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Global Accountants'
Liability Update

May 2021



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Our global team of securities and professional liability lawyers at Hogan Lovells 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 Hong Kong, the Netherlands, and the United States which are summarized in the pages that follow.



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Recent court decisions

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Court of Appeal rules in favor of accounting firm in breach of contract claim

The Court of Appeal has rejected a claim from a California-based businessman that a global accounting firm failed to ensure that its employees acted with reasonable skill and care when acting as trustees in bankruptcy.

A bankruptcy order was granted in 2002 over an unpaid debt of HK\$30 million with the plaintiff being the most substantial unsecured creditor. The plaintiff engaged the firm, and two of its partners were appointed as joint and several trustees over the bankrupt's estate. Over the next eight years, the firm's partners were removed and replaced as trustees by a second and then a third set of trustees.

In 2011 and 2012, the third trustees brought three actions to recover assets of the bankrupt, in multiple jurisdictions. The parties reached a settlement under which the plaintiff received slightly over HK\$500,000 after the deduction of fees and expenses. The plaintiff sued the firm for a breach of an implied term in the engagement contract for an alleged failure to ensure its employees, the original trustees, would act with reasonable skill and care.

The Court of Appeal dismissed the plaintiff's appeal challenging the lower court judgment that rejected its claim for breach of contract. The Court of Appeal explained that terms are often implied into certain classes of contractual relationship where the court considers the implied term as a necessary incident of the relationship based on principles of reasonableness, fairness and the balancing of competing policy considerations.

The Court of Appeal said that implying the term was unnecessary in light of the comprehensive protection afforded to creditors under the Hong Kong statutory insolvency and partnership regime. The Court of Appeal dismissed the breach of contract claim and awarded the firm the costs of the appeal.

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Recent regulatory and enforcement developments

Hong Kong

Auditors face tougher regulation and harsher enforcement

Some 150 companies representing six per cent of companies listed on the Hong Kong Stock Exchange are reported to have had their trading suspended on 1 April 2021 for failure to file their preliminary audited results by the 31 March 2021 deadline. The Financial Reporting Council (FRC) may impose fines of up to HK\$10 million for every party involved, which can include the audit partner, the quality control partner and the accounting firm itself. In contrast, the maximum fine which could be imposed by the Hong Kong Institute of Certified Public Accountants (HKICPA) was HK\$500,000 for each case.

The FRC has also started issuing practicing certificates for firms auditing listed

companies, detailing mistakes made by the firm and its accountants over the past five years.

Recently, the FRC also announced the investigation into an accounting firm for issuing a qualified opinion on significant areas of an insurance entity's financial statements. As explained by the FRC, an auditor is not permitted to qualify an audit opinion if known effects of such exceptions could be both material and pervasive. Instead, they are required to withdraw from the audit or to state in the auditor's report that they do not express an opinion on the financial statements.

The FRC reports on oversight and governance

The FRC published the [latest issue of its e-news](#) in March 2021, detailing its work over the previous quarter.

The regulator's "Oversight, Policy and Governance" (OPG) function completed its review and approval of applications from overseas entities listed in Hong Kong, for renewal of the recognition of their auditors as public interest entity auditors. The FRC described this as a "substantive process which includes re-evaluating whether the auditor has the resources and capabilities

to carry out the listed entity's audit." The body also met with the HKICPA to obtain an update on how far the [recommendations arising from the first assessment](#) of their specified functions are being addressed.

The FRC also published the first edition of a report by its OPG function setting out an [Overview of the Market for Listed Entity Audits in Hong Kong](#). The report sets out findings and insights about competition features of the market, such as segmentation, concentration, auditor



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switching rates, market entrants and exits and audit pricing, citing potential implications for sustainable audit quality.

The FRC said that making the information available to the public would enable it to better engage with all stakeholders in considering the need for additional policy actions.



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The Netherlands

Accountancy Division examines parameters of confidentiality obligation

Introduction and facts

An accounting consultant (*accountant-administratieconsulen*) worked for an accounting firm, which, since 2011, handled the payroll administration, compiled the financial statements, prepared corporate tax returns and performed other various assignments for the complainant.

