Our Global Accountants' Liability practice

June 2018

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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. We have experienced lawyers on five continents 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. We recently identified developments of interest in Germany, Mexico, The Netherlands, Spain, and The United States, which are summarized in the pages that follow.

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Recent court decisions

Germany

Federal Court clarifies how to consider short-term liabilities when determining insolvency

In a recent judgment, the German Federal Supreme Court (BGH, Dec 19, 2017, case no. II ZR 88/16) clarified whether short-term liabilities are relevant when determining whether a company has become insolvent due to illiquidity.

The judgment was handed down in connection with a reimbursement claim brought by an insolvency administrator against a managing director of a German GmbH [Gesellschaft mit beschränkter Haftung; limited liability company]. Under German law, a managing director must file for insolvency as soon as the company has become insolvent. If the managing director does not comply with this duty, he or she is obliged to reimburse the company for all payments made after that date (Sec. 64 para. 1 German Limited Liability Companies Act *[GmbHG]*). Therefore, the exact time the company has become insolvent is a major issue in many disputes in German proceedings.

This issue impacts damages claims against accountants who are often responsible for determining whether a company has become insolvent. In recent years, insolvency administrators have increasingly alleged that damage stemming from a delay in filing for insolvency has been caused by an accountant's failure to detect that the company has become insolvent and to inform the company's directors of the insolvency.

Under German law, a company is deemed insolvent if it is unable to pay its due liabilities (i.e. illiquidity, Sec. 17 para. 1 German Insolvency Code [InsO]). To determine such illiquidity one must compare the due obligations with the liquid funds (so called illiquidity test). In a previous landmark decision the German Federal Supreme Court held that a company is illiquid if the due obligations exceed the liquid funds by 10 percent or more (so called liquidity gap) unless it is foreseeable that the company will be able to close the liquidity gap within three weeks' time.

Based on this decision some lower courts and practitioners drew the conclusion that the illiquidity test requires a comparison of both (i) the sum of the liquid assets (liquidity I) and the sum of the short-term assets which will be raised within the next three weeks (liquidity II) on the one hand with (ii) the sum of the due liabilities (liabilities I) on the other hand. In many cases, liabilities which will become due within the next three weeks (liabilities II) were not included in the illiquidity test and some decisions in lower German courts have approved of this approach.

The German Federal Supreme Court has now made it clear that liabilities that become due during the next three weeks must be included in the illiquidity test. The court's reasoning is, if only short-term assets (liquidity II) but not short-term liabilities (liabilities II) were taken into account, a company could rely on new liquid assets to meet old liabilities. But at the same time the company would push along a "bow wave" of continuously arising new liabilities. This, the Supreme Court found, would run contrary to the purpose of German insolvency law.

It can be expected that the German Federal Supreme Court will apply the same principles when determining the liability of accountants. Thus, it is advisable for accountants to observe this new case law.

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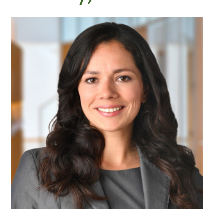

