Hogan Lovells

Global Accountants' Liability Update

May and June 2016

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A legal practice
for a changing world

Welcome

Hogan Lovells' global team of securities and professional liability lawyers is uniquely positioned to monitor legal developments across the globe that impact accountants' liability risk. Our team recently researched legal and regulatory developments related to auditors' liability in England, France, Germany, Hong Kong, Mexico, the Netherlands, Spain, and the United States. We have experienced lawyers in each of these jurisdictions ready to meet the complex needs of today's largest accounting firms as they navigate the extensive rules, regulations, and case law that shape their profession. This month, our team identified developments of interest in France, Hong Kong, Mexico, the Netherlands, Spain, and the United States, which are summarized in the pages that follow.

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United States

Recent Court Decisions

Court Approves PwC Settlement with Madoff Feeder Fund

A federal judge in New York recently approved a settlement between PricewaterhouseCoopers (PwC) and investors in Fairfield Greenwich (Fairfield), a major "feeder fund" for Bernie Madoff's defunct Ponzi scheme.

As we a reported earlier this year, three PwC entities agreed in January to settle a lawsuit brought by a class of Fairfield investors claiming that PwC's 2002 through 2007 audits of Fairfield were conducted negligently. Pursuant to Federal Rule of Civil Procedure 23(e), the settlement could take effect only with the court's approval.

On May 6, 2016, Judge Victor Marrero of the District Court for the Southern District of New York approved a $55 million settlement payment to the plaintiff class by PwC Canada, PwC Netherlands, and PwC International. Judge Marrero held that the settlement is "in all respects, fair, reasonable and adequate to, and is in the best interests of . . . each of the Settlement Class Members." The Court concurrently dismissed all of Plaintiffs' claims against the PwC entities with prejudice, granted Plaintiffs' counsel thirty percent of the settlement amount, plus an additional $1,810,819 for expenses, and ordered a claims schedule for all Fairfield Greenwich investors damaged by Madoff's scheme to submit proofs of claim by May 23. Because the PwC entities were the last remaining defendants in the Fairfield class action, this settlement represents the final settlement in the case. The court will retain limited jurisdiction solely over claims arising out of the settlement process.

Second Circuit Applying Omnicare to Securities Law Claims Against Auditors

The Second Circuit recently confirmed in two separate opinions that auditor liability under the federal securities laws for statements of opinion has been limited by the Supreme Court's recent decision in Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, 135 S. Ct. 1318 (2015).

In Special Situations Fund v. Deloitte, investors in ChinaCast Education Corp. (ChinaCast) tried to hold Deloitte accountable for the investors' losses stemming from embezzlement by ChinaCast executives. Plaintiffs brought claims under Sections 10(b), 18, and 20(a) of the Securities Exchange Act of 1934, alleging that Deloitte missed "red flags" in its audits of ChinaCast, thereby negligently issuing a "clean audit opinion" of the troubled e-learning company. Judge Edgardo Ramos of the District Court for the Southern District of New York dismissed the Section 18 claim last year because Plaintiffs failed to show that Deloitte "subjectively knew" that its audit opinions about ChinaCast were false, as required by Omnicare. Judge Ramos also dismissed Plaintiffs' Section 10(b) and 20(a) claims on other grounds. The Second Circuit Court of Appeals recently affirmed the dismissal of all three claims. Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd., No. 15-1813, 2016 WL 1392280 (2d Cir. Apr. 8, 2016).

In so doing, the Court of Appeals for the first time applied Omnicare to a Section 18 claim against auditors. Omnicare, which involved a claim under Section 11 of the Securities Act of 1933 against a corporation and its officers, held that a plaintiff states a claim based on false or misleading statements of opinion only if the complaint alleges that (1) the defendant subjectively believed the opinion to be false, (2) the opinion contained "embedded statements of untrue facts," or (3) the defendant omitted material facts regarding the defendant's knowledge of or inquiry into the opinion "if those facts conflict with what a reasonable investor would take from the statement itself[.]" The Second Circuit concluded that the Plaintiffs' complaint in Special Situations failed to meet any of the three Omnicare standards.