In 2013, the Tax and Customs Administration (*Belastingdienst*) announced an audit of a private limited company and a foundation affiliated with the company. This led to the Fiscal Intelligence and Investigation Service (*Fiscale Inlichtingen en Opsporingsdienst* or FIOD) making an unannounced visit to the accounting firm's office on 26 January 2015. During this visit, FIOD demanded historical data from the accounting firm and the public prosecutor demanded, among other things, physical and digital files including advisory files and all correspondence with the private limited company and the foundation from 2010 and 2011.

After consulting with the firm's legal affairs department, which stated that the firm is legally obliged to comply with the demand, the accounting consultant handed over the 2010 and 2011 audit files – albeit under protest. Subsequently, FIOD interviewed the accounting consultant following a summons from the examining

judge in a the criminal case against the father of the complainant's agent. The complainant thereupon filed a complaint against the accounting consultant with the Accountancy Division (*de Accountantskamer*).

Complaint regarding documents

The complainant asserted that the accounting consultant, by providing the entire correspondence, advisory files and administration to FIOD, violated the fundamental principles of integrity, professionalism and confidentiality.

The accounting consultant defended himself arguing that he had to provide these documents and that a failure to do so would have constituted a crime. He argued that Article 16 of the Code of Ethics for Professional Accountants (*Verordening gedrags- en beroepsregels accountants* or VGBA) therefore applied. Moreover, the accounting consultant stated that he consulted with the firm's legal affairs department and did not provide more documents than requested.

The Accountancy Division confirmed that Article 16 of the VGBA does indeed apply. Therefore the accounting consultant did not violate any fundamental principle of confidentiality. Moreover, the Accountancy Division found that the complainant had not demonstrated with sufficient



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plausibility that the accounting consultant provided more documents than requested to the FIOD.

Complaint regarding interrogation

According to the complainant, the accounting consultant's cooperation at a delegated interrogation conducted by FIOD, while he was not relieved of his duty of confidentiality, was not required by criminal law. This, he argued, is because Article 213 of the Code of Criminal Procedure applies only to an interrogation by an examining judge and not to a delegated interrogation by FIOD. Thus, the complainant argued there was no legal obligation for the accounting consultant to cooperate in the interrogation.

The accounting consultant disputes this and argues that he was obliged to cooperate in this interrogation. He argued it is irrelevant whether the hearing was delegated or not: cooperating in such an interrogation does not violate an accountant's duty of confidentiality. Moreover, because the accounting consultant was not allowed to speak to the complainant about the interrogation, he could not have requested a waiver of confidentiality. Finally, the accounting consultant states that he always acted in accordance with the advice of the firm's Legal Affairs Department.