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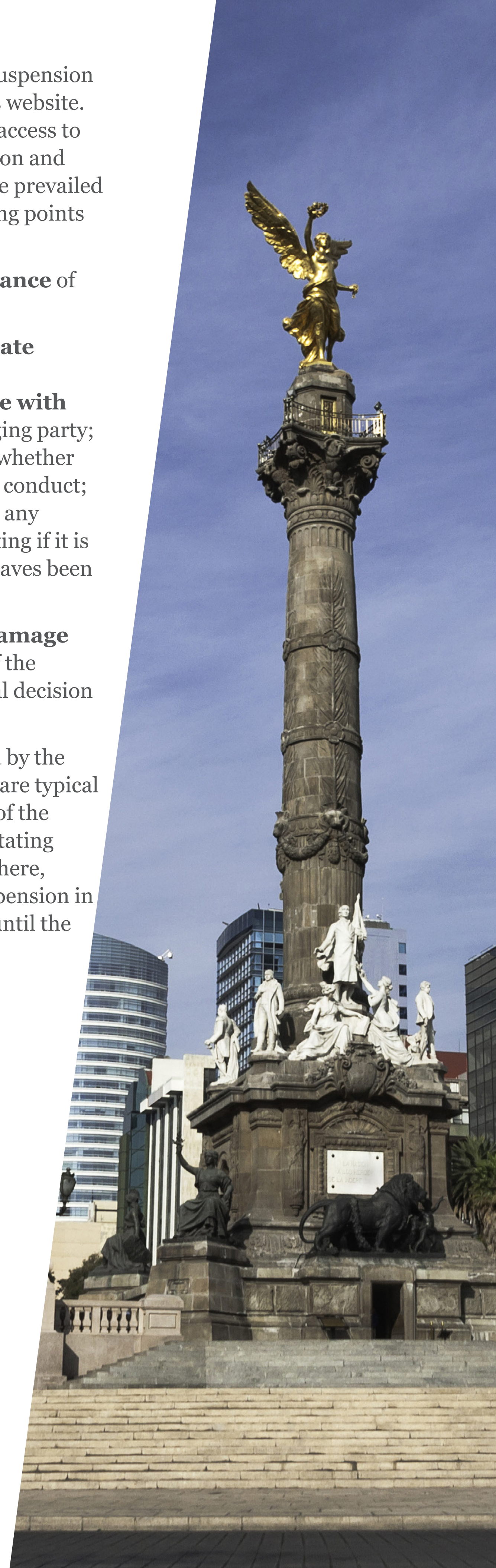
Mexico

Penalties imposed by the National Banking and Securities Commission shall not be published on its website because publication violates the human right to have a good name and reputation

The Law of the National Banking and Securities Commission (CNBV) provides that, in order to protect the right of access to public information, the CNBV shall publish on its website, in accordance with the "Guidelines for the Disclosure of Penalties imposed by the CNBV" (The Guidelines), penalties imposed by it. In this particular case, the CNBV imposed a penalty on an external auditing firm (the Firm) for alleged violations of the Credit Institutions Law.

The penalty was challenged through a proceeding for annulment before the Federal Court of Administrative Justice (Administrative Court). In addition to challenging the penalty on the merits of the case, the firm also pursued a precautionary measure motion to suspend the publication of the penalty on the CNBV website.

In the precautionary measure motion, the firm argued that the publication of the penalty on the CNBV website was illegal because: (i) the penalty was not final, in other words, the firm still had the ability to challenge its legality, and (ii) the publication of the penalty violated the firm's right to have a good name and reputation because its clients would be informed that the firm allegedly failed to comply with provisions of the Credit Institutions Law even though the matter was still under review by the courts. In contrast, the CNBV argued that the publication of the penalty on its website was legal because the publication was made in accordance with applicable law including The Guidelines and was necessary to make information available to the public.



On 17 January 2018, the Administrative Court granted the requested suspension requiring that the CNBV remove the publication of the penalty from its website. In this decision, the Administrative Court weighed the human right of access to information against the human right to have a good name and reputation and decided that in this particular case, the firm's right to have a good name prevailed over the right of the public to be informed. The court found the following points persuasive:

a) The publication of the penalty was not information of **public relevance** of general interest or of social impact;

b) The information published on the website of CNBV **was not accurate because it did not comply with all requirements that the publication of penalties contain certain facts in accordance with the Guidelines** (company's name or corporate name of the infringing party; violated provision and type of penalty imposed and, if appropriate, whether the corresponding payment was made; description of the infringing conduct; detailed description if the penalty is considered serious or if there is any repeated violation; imposition date; status of the resolution (indicating if it is final, or whether it may be challenged or if any remedies against it haves been filed); and

c) If the requested suspension is not granted, **a difficult to repair damage** would be caused to the image, dignity, good name and reputation of the external auditor, which may not be fully compensated by a later final decision in favor of the firm.

The CNBV is appealing this decision, arguing that the decision reached by the Administrative Court is illegal because it has restorative effects, which are typical of a final decision solving the proceeding for annulment on the merits of the case. Contrary to the CNBV's argument, there are judicial precedents stating that a decision granting a suspension, as the Administrative Court did here, temporarily restores the affected rights to the party requesting the suspension in order to preserve the dispute and to avoid affecting the parties' rights until the merits of the matter are decided.