The following month, the Second Circuit issued a summary order confirming a widely held belief that the Omnicare standards apply to limit Section 11 claims against auditors. In In re Puda Coal Securities Litigation, investors in Puda Coal, Inc. tried to hold Moore Stephens Hong Kong, the company's auditor, liable for the investors' losses stemming from a fraudulent scheme orchestrated by Puda Coal's chairman that effectively stripped the company of all revenue-producing assets. Plaintiffs brought claims under Section 11 of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934, alleging that the "clean audit opinions" issued by Moore Stephens while the scheme was ongoing were materially false and misleading because they did not fairly present Puda Coal's financial position during that time. Judge Katherine B. Forrest of the District Court for the Southern District of New York dismissed the suit in 2014, before Omnicare was decided, because Plaintiffs failed to show that Moore Stephens knew about the fraud. The Second Circuit affirmed, relying on Omnicare and Special Situations Fund. In re Puda Coal Sec. Litig., No. 15-2100 (2d Cir. May 20, 2016). The Second Circuit concluded that because there was no evidence that Moore Stephens did not believe its clean audit opinions, nor any evidence that it omitted material facts about the basis of these opinions, Plaintiffs' Section 11 claims could not be sustained.

Taken together, Special Situations Fund and Puda Coal indicate that post-Omnicare, the Second Circuit will require federal securities law claims against auditors based on misstatements or omissions in audit opinions to meet the same strict standards that Omnicare requires to hold a corporate officers liable for statements of opinion.

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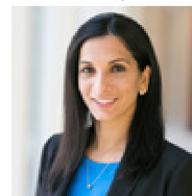

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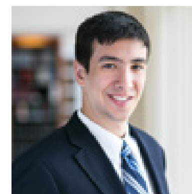

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Recent Regulatory and Enforcement Developments

French order enables statutory accountants to carry out their activities under a company structure shared with other accounting and legal professionals

France

Pursuant to a French order dated 31 March 2016, members of legal and accounting professions (including statutory accountants) may now carry out their activities together under a single company structure. The purpose behind this newly created type of company, called a "société pluri-professionnelle d'exercice" (SPE), is to enable members of different types of regulated professions to provide, thanks to the sharing of expenses, an extensive and integrated range of services while offering competitive prices to clients.

Characteristics of an SPE

Because SPEs enable the joint practice of different professions under a single entity, certain conditions must be met so that the interests and principles applicable to each profession may be protected.

— Qualified professional as partners

  — Pursuant to the order, lawyers, including those working at the Council of State and the French Supreme Court, auctioneers, bailiffs, notaries, receivers, judicial representatives, counsel in intellectual property as well as statutory accountants may come together and establish an SPE, which will practice its members' activities.

  — In order to perform the acts and missions associated with a given profession, the SPE must however have at least one partner belonging to that profession.

— Independence of the partners

  — To preserve the interests of each professional, the order also provides that the articles of association of the SPE must ensure the independence of the partners and employees of the company. Further, compliance with the code of ethics of each profession practiced by the SPE is imposed. Finally, each professional has a duty to inform the SPE and other professionals within the SPE of any existing (or potential) conflict of interests between (i) his or her professional activities within the SPE and any other professional activities he or she may carry out/interests he may hold outside the SPE, and (ii) his or her professional activities and other professionals' activities within the SPE.

— Preserving professional secrecy

  — Each professional carrying out activities within the SPE is also held to the obligations of loyalty, confidentiality, and professional secrecy associated with his or her given profession. Members are therefore obligated to continue to abide by the specific rules applicable to their own profession.

  — That being said, under certain circumstances, exchanges of information may be permitted. Indeed, it is acknowledged that professionals may share confidential information to facilitate the accomplishment of joint missions and when such exchange has been expressly consented to by the client.

Special requirement relating to statutory accountants

With regards to statutory accountants, the order provides that certain conditions must be met in order for them to be able to freely practice within a SPE. Indeed:

— at least one statutory accountant must be a partner (as opposed to an employee) of the SPE; and

— at least one member of the SPE (partner or employee) qualified to practice as a statutory accountant must be a member of the board of directors or of the supervisory board.