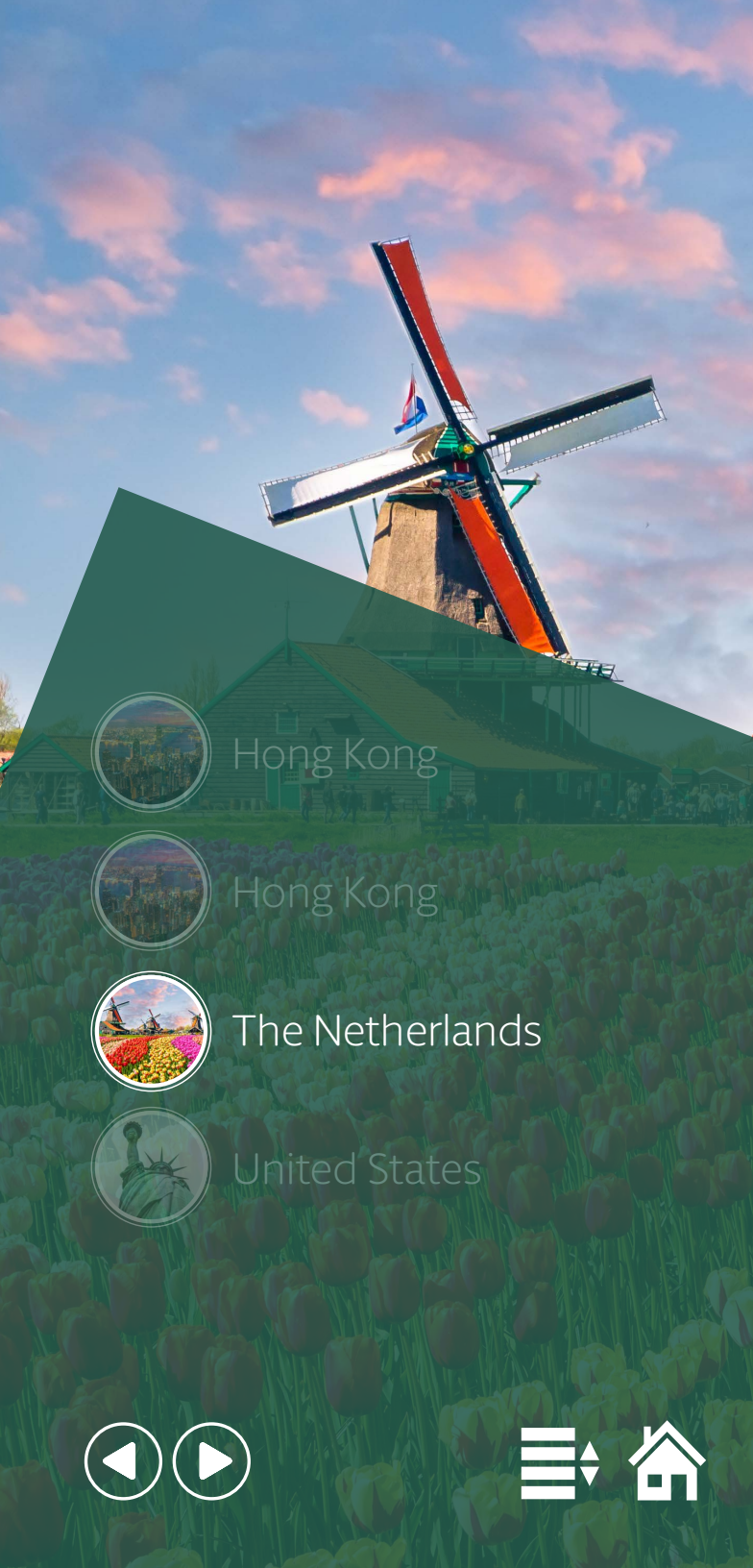
The Accountancy Division decision notes that in September 2016, the accounting consultant was informed in writing that the examining judge was to hear him as a witness in a criminal case against the father

of the representative of the complainant. The letter stated explicitly that FIOD would conduct the examination on behalf of the examining judge and would summon him for this purpose. The Accountancy Division concluded that the letter from the examining judge made very clear that the Accounting Consultant was obliged to cooperate in this interrogation even though it had been delegated to FIOD.

Moreover, according to established case law – as considered in the Supreme Court judgment of October 25, 1983 – the attorney-client privilege referred to in Article 218 Dutch Code of Criminal Procedure does not apply to registered accountants. According to the Accountancy Division, this should not be different with respect to an accounting consultant. Finally, because the accounting consultant has always acted carefully in his correspondence with FIOD and consulted the firm's Legal Affairs Department on numerous occasions, assertions that he violated his professional obligations are not persuasive. Therefore, the complaint was declared manifestly unfounded.

Conclusion

An accounting consultant did not violate any fundamental principle of confidentiality by complying with a FIOD request to provide documents. Also, cooperating in an interrogation conducted by the FIOD at the direction of an examining judge in a criminal case, is a legal obligation and does not lead to disciplinary misconduct. According to established case law – as considered in the



Supreme Court judgment of October 25, 1983 – attorney-client privilege does not apply to registered accountants and the Accountancy Division has concluded this should be no different for an accounting consultant.