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The Netherlands

Concentration of complaints is desirable, but not required by law

On 4 April 2018, the Trade and Industry Appeals Tribunal (the Tribunal) overturned established case law of the Accountancy Division which provides that a complainant must submit all his or her disciplinary complaints arising from the same set of facts simultaneously. [1]

Facts

An auditor in public practice had been assigned by the Netherlands Competition Authority (the NCA) to conduct an investigation into the financial position of an entity allegedly infringing the Dutch Competition Act. The company being investigated filed a complaint against the auditor but the Accountancy Division ruled in 2015, that this complaint was unfounded. No appeal was filed. Nevertheless, the *same* complainant filed another complaint against the *same* auditor in 2016, alleging a violation of the rules of professional conduct in the course of the *same* investigation.

Decision of the Accountancy Division

The Accountancy Division declared the second complaint should be dismissed because due process rules established in disciplinary case law require that a complainant submit all his or her complaints relating to the same set of facts simultaneously in a single disciplinary proceeding. The Accountancy Division reasoned that it would be a due process violation to submit a complaint in a new disciplinary proceeding that relates to the same body of facts that gave rise to a previous disciplinary proceeding.

Thus, the Accountancy Division ruled that the company's complaint alleging violations of the professional conduct rules should have been submitted in the previous disciplinary proceedings.

Ruling of the Trade and Industry Appeals Tribunal

Overturning the Accountancy Division's decision, the Tribunal ruled that the complaint was in fact allowable.

Article 22 of the Act on Disciplinary Jurisprudence of Accountants (the Wtra) permits anyone to file a disciplinary complaint as long as they do so within the stipulated limitation periods. Article 22 (1) of the Wtra establishes that a disciplinary complaint is time-barred if it is not submitted within three years after the complainant has become aware (or should have become aware) of the culpable acts or omissions. In all cases, a complaint must be brought within six years of the culpable act or omission.

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1 Trade and Industry Appeals Tribunal 4 April 2018, ECLINL:CBB:2018:99.

The Tribunal explained that specific circumstances may warrant limiting the right to submit a complaint that is not time barred. For example, the right to complain can be limited if:

a) getting to the substance of a case conflicts with the principles of due process of law;

b) getting to the substance of a case conflicts with the *ne bis in idem*-principle; or

c) the complaint results in the misuse of the right of complaint.

Applying these principles to the facts before it, the Tribunal held that, although it is preferable for complainants to bundle their complaints against an auditor, they have no obligation to do so. In this regard, the Tribunal overturns the established case law of the Accountancy Division.

After examining the grounds for limiting the right of complaint outlined above, the Tribunal concludes there is no reason to preclude the disciplinary complaint at issue. The legal principle *ne bis in idem* has not been breached as the present complaint did not repeat allegations included in the complaint decided by the Accountancy Division in 2015. Under this new precedent, a new disciplinary complaint may arise from the same body of facts dealt with in earlier disciplinary proceedings.

Conclusion

Because the Tribunal ruled that the complaint should not have been dismissed, the case has been referred back to the Accountancy Division for a substantive assessment.

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The United States

D.C. Circuit holds witness' right to counsel during PCAOB investigative testimony includes assistance of accounting experts

On 23 March 2018, the U.S. Court of Appeals for the District of Columbia Circuit held that the PCAOB violated a witness's right to counsel when it compelled him to testify but refused to permit his counsel the assistance of an accounting expert during that testimony.

The Board's enforcement division began investigating an audit conducted by Ernst & Young and Mark E. Laccetti – the Ernst & Young partner in charge of the audit – in 2007, for allegedly violating Board rules and auditing standards. The division compelled Laccetti to testify in an investigative interview, and he requested that his attorney be accompanied by an Ernst & Young accounting expert who could advise his attorney during the testimony. The division denied Laccetti's request, citing concern that "in-house" experts might "monitor" the investigation. The division's attorneys then questioned Laccetti for four days, during which the division was accompanied by its own accounting experts. Ultimately, the Board concluded that Laccetti had violated Board rules and auditing standards, sanctioned him, suspended him from the accounting profession for two years, and fined him US$85,000. The Securities and Exchange Commission affirmed the Board's decision over Laccetti's appeal.