Finally, the order specifies that SPEs cannot themselves be members of the French Statutory Accountants Association nor can they be registered on the Roll of the Order of Statutory Accountants.

Liability

Each partner within the SPE is fully liable (i.e. there is no limitation of liability) for the acts performed in the scope of his/her profession. That being said, in such an event, the SPE will also be held severally liable with the partner. As a result, the order requires that SPEs purchase professional liability insurance, which provides important financial security for partners and constitutes a welcome payment guarantee for clients.

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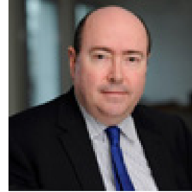

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Hong Kong

Hong Kong reforms corporate insolvency law, adopts new corporate tax provisions and enters agreements to avoid double taxation.

Reform to corporate insolvency law

On 3 June 2016, Hong Kong adopted long-awaited reforms to its corporate insolvency law. The effective date of the changes is yet to be confirmed. The reforms aim to:

- Increase the protection of creditors;
- Streamline the winding up process; and
- Further enhance the integrity of the winding up process.

The minor reforms adopted do not, however, bring Hong Kong law into line with international insolvency practice. Specifically, the reforms do not adopt a statutory corporate rescue procedure, or insolvent trading provisions and measures for cross-border insolvency. Proposals to address these issues have been expected for several years. But now, with the reforms enacted without such measures, they may not be forthcoming anytime soon.

Hong Kong's companies law underwent a major rewrite in 2014, during which almost all of the existing law was repealed. Only the insolvency and winding-up provisions, which date back to 1984, were preserved. The current revisions are viewed by some as failing to implement the significant updates that are needed.

New corporate tax provisions

On 3 June, an amendment to the Inland Revenue Ordinance came into effect that: 1) permits, under certain conditions, corporations conducting business in Hong Kong as an intra-group financing business to deduct interest payments on money borrowed by the corporation; 2) establishes a concessionary profits tax rate of 8.25 per cent in certain qualifying corporate treasury centres, and 3) clarifies profits, tax and stamp duty treatments in respect to regulatory capital securities (RCSs) issued by banks to comply with the Basel III capital adequacy requirements.

The concessionary profits tax rate for qualifying corporate treasury centres will apply to qualifying profits accrued on or after 1 April 2016. The new interest deduction rule will apply to interest payable in relation to an intra-group financing business on or after the same day. The provisions relating in to RCSs and related amendments to the Stamp Duty Ordinance became operative immediately.

Comprehensive agreements for the avoidance of double taxation

Hong Kong signed its 35th Comprehensive Agreement for the Avoidance of Double Taxation (CDTA) with Latvia in April. Recently signed CDTAs with Romania and Russia were implemented in May 2016, with ratification procedures pending. These agreements follow the March 2016 ratification of the Fourth Protocol to the Comprehensive Arrangement for the Avoidance of Double Taxation between Mainland China and Hong Kong. The Fourth Protocol, which was signed in April of last year, clarifies the manner in which double taxation with Mainland China can be avoided.

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Mexico

Background

As reported in November 2014 and January 2015, the National Banking and Securities Commission (Commission) issued a set of regulations containing the requirements, credentials and process that auditors and accountants must fulfill in order to act as independent auditors and assist the Commission in its oversight duties over money laundering and terrorism financing activities.

Update

On 9 June 2016 the Commission issued the calendar according to which auditors can begin the certification process. The dates at which the certification process can begin varies according to the type of entity the would-be independent auditor intends to audit. The calendar is as follows:

Type of entity or company	Date on which the certifications process can be commenced
Financial institutions, stock brokers and regulated financial institutions (SOFOM ER)	June 2015
Currency exchange, warehouses and credit unions	September 2015
Savings and leasing cooperative entities, popular financial institutions (sociedades financieras populares), community financial institutions (sociedades financieras comunitarias), rural integration financial entities (organismos de integración financier rural)	January 2016
Investment fund operating entities (sociedades operadores de fondos de inversion), investment fund stock distribution entities, currency exchange and money transferring entities	April 2016
Unregulated financial institutions (SOFOM ENR), Financiera Nacional de Desarrollo Agropecuario, Rural, Forestal y Pesquero	August 2016

Professionals pursuing certification may commence the process at any time after the dates identified above. Certification must be secured before 1 January 2017.

