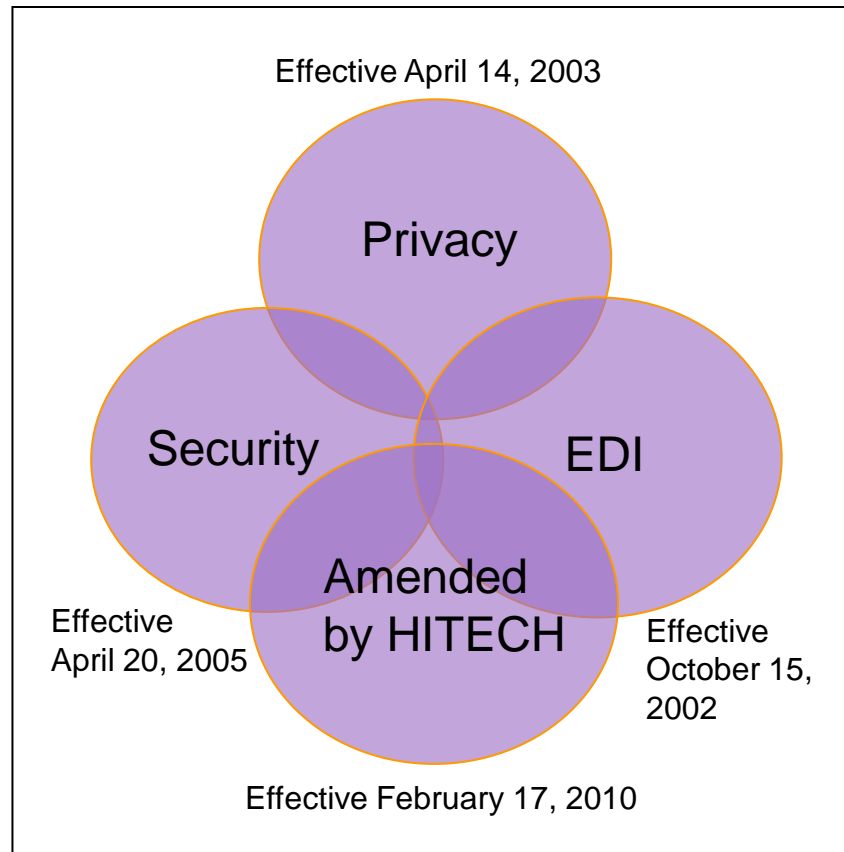
- Rely solely on the common law test
- Retain rights to direct or control the contractor
- Impose restrictions on the methods or means for the performance of the services
- Allow the consultant to direct/control/supervise your employees
- Require reports from or provide reviews to the contractor
- Pay hourly fees or provide a profits guarantee
- Extend privileges/benefits of a type provided to employees

PRESENTER: SAGE FATTAHIAN

HIPAA SECURITY BREACHES

HIPAA's Scope

Portability



Discrimination

Administrative Simplification

HIPAA Privacy Rule, Security Rule, and HITECH

- **Privacy Rule:** Sets standards to limit how Protected Health Information (PHI) is used and disclosed, and to provide individuals with certain rights related to their PHI
- **Security Rule:** Defines the administrative, physical and technical safeguards necessary to protect the confidentiality, integrity, and availability of electronic PHI (ePHI)
- **HITECH:** Amends Privacy and Security Rules, adds Breach Notification requirements, increases enforcement and penalties for HIPAA Breaches
For this presentation, "HIPAA" refers to these three items

To Determine if HIPAA Applies

Step 1

- Is there a Covered Entity (CE) or Business Associate (BA) involved?
- If "yes," then

Step 2

- Is PHI involved?
- If "yes," then

Step 3

- How and when may PHI be used and disclosed?



Step 1: Is There a CE Involved?

CEs (exclusive list)

- **Health Plans** (insurers and group health plans): medical, dental, prescription drug, employee assistance program, healthcare flexible spending account, certain long-term care, wellness programs
- **Healthcare Providers** that transmit health information in standardized e-format: physicians, other medical providers, hospitals, pharmacies
- **Healthcare Clearinghouses**: entities that convert data into or out of standardized e-format

Not CEs (not an exclusive list)

- **Employers/Plan Sponsors**
- **Nonhealth Plan Benefits**, including disability, dependent care spending account, life insurance, AD&D, educational assistance, workers' comp, retirement plans
- *Even though they may have access to health information*
- *PHI may not be used to make decisions related to employment or nonhealth plan benefits, except as authorized by the individual*

Step 1: Is There a BA Involved?