Laccetti appealed that decision in the D.C. Circuit arguing, in part, that by denying his counsel access to an accounting expert, the PCAOB effectively denied Laccetti his own right to counsel as enshrined in PCAOB Rule 5109, the Sarbanes-Oxley Act, and basic principles of due process.

The D.C. Circuit agreed, unanimously ruling that the Board must allow a witness and his counsel the assistance of an accounting expert when such an expert could assist counsel at an investigative interview. The court's decision drew heavily on *SEC v. Whitman,* 613 F. Supp. 48 (D.D.C. 1985). The *Whitman* court held that a witness' right to counsel under the Administrative Procedures Act during SEC enforcement proceedings – which provisions were identical to the PCAOB rule at issue in *Laccetti* – necessitated access to technical experts. The court explained that such access is critical in enabling a witness' counsel "to fully (and thereby adequately) serve his client" in the course of complex and technical investigations.

The D.C. Circuit found "no meaningful distinction between the right to counsel in the APA and the right to counsel in the Board's rules," and held that the Board "acted unlawfully when it barred Laccetti from bringing an accounting expert to assist his counsel at the investigative interview." Rejecting the Board's harmless error argument, the court vacated the SEC's affirmation and remanded the case to the Commission with direction to vacate the Board's underlying orders and sanctions.

See *Laccetti v. SEC*, 885 F.3d 724 (D.C. Cir. 2018).

Big four auditing firm settles potential False Claims Act liability for US$149.5MM

Deloitte & Touche LLP recently agreed to pay US$149.5MM in settling potential False Claims Act liability arising from its auditing of non-bank mortgage originator Taylor, Bean & Whitaker Mortgage Corp. ("Taylor Bean").

In August 2009, federal authorities raided Taylor Bean's office in connection with alleged mortgage fraud involving the sale of fictitious and double-pledged mortgage loans. The very next day, the Federal Housing Administration suspended Taylor Bean from issuing any further government-insured mortgages. Taylor Bean entered bankruptcy and ceased operations shortly thereafter, and a number of its executives received lengthy federal prison sentences for fraud convictions.

Taylor Bean was a member of the Department of Housing and Urban Development's Direct Endorsement Lender program, which allows lenders to originate and underwrite mortgage loans insured by the Federal Housing Administration. If a borrower defaults on these insured loans, the loan holder may then submit a claim to the federal government to recoup certain losses sustained on that default. Program members are required to submit audit reports on their financial statements and other materials to HUD annually to maintain eligibility.

Deloitte was Taylor Bean's outside, independent auditor from 2002 through 2008, during the years of Taylor Bean's alleged misconduct. Federal prosecutors claimed that Deloitte's audits deviated from industry standards, failing to detect Taylor Bean's misconduct, and that Deloitte's audit reports permitted Taylor Bean to improperly continue issuing FHA-backed mortgages.

"With taxpayer dollars at stake, auditors must take their obligations seriously when auditing companies that participate in government programs," said Chad A. Readler, Acting Assistant Attorney General for the Department of Justice's Civil Division. "When auditors fail to exercise their professional judgment, and make false statements that allow bad actors to remain in government programs and submit false claims to the government, there will be consequences."

Deloitte defended its audit work, with firm spokesman Jonathan Gandal noting that members of Taylor Bean's management – including its CEO – "were convicted of engaging in a complex, collusive fraud . . . aimed at misleading our organization and investors." Deloitte's settlement terms did not include any findings of liability. Deloitte further noted its commitment to high standards of professionalism, and that the settlement "resolve[s] this matter to avoid the risk and uncertainty of protracted litigation."

See Jon Hill, *Feds Get $149.5M Deal With Deloitte Over Taylor Bean Audits* (Feb. 28, 2018); *Deloitte & Touche Agrees to Pay $149.5 Million to Settle Claims Arising From Its Audits of Failed Mortgage Lender Taylor, Bean & Whitaker*, Department of Justice Release 18-252 (Feb. 28, 2018).