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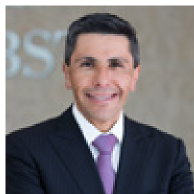

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BANCO DE MEXICO

The Netherlands

How firm is the Chinese wall between audit services and other services?

Introduction

Under Dutch legislation, an audit firm may not simultaneously perform statutory audits and other types of services for the same company. This 'Chinese wall' provision aims to preserve the independence of accountants and the interests of both the control client and third parties.

However, a recent study of annual financial statements of several Dutch companies revealed that many of these companies engage the services of regular auditors not only for statutory audits, but also for other services, such as tax advice[1]. The researchers found that frequently a Dutch branch of an accounting firm audits a company's financial statements while a foreign branch of the same accounting firm concurrently advises foreign group companies on other matters.

Does this mean there is a hole in the Chinese wall?

Independence of audit firms under Dutch Law

Article 19 of the Dutch Audit Firms Supervision Act (the AFSA) stipulates that an audit firm should provide services in such a way that its independence is guaranteed. More specifically, the AFSA prescribes that "an audit firm that performs statutory audits for a public-interest entity, does not provide any other type of services to that entity or related entities."[2]

An entity of public-interest in this regard includes a listed company.

Dutch law therefore prohibits audit firms from providing additional services when they are simultaneously responsible for a statutory audit. The scope of that prohibition, however, is limited because the prohibition only applies if one of the entities concerned (either the audit firm or the public-interest entity) is actually established in the Netherlands. Dutch law only applies when there is a territorial link and if both entities are located outside the Netherlands, Dutch law is not implicated. Nonetheless, accounting firms must safeguard the independence of their audits in accordance with the International Ethics Standards Board for Accountants (the IESBA).

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1. The investigation was conducted by BreakThrough Solutions, as reported in: Financieel Dagblad (Financial Times), '"Chinese muur" accountants vertoont een gat,' 20 April 2016.
2. Article 24b AFSA.

The European Framework

A new EU Regulation that will also regulate statutory audits of public-interest entities in EU Member (the Regulation) became effective 17 June 2016[3].

The Regulation indicates that the provision of non-audit services to audited entities by statutory auditors or members of their network may compromise their independence. Therefore the Regulation prohibits firms that provide statutory audit services from also providing certain non-audit services to an audited entity or its affiliates within the EU[4]. The prohibition as stated in the Regulation, unlike the Dutch one, is not general in character. Instead, it prohibits only 'certain' prohibited services including (but not limited to) tax services, bookkeeping, and legal advice.

The Regulation sets out minimum standards, to which all EU Member States must adhere. Member States are, however, free to prohibit additional services that are allowed by the Regulation. The Dutch Minister of Finance has already indicated that the Netherlands will extend the prohibition of the Regulation to reach all additional services, mirroring the scope of the prohibition under current Dutch law.

How will these changes impact firms' ability to provide non-audit services?

The EU Regulation will prohibit audit firms located in other EU Member States from providing certain advisory services to audited public-interest entities (listed companies) established anywhere in the EU. Note that the prohibition does not apply to third (non-EU) countries. It is still unclear how the Regulation will apply to companies that operate in several Member States, as the activities that are prohibited might differ from country to country (except for those listed in the Regulation, which are prohibited in all Member States).

The Netherlands Authority for Financial Markets (AFM) supervises compliance with the Dutch and EU legislation. To that end, the AFM is endowed with certain administrative powers. The AFM can issue directions, impose penalties for non-compliance, or even impose administrative fines for breaches of legal obligations, including those stipulated in the AFSA as mentioned above.

Conclusion

Considering the new EU Regulation, the hole in the Chinese wall seems to be repaired within the EU. Foreign branches of Dutch audit firms in the EU will now be prohibited from providing certain non-audit services to listed companies audited by another branch of the firm.