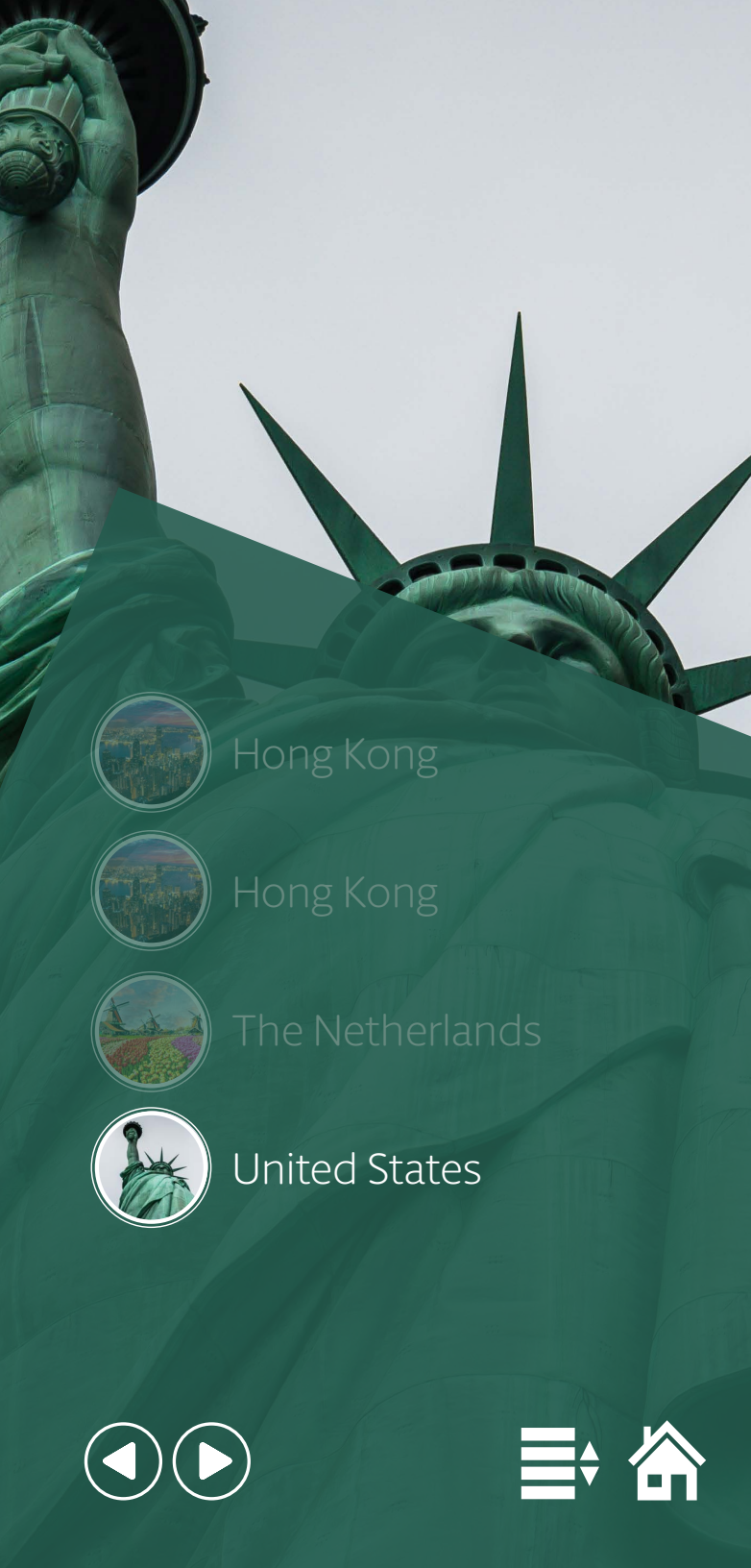
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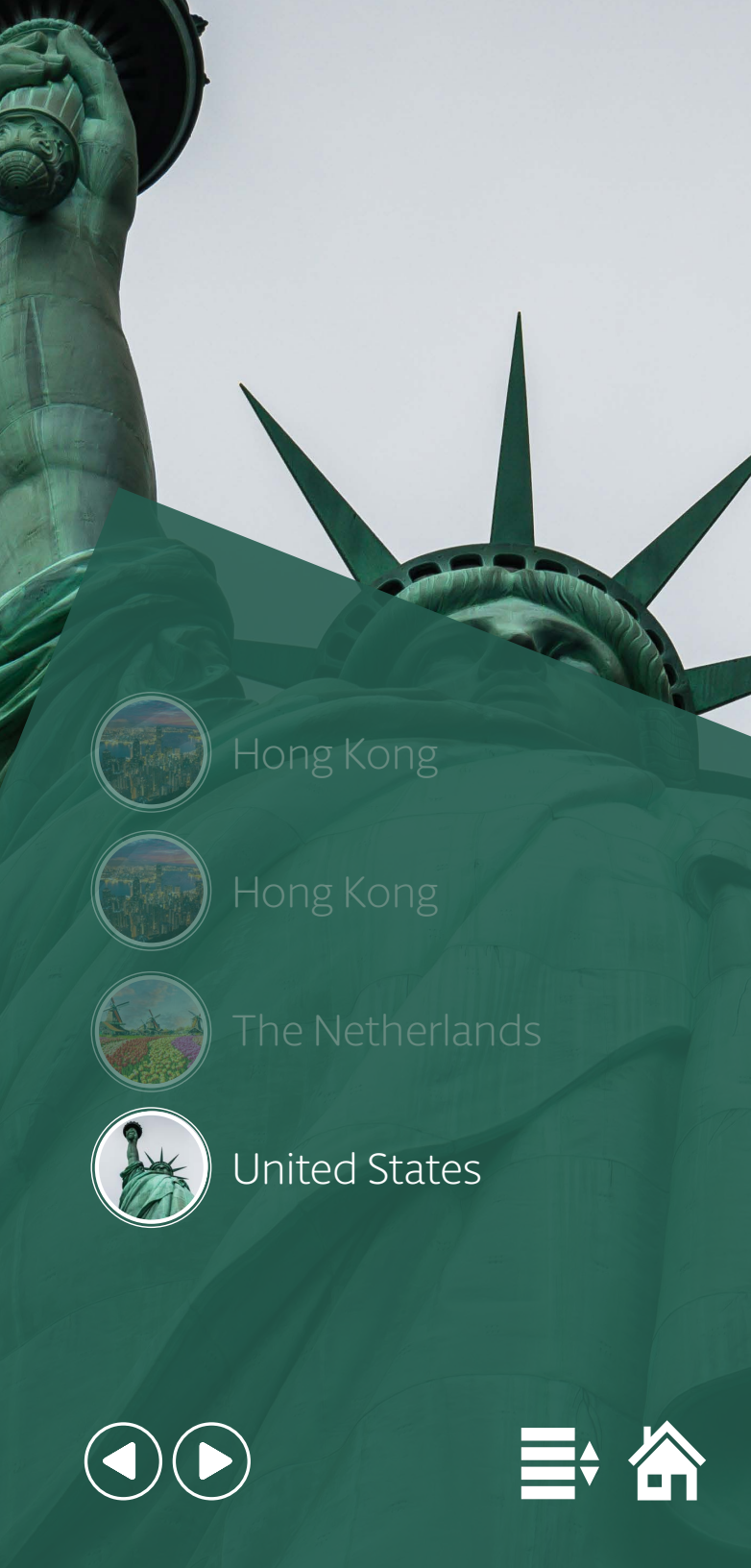
United States