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Recent regulatory and enforcement developments

Mexico

The National Banking and Securities Commission issued new General Provisions Applicable to External Auditors

On 26 April 2018, the National Banking and Securities Commission (CNBV) published in the Federal Official Gazette, the General Provisions Applicable to Entities and Issuers Supervised by the National Banking and Securities Commission Who Contract External Audit Services for Basic Financial Statements (the Provisions). The Provisions, which as a general rule will become effective on 1 August 2018, collect regulations applicable to external auditors into a single document in order to facilitate ease of compliance.

The Provisions include the following new items:

Independence

The Provisions establish additional requirements relating to the independence of external auditors, external auditing firms and audit teams.

The Provisions now make clear that an external auditor, the firm, and any partner or member of the audit team must be continuously independent from the execution date of the provision of services agreement, through the performance of the external audit, until the issuance of an external audit report and any corresponding communications and opinions.

This new requirement should be reflected in provision of services agreements.

Quality control

The Provisions include new requirements for what must be included in external auditing firms' quality control system manuals. The Provisions do not, however, specify if such manuals must be maintained in physical or digital format. This could prove to be a significant change because the CNBV has previously penalized external auditing firms for maintaining quality control manuals solely in digital format.

Responsibility of the firm and the auditor on the audit report

The Provisions establish that the firm together with the external auditor shall be responsible for the contents of the external audit report and other communications and opinions issued by them. However, the Provisions do not clearly establish the way in which the firm and external auditor share such responsibility.

Contracting the firm

In accordance with the Provisions, an external audit services agreement establishes the firm's obligation to provide the engaging entity with information and documentation it may request in order to verify compliance with its obligations. The Provisions do not specify what type of information and documentation the issuer may request from the external auditor. Therefore, it is important to reach an agreement about what information will be provided by the external auditing firm and document such agreement.

In that regard, the Provisions establish additional contracting requirements that entities, issuers and external auditing firms must comply with beyond the existing independence and quality control requirements. This additional regulation of the contract relationship may constitute a violation of contracting freedom and could be challenged in a future annulment suit brought by a party to whom the new requirement has been applied.

Replacement of the firm and of the independent external auditor

The Provisions require that the Audit Committee consider the replacement of the external auditing firm and the external auditor when they do not comply with the necessary requirements to perform their job. However, the Provisions do not specify when an external auditing firm or external auditor will be considered to

not have complied with the necessary requirements to perform their job.

The Provisions also establish that a firm that decides to stop rendering external audit services shall inform the CNBV of their reasons for doing so and shall deliver the CNBV with a report of the works performed. The format and contents of the report are not specified, leaving the Provisions open to complaints that they also violate the principle of legal certainty. Here too, an interested party would have to bring an annulment suit before the Administrative Court in order to gain more clarity.

Assessment of the firm´s and the independent external auditor´s tasks

The Provisions require audit committees to perform a regular assessment of the firm and the auditor. For this purpose, the audit committee may request documentation evidencing compliance with the Provisions. Here, again, the Provisions do not specify what type of information the entity or issuer may request. Therefore, contracting entities should specify what information will be provided in order to create legal certainty.

The Provisions also require that before issuing the Audit Report, the external auditor shall provide the Audit Committee with a prior report that meets certain requirements beyond what must be included in an opinion on financial statements or in the provision of services agreement.

Report on observed irregularities

The Provisions bind the firm to communicate to the CNBV, through a report, any identified irregularities. Although such disclosure could possibly jeopardize the stability, liquidity or solvency of the audited entities, the Provisions state that a good faith communication with the CNBV identifying irregularities shall not constitute a breach of contract that prohibits such a disclosure. However, it's unclear whether courts and disciplinary tribunals will agree.

Conclusion

As noted above, we believe that several obligations established by the Provisions are ambiguous. It is currently unclear how the CNBV will rely on these new provisions in the course of administrative penalty procedures and how they will affect the defense of external accounting firms in such procedures. In addition, it appears that several requirements and obligations provided for in the Provisions may be vulnerable to challenge made through future annulment suits before the Administrative Court.