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3. Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC.
4. Article 5 of Regulation (EU) 437/2014.

Spain

Deloitte Spain indicted and Spain issues Finance order impacting corporate tax filings for Spanish companies.

- On 19 May 2016, the Spanish Audiencia Nacional indicted Deloitte Spain and one of its partners in connection with the 2011 IPO of the Spanish bank, Bankia. The expert report presented in the proceeding states that Bankia became a listed company on the basis of an audit report that did not reflect a "true and accurate" picture of their annual accounts. The legal representative of Deloitte Spain and the responsible partner of the Bankia testified before the Audiencia Nacional on 20 June 2016.
- On 10 May 2016, a Ministry of Finance order (Order ECC/570/2016) was approved, which describes a specific self-settlement model that can be used to pay taxes required by Article 87 of the Spanish Act 22/2015, on Accounts Auditing. This required tax must be paid in order to obtain the Audit Report required by the Spanish Institute of Accountants and Auditors (ICAC) on the Annual Accounts of Spanish companies.

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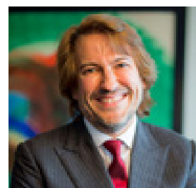

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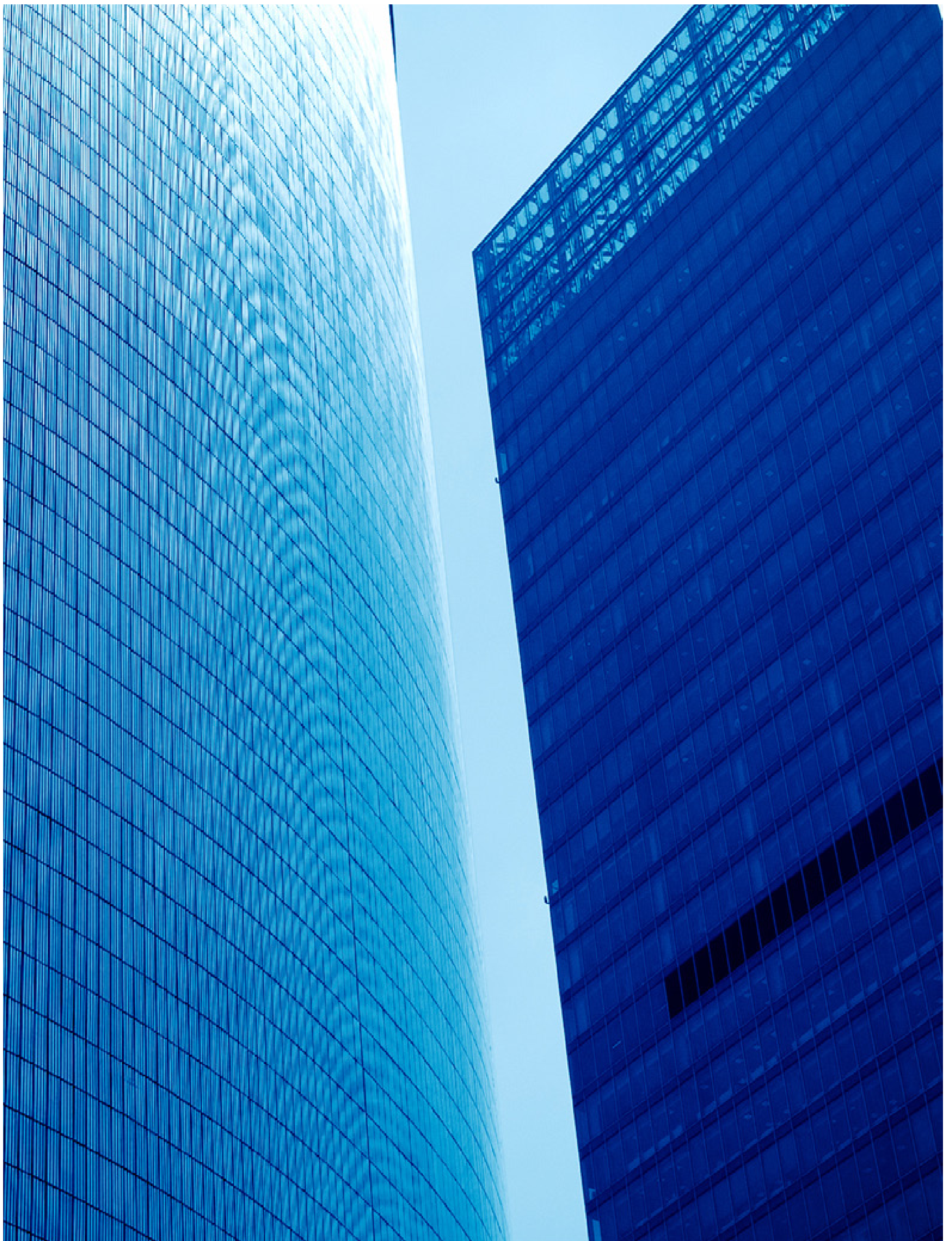