SEC charges auditor with failure to register with PCAOB and violating auditing standards

On 5 April 2021, the Securities and Exchange Commission [commenced an administrative proceeding](#) against Christopher Knauth, a Texas-based CPA, for allegedly failing to register his firm with the Public Company Accounting Oversight Board (PCAOB) and alleged wholesale audit failures.

According to the SEC's order, Knauth falsely represented to a public company audit client that his firm was registered with the PCAOB; while Knauth eventually filed an application to register his firm with the PCAOB, the PCAOB repeatedly informed him that the application was incomplete. Despite this, the SEC alleges that Knauth performed the 2018 audit and three interim reviews for the public company, which resulted in violations by the public company of the reporting requirement that auditors of public companies be registered with the PCAOB. The SEC also alleges that Knauth's audit and interim reviews failed to comply with multiple PCAOB Auditing Standards, including failing to properly plan the audit and to assess audit risks, failing to exercise due professional care and professional skepticism, including failure to obtain engagement quality reviews (EQRs), failing to obtain sufficient appropriate audit evidence and failing to prepare adequate audit documentation.

The SEC alleges that Knauth engaged in improper professional conduct, willfully aided and abetted and caused his firm's failure to register with the PCAOB, and willfully aided and abetted and caused his audit client's reporting violations. The administrative proceeding against Knauth will be scheduled for a public hearing before the Commission.



2020 Review: PCAOB enforcement actions drop while SEC levels remain high

A [recent report](#) prepared by Cornerstone Research, entitled *Regulatory Actions Involving Accountants*, found that the SEC's enforcement activity in the area of accounting and auditing remained relatively stable in 2020, while the PCAOB's enforcement activity dropped. Accounting and auditing enforcement actions can be tracked on the SEC and PCAOB websites, see *e.g.*, [SEC Accounting and Auditing Enforcement Releases \(AAERs\)](#) and PCAOB settled and adjudicated disciplinary orders on the [PCAOB's Enforcement website](#).