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Spain

Draft resolution on the presentation of financial instruments published

The Institute of Accounting and Audit of Accounts (ICAC) has prepared a draft resolution on the presentation of financial instruments and other accounting standards relating to the commercial regulation of capital companies.

The main objective of this regulation is to adopt criteria for balance sheets of financial instruments (shares, participations, obligations, etc.) in line with the International Accounting Standard adopted by the European Union (NIC-EU 32). In addition, this regulation clarifies the numerous accounting implications of the commercial regulation of capital companies; for example, in matters of social contributions, operations with own shares, distribution of results, increase and reduction of share capital, issuance of obligations, dissolution and liquidation, structural modifications and change of registered office.

This draft resolution is the most recent step in Spain's effort to harmonize its accounting standards with the international accounting standards adopted by the European Union. Previously, there has not been comprehensive regulation in Spain of the accounting implications of the commercial regulation of capital companies. However, it appears that the accounting practices for these operations will soon have to comply with more detailed standards.

Please find here a link to the draft resolution (in Spanish).

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The United States

FASB seeks comment on proposed GAAP updates

On 26 April 2018, the Financial Accounting Standards Board (FASB) submitted a series of proposed updates to the *FASB Accounting Standards Codification* for public review and comment. The *Accounting Standards Codification* constitutes "the source of authoritative generally accepted accounting principles (GAAP) . . . to be applied by nongovernmental entities." The proposed updates primarily concern the interplay of two topics within the *Accounting Standards Codification* – Topic 808, *Collaborative Arrangements*, and Topic 606, *Revenue from Contracts with Customers*.

Topic 808 defines collaborative arrangements as those "contractual arrangement[s] under which two or more parties actively participate in a joint operating activity and are exposed to significant risks and rewards that depend on the activity's commercial success." But, as the FASB notes, Topic 808 does *not* provide comprehensive guidance on *how* to recognize or measure these arrangements.

This lack of guidance has resulted in "diversity in practice" in how entities account for these transactions, "often based on an analogy to other accounting literature or an accounting policy election." While some entities apply revenue guidance to all or a portion of their arrangements, others apply different accounting methods as policy. This inconsistency is exacerbated by certain 2014 updates to Topic 606, which created questions "about the effect of the revenue standard on the accounting for collaborative arrangements" and whether Topic 606 should be applied to collaborative arrangement transactions.

The main goals of the proposed updates are to (1) provide guidance about which collaborative arrangement transactions should be accounted for as revenue under Topic 606 and (2) align the FASB's guidance on Topic 808 with its guidance on Topic 606. The FASB is affirmatively seeking input regarding these proposals from any and all stakeholders, and provides a list of discrete questions to which the FASB invites reply. Comments are due to by 11 June 2018.

The FASB's proposed updates can be found at the FASB's website, http://www.fasb.org. Comments may be submitted using the FASB website's electronic feedback form, emailing director@fasb.org, or sending a letter to "Technical Director, File Reference No. 2018-240, FASB, 401 Merritt 7, PO Box 5116, Norwalk, CT 06856-5116."

See FASB Exposure Documents Open for Comment (accessed May 9, 2018), http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1175805074609

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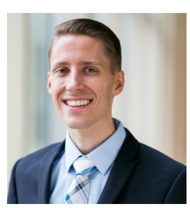