- **Business Associates (BAs)** are:
 - Third parties that perform services *for or on behalf of* the CEs that involve the use, disclosure, or maintenance of, or access to, PHI
 - **Examples:** Third-party administrators, billing services, attorneys, actuaries, consultants, and accountants (*list is not exhaustive*)
 - BAs are required to comply with the majority of HIPAA's rules
 - CEs and BAs enter Business Associate Agreements (BAAs) through which the BAs agree to comply with HIPAA
 - BAs enter into sub-BAAs with third parties that they retain to assist with services that involve the use or disclosure of PHI

Step 2: Is PHI Involved?

- **Protected Health Information (PHI)** is individually identifiable health information that:
 - is created, received, or maintained by a CE or BA;
 - relates to past, present, or future physical or mental health or condition or payment for provision of healthcare; and
 - identifies the individual directly or indirectly
- **PHI includes:**
 - demographic information (it may contain no medical information)
 - oral, hardcopy, and electronic information

HITECH Notification of Breach Rule

- **General Rule:**

If security of *Unsecured PHI* is *Breached*, CE must provide notice without unreasonable delay and within 60 days after *Discovery* of the *Breach* to impacted individuals, media (in certain instances), and HHS



Unsecured PHI

- **Unsecured PHI** is PHI that is not secured through use of a technology or methodology identified by HHS as rendering the information unusable, unreadable, or indecipherable to unauthorized persons
- Acceptable means for securing PHI:
 - Encryption (*for electronic information in use, at rest, and in transmission*)
 - Destruction (*electronic and paper*)
- If PHI is “secured,” there is no obligation to notify

Breach Occurrence

- Breach is the unauthorized acquisition, access, use or disclosure of Unsecured PHI not permitted under the Privacy Rule
 - Impermissible use or disclosure of Unsecured PHI is presumed to be a Breach
 - Unless there is a low probability that the Unsecured PHI was compromised
 - To determine if there is a low probability, Privacy Officer needs to conduct fact-specific assessment
 - If there is a low probability, notification is not required
 - There are three statutory exceptions to the definition of “Breach”
 - If any of the exceptions apply, notification is not required

Low Probability Standard

- To determine if there is a low probability that the Unsecured PHI was compromised, a fact-specific assessment must consider:
 - Nature and extent of Unsecured PHI that was used or disclosed
 - Who used or received the Unsecured PHI
 - Was the Unsecured PHI actually acquired or viewed
 - To what extent has the risk from the breach been mitigated

Three Statutory Exceptions to “Breach”

- #1 Was the Breach an unintentional access, use, or disclosure of Unsecured PHI by an authorized employee who acted in good faith and within that person’s scope of authority, and which did not result in any further impermissible use or disclosure of the Unsecured PHI?
- #2 Was the Breach an inadvertent disclosure by and between authorized employees, and was the Unsecured PHI not further used or disclosed in an impermissible manner?
- #3 Was there a good-faith belief by the CE or BA that the unauthorized person to whom the Unsecured PHI was disclosed would not reasonably be able to retain it?

Discovery of Breach

- Breach is discovered on the first day that it is known (or reasonably should have been known) to the CE or BA
 - Knowledge of employees, officers, or other agents is attributed to the CE or BA (except for the individual who committed the Breach)

Breach Notification

- **Who must be notified?**
 - **Impacted Individuals:** Written notice is sent to the last known address
 - **Media:** If a Breach involves more than 500 individuals in a state or jurisdiction, notice through major media outlets
 - **HHS**
- **What does the notice say?**
 - Content of Notice is defined in HITECH.
 - The Notice generally describes the incident, PHI involved, steps individuals should take to protect themselves, and steps the CE and/or BA is taking to protect the individuals and mitigate the risk. Also, includes contact information
- **When does the Notice have to be sent?**
 - As soon as possible, but not later than 60 days after discovery of breach

Possible Penalties and Enforcement

- A Covered Entity may be subject to:
 - Targeted, complaint-driven investigation by HHS
 - Random audit by HHS
 - Civil action by state attorneys general
 - Possible civil penalties as high as \$1.5 million for multiple violations of the same requirement in a calendar year (HITECH increased this amount significantly)
 - Possible criminal penalties as high as \$250,000 and 10 years of imprisonment



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QUESTIONS?