SEC enforcement activity

In 2020, the SEC initiated 50 accounting and auditing actions, 46 of which were administrative proceedings and four of which were civil actions. The drop in actions filed was attributable almost entirely to low enforcement activity in the first quarter of 2020, no doubt caused in large part by the COVID-19 pandemic. SEC enforcement activity levels in the second through fourth quarters of 2020 were similar to those in the second through fourth quarters of 2019.

In terms of the types of actions the SEC pursued in 2020, the most common allegations were those related to internal controls over financial reporting and revenue recognition, with nearly 33% of actions initiated relating to those topics. Another 18 actions involved restatements.

In 75% of cases, the resolution of the SEC's actions involved monetary settlements, most often against firms rather than individuals. In fact, only \$3.9 million in monetary sanctions, out of a total settlement amount across all cases of \$1.4 million, was imposed against individuals.

PCAOB enforcement activity

In contrast, the number of PCAOB actions in 2020 was just 13, a 46% decrease from 2019 levels. Like the SEC, the PCAOB's activity dropped in the first quarter of 2020, but it did not rebound in the remainder of 2020, with the enforcement levels remaining low during the second, third, and fourth quarters of 2020.

None of the 13 actions pertained to audit of broker-dealers, consistent with the PCAOB's track record in 2019 but a sharp departure from the PCAOB's activity from 2015 to 2018, during which time 40% of actions related to audits of broker-dealers. The PCAOB's enforcement activity in 2020 focused on restatements, material weaknesses in internal controls, and violations of the Engagement Quality Review standard.

Monetary penalties were imposed against 70% of respondents and totaled nearly \$1.5 million dollars, the vast majority of which was assessed against firms rather than individuals.



2021 Outlook

2020 was no doubt an anomalous year due to the COVID-19 pandemic and enforcement activity by both the SEC and the PCAOB is likely to rebound in 2021 – but to what levels it remains to be seen. For the first quarter of 2021, the PCAOB has announced three enforcement actions, in line with its enforcement activity levels in the first quarter of 2020. The SEC, on the other hand, has initiated six actions, doubling its enforcement activity during the same quarter of 2021. Accounting firms and their clients should keep a close eye on the PCAOB’s activity over the coming months to see what enforcement role the PCAOB will play going forward.

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Biden Administration looks to increase IRS enforcement activity

A significant focus on tax compliance and follow-up enforcement actions may be on the horizon. We previously [reported](#) that the Internal Revenue Service (IRS) Cyber Crimes Unit had signaled its determination to increase enforcement activity relating to income from cryptocurrencies. Those efforts are continuing. However, if the Biden Administration has its way, cryptocurrency enforcement will just be the tip of the iceberg when it comes to increased tax enforcement.

Additional funding sought by Biden Administration to increase tax enforcement

President Biden has proposed increasing the IRS budget by \$80 billion over ten years and to give the IRS new tools to detect tax evasion by high-earners and large corporations. High income taxpayers are more likely to earn income through businesses, capital gains and other non-wage sources and, according to the IRS, are more likely to hold their wealth in opaque structures. Nonetheless, the top one percent of earners have become far less likely to be audited in recent years.

The U.S. Department of the Treasury (Treasury) has published The American Families Plan Tax Compliance Agenda,¹ which explains that “the President’s compliance proposals are designed to ameliorate existing inequities by focusing on high-end evasion.” Specifically, the Administration contends that the new tax

compliance agenda will raise audit rates only for individuals earning \$400,000 a year or more.² Administration officials predict that the \$80 billion investment in tax enforcement will raise \$700 billion over a decade. That new revenue is relied on to fund part of President Biden’s proposed “American Families Plan,” which includes proposals for universal pre-kindergarten, a federal paid family and medical leave plan, programs to make child care more affordable, and free community college for all.

Treasury has explained that the increased IRS funding provided for in the American Families Plan would be used to upgrade technology, improve data analytic approaches, and hire and train IRS agents dedicated to complex enforcement activities. These investments would be paired with a new reporting requirement that would give the IRS an ability to verify income from non-wage sources.

This new reporting requirement aims to address a concern that more than 50 percent of taxes from sources like partnership and proprietorship income go unpaid. Both “the Government Accounting Office (GAO) and IRS agree that strengthening third-party reporting is one of the most effective ways to improve tax compliance.”³ Thus, the Biden Administration proposes requiring that financial institutions include new data on tax reporting forms. Specifically, financial institutions would be required to report

¹ U.S. Dep’t of Treas., [The American Families Plan Tax Compliance Agenda](#) (May 2021).