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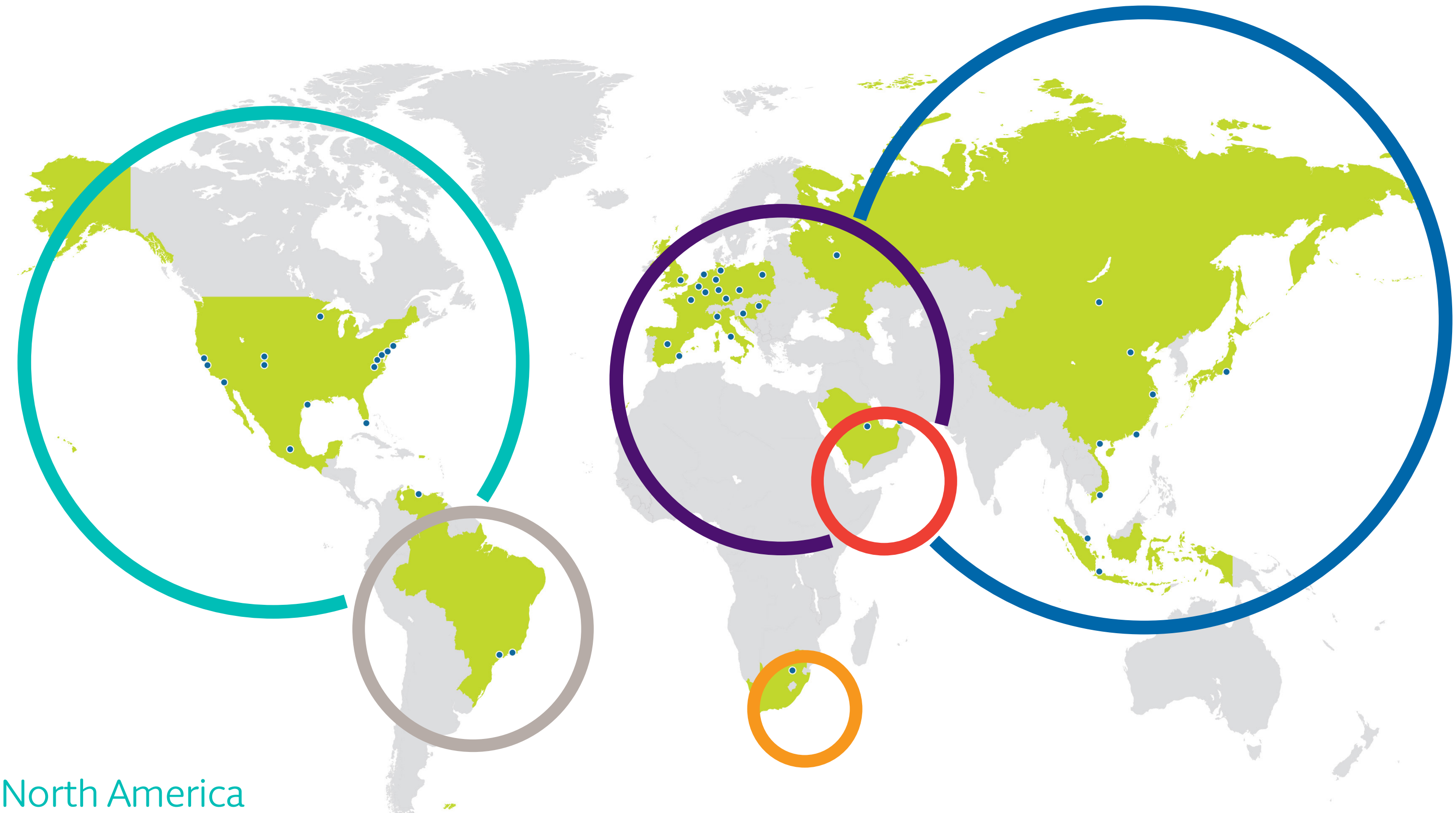

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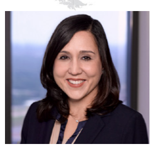

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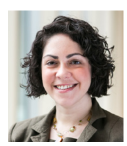

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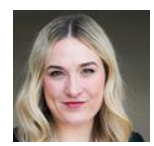

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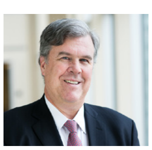

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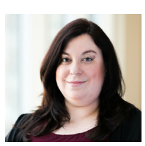

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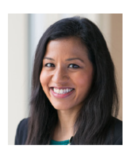

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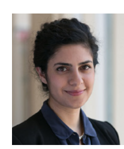

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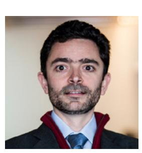

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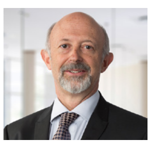

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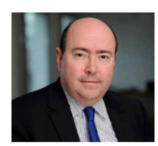

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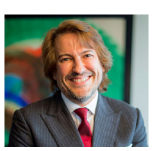

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