United States

SEC Approves New Rules Requiring Disclosure of Engagement Partner; PCAOB Proposes New Standards for Lead Auditors

On May 10, the SEC approved new rules requiring the disclosure of the name of the audit engagement partner of any audit of a public company, as well as the names of other audit firms that participated in each audit. As we reported earlier this year, the new rules will require auditing firms to file a new form with the PCAOB, "Form AP," that provides the name of the relevant audit engagement partner and any other firms that participated in the audit.

Relatedly, in April the PCAOB proposed amendments to certain auditing standards affecting audits of multinational companies that involve multiple audit firms or accountants. The proposed amendments are designed "to strengthen the existing requirements and impose a more uniform approach to the lead auditor's supervision of other auditors." The proposed amendments include requiring the lead auditor to provide the other auditors with written assessments of potential risks of material misstatements, obtain and review the other auditors' descriptions of audit procedures they intend to perform, and assess whether the other auditors are sufficiently qualified and aware of applicable PCAOB and SEC rules. Comment letters on the proposed amendments are due by July 29, 2016.

House Votes to Extend Exemption from Auditor Attestation Requirements for Emerging Growth Companies

Despite opposition from the SEC, the House of Representatives last month passed a bill to expand an existing exemption from Section 404(b) of the Sarbanes-Oxley Act of 2002 for emerging growth companies (EGCs), defined in the Securities Act of 1933 and the Securities Exchange Act of 1934 as companies with total annual gross revenues of less than $1 billion during their most recently completed fiscal year.

Section 404 requires auditors to attest to management's assessment of the effectiveness of its internal controls over financial reporting, but EGCs are currently exempt from complying with Section 404 for five years after the issuance of their IPO. H.R. 4139, passed by the House on May 23 and known as the Fostering Innovation Act of 2015, would expand this exemption from five years to ten years after the issuance of an EGC's IPO for EGCs that have average annual gross revenues of less than $50 million and do not become large accelerated filers. Proponents of the bill argue that it is a necessary extension of the "cost-saving" benefits for emerging growth companies conferred by the Jumpstart Our Business Startups Act of 2012, while detractors, including the SEC's Office of the Investor Advocate, argue that it will undermine the fundamental audit requirements put in place by Sarbanes-Oxley to protect investors. The bill now moves to the Senate for consideration.

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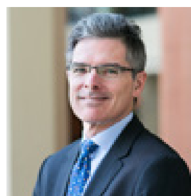

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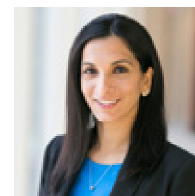

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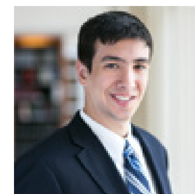

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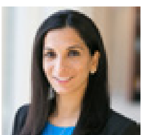

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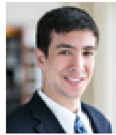

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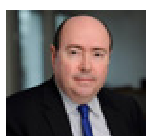

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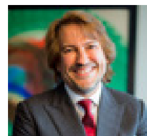

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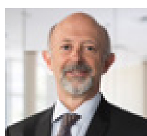

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