² *Id.*

³ *Id.* at 1-2.



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gross inflows and outflows on all business and personal accounts including bank, loan and investment accounts.⁴ Treasury explains that the proposed reporting requirements would extend to payment service providers that are not traditional financial institutions including payment settlement entities, foreign financial institutions, and crypto asset exchanges and custodians.⁵ With regard to cryptoassets, Treasury explained that under the new regime, “as with cash transactions, business that receive cryptoassets with a fair market value of more than \$10,000 would be reported on.” This, Treasury explained, is necessary to minimize any incentive for businesses to shift income out of the new data reporting regime.

Crypto enforcement continues

Simultaneously with the Biden Administration’s announcement of its tax compliance initiative, the DOJ Tax Division and the IRS have continued to ramp up pressure regarding the taxation of cryptocurrencies. In fact, the IRS is employing “John Doe” summonses to require cryptocurrency exchanges to release user information. Such a summons was issued to [Kraken](#) on 30 March 2021 and to [Circle Internet Financial](#) (which owns cryptocurrency exchange Poloniex) on 1 April 2021. These summonses require the recipient exchanges to identify users who had at least \$20,000 in transaction value in any single year from 2016 to 2020. According to the IRS Commissioner Charles Rettig, “The John Doe summons is a step to enable the IRS to

uncover those who are failing to properly report their virtual currency transactions. We will enforce the law where we find systemic noncompliance or fraud.”⁶ Commissioner Rettig also explained that the summonses should encourage all crypto holders to comply with tax laws because such tools send a “clear message to U.S. taxpayers that the IRS is working to ensure that they are fully compliant in their use of virtual currency.”⁷

What’s next?

Cryptocurrency tax investigations of entities and individuals are likely to be opened as investigators sort through data provided pursuant to the recently-issued subpoenas. The IRS may further scrutinize and potentially open investigations to review tax returns for taxpayers who did not properly file their crypto taxes during 2016-2020, especially for any taxpayers who received notices from the IRS about reporting requirements in 2019.

The impact of the Biden Administration’s intent to fund some of its spending program through additional tax enforcement will reach much further than taxes on cryptocurrencies. The full \$80 billion increase in IRS funding sought by the Biden Administration may not be appropriated by Congress. Nonetheless, the proposal to fund new spending programs through increased tax enforcement that would target high income earners and corporate entities is notable, and increased audits and enforcement is likely on the horizon.

⁴ *Id.* at 19.

⁵ *Id.*

⁶ Press release, U.S. Dept. of Justice, [Court Authorizes Service of John Doe Summons Seeking Identifies of U.S. Taxpayers Who Have Used Cryptocurrency](#) (Apr. 1, 2021).

⁷ *Id.*





A 2019 Congressional Budget Office report found that the IRS's budget was cut 20% between 2010 and 2018 and that those cuts led to a drop in examinations of both individual tax returns (a 46% drop) and in audits of corporate tax filings (a 37% drop).⁸ A restoration in funding, even one that fell short of \$80 billion, is certain to increase scrutiny of returns filed by high income earners and corporations.

Although it will certainly take time for this increased spending to take effect, the Biden Administration has made its intentions clear that it will seek to fund its policy proposals in part through increased tax enforcement.

⁸ Congressional Budget Office, [Trends in the Internal Revenue Service's Funding and Enforcement](#) (July 2020).

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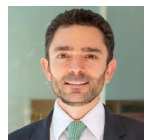
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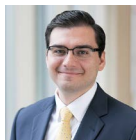
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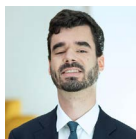


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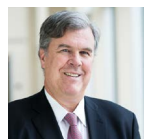
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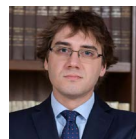
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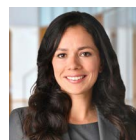
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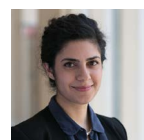
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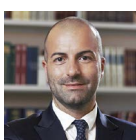
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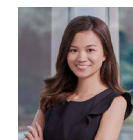
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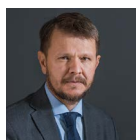
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