Join us for upcoming events in the Technology
May-rathon series at:

www.morganlewis.com/topics/technology

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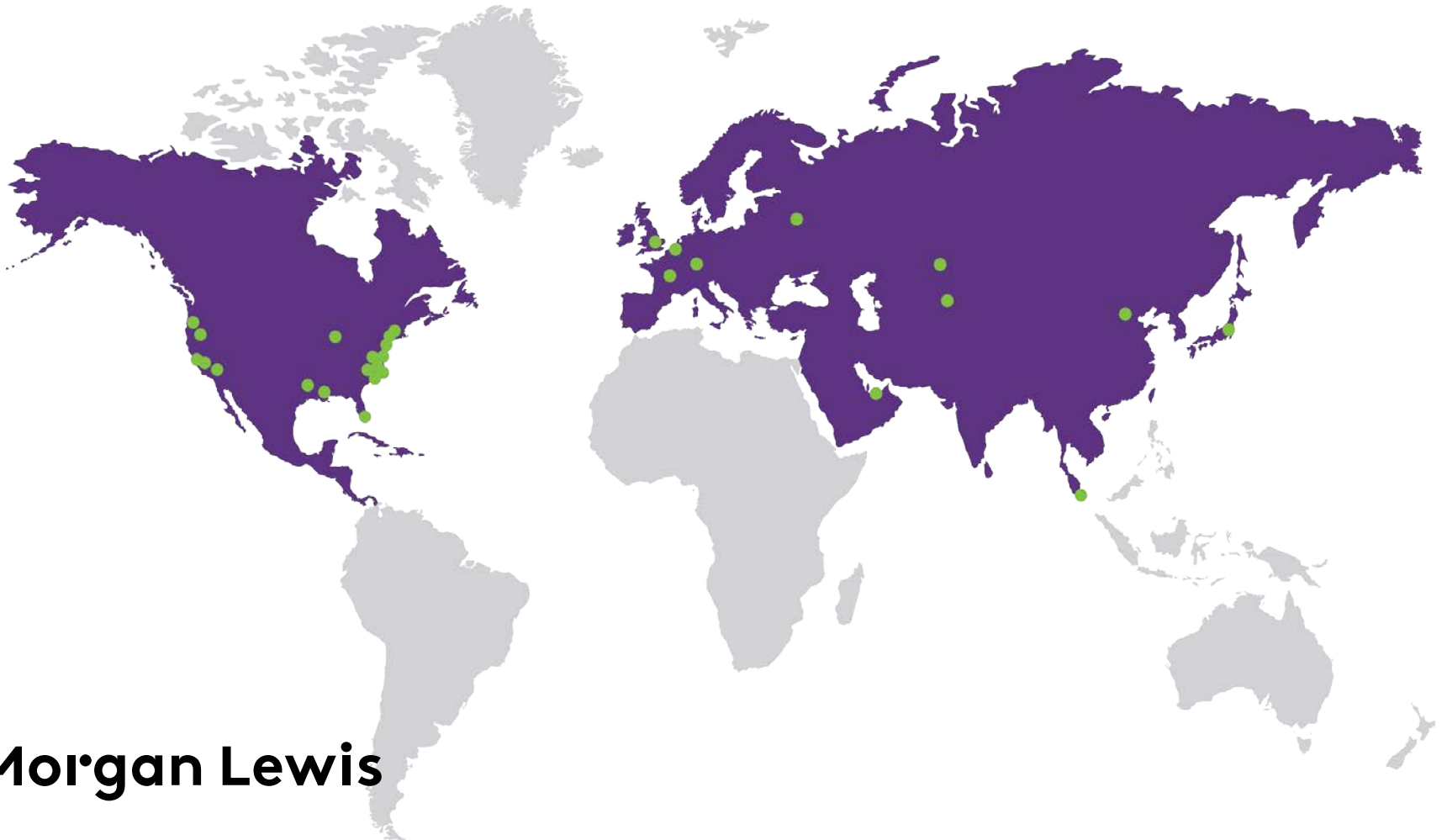
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