Hogan Lovells

Global Accountants’ Liability Update

Contents

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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. Our team recently researched legal and regulatory developments related to auditors' liability in England/Wales, France, Germany, Hong Kong, Italy, Mexico, The Netherlands, Singapore, 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 England/Wales, France, Germany, Italy, Mexico, The Netherlands, Singapore, Spain, and the United States, which are summarized in the pages that follow.

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Recent Court Decisions

France

French courts rule on scope of auditor and statutory accountant liability to third parties

In May 2015, the Lyon and Paris Courts of Appeal handed down two decisions addressing the scope and nature of external auditor and statutory accountant liability. These decisions provide valuable guidance regarding:

- Whether an individual auditor performing services on behalf of an auditing firm may be held personally liable for a violation of audit standards.
- Are external auditors and statutory accountants liable for failing to detect every irregularity in their clients' accounts or is their duty limited to conducting a thorough audit, even though some irregularities are later detected?

In the case that led to the decision handed down by the Paris Court of Appeal on 19 May 2015, the claimant, a printing company, was required by the French postal service to pay more than €600,000 for postage charges that were not originally invoiced due to technical problems. The printing company initiated proceedings against their external auditor alleging he negligently failed to detect the unpaid services.

Two questions were raised before the Paris Court of Appeal. First, the external auditor asserted that because he did not personally execute the engagement letter, he could not be personally liable. He claimed that the proceedings should have been filed against the auditing company. In this regard, the Paris Court of Appeal highlighted two Articles from the French Commercial Code:

- Article no. L. 822-9 states that an auditing firm consists of the association of external auditors who carry out their missions on *behalf* of the company.
- Article no. L. 822-17, which determines the extent of the liability of external auditors, states that external auditors are to be held liable for any mistakes and omissions that they make while auditing their clients' accounts.

Based on these two Articles, the Paris Court of Appeal ruled that an external auditor is personally liable for any mistakes and omissions made during his/her mission notwithstanding the fact that the contract has been entered into between the company he/she works for and the client.

With regard to the liability of external auditors, the Paris Court of Appeal held that an external auditor is only liable if he or she was negligent while carrying out an auditing mission. Here, the claimant was not able to prove that its external auditor failed to detect inaccuracies in the client's accounts due to negligence. On the contrary, the Court of Appeal noted that the exhibits produced by the claimant tended to prove that the external auditor conducted a thorough audit. Thus, the Paris Court of Appeal held that the contract between a company and its external auditor is not based on the promise that the latter will detect all the inaccuracies in his or her clients' accounts, but rather that the auditor will comply with professional standards to detect the said inaccuracies.

On 21 May 2015, two days after the decision of the Paris Court of Appeal, the Lyon Court of Appeal handed down a similar decision on the liability of statutory accountants. In this case, a company had filed a complaint against its statutory accountant alleging that the latter had failed to detect inaccuracies, which led the company to sustain significant financial losses. The court held that a statutory accountant is not liable solely for failing to detect inaccuracies in the accounts; rather, it must be proven that he or she was negligent while carrying out the audit.

In this case, the statutory accountant was not held liable because the claimant was not able to prove negligence.

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Recent Court Decisions

Germany

German court rejects accountant's liability for loan default

In a legal dispute between a bank and an accounting firm, the Higher Regional Court of Dusseldorf recently considered whether an accounting firm was liable for damages a bank suffered as a result of a loan default, which was allegedly caused by negligent accounting.

The bank alleged that the accounting firm, which audited the accounts of the borrower, failed to detect that the borrower's directors had issued fictitious invoices. Later, the borrower filed for insolvency and was therefore unable to repay the loan. Consequently, the bank sued the accounting firm for damages.

No German statute explicitly provides for an accountant's liability to third parties (with the exception of affiliated companies). However, German courts have allowed third parties to sue accounting firms for a breach of contractual obligations if the third party falls within the "protective scope" of the contract between the accounting firm and the audited company (Vertrag mit Schutzwirkung zugunsten Dritter). Strict requirements must be met in order for a third party to benefit from this extended scope of liability. Most importantly, the third party must produce evidence that the accounting firm, when conducting its accounting, was aware that the third party (i) put trust in the results of the accounting *and* (ii) expected the accounting firm to go beyond the scope of ordinary accounting.

In the case at hand, the accounting firm knew that the borrower intended to submit the accounting report to the bank in order to obtain the loan. However, the court held that the accounting firm did not conduct any services other than the usual accounting of the annual accounts. Thus, the court dismissed the bank's tort claims against the accounting firm.

In addition, the court relied on case law established by the German Federal Court of Justice (Bundesgerichtshof) that requires a showing of "careless and unscrupulous behavior" on the accounting firm's part for such a tort claim. Although the court found that the accounting firm breached its professional duties, the court held that the threshold of acting careless and unscrupulous was not met.

The judgment, which is final, adds guidance to the complex German case law on third-party liability for accountants. Even though the requirements for such claims are rather strict, these claims have become increasingly common in German courts.

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Recent Court Decisions

Italy

Italian Supreme Court issued a decision on 7 May regarding auditor liability.

Factual background relevant to decision 7919/2015
A director of Pantrem & C. S.p.A. (Pantrem) summoned Reconta Ernst & Young (REY) seeking compensation for damages purportedly arising from the auditor's negligent certification of Pantrem's financial statements. The plaintiff had been ordered to pay damages as the result of a D&O claim filed by the receiver of Pantrem — appointed following its bankruptcy declaration — because he had failed to verify the reliability of the balance sheets drafted by the former directors and failed to correct any irregularities. The plaintiff alleged that he relied on REY's certifications and that no damage would have occurred had REY diligently assessed the balance sheets of the company. As a result, the damage that he suffered due to the D&O claim was attributable to REY's negligence.

Courts' decision
The courts of merits and the Supreme Court rejected the plaintiff's claims on the following grounds.

First, the purpose of the auditors' activity is to express a qualified opinion on the "reliability" of the bookkeeping and of the corporate financial statements. The aim of this activity is to provide shareholders and third parties with information concerning the financial situation of the company, and its outcome cannot be considered as a certificate of legal adequacy of the financial documents of the company.

Second, the court held that the director is not a beneficiary of the auditing activity. Directors are under the duty to draft financial statements and have the capability to assess the financial situation of the company and to collect information on their own. Hence, they are in the position to ascertain possible financial irregularities, even if they were caused by former directors, and their liability cannot be discharged by external auditors' negligence. In the case at hand, the liability of the director arises from the fact that when he discovered the irregularities, he did not inform the shareholders, did not draft a correct balance sheet, and did not implement the necessary activities to avoid or minimize the damage. The "*damages caused by irregularities of the statement of account are firstly attributable to the conduct of directors and statutory auditors which jointly drafted it.*" The auditing activity refers to a phase that follows the draft of the balance sheets so that the damages arising from false accounts firstly depend on directors and statutory auditors, which contributed to draft such documents. "*The negligence and the omissions attributable to the auditing firm are only the reflection of those of the directors' and statutory auditors.*"

With reference to the alleged responsibility of REY for the damages suffered by the plaintiff, the Supreme Court clarified that the D&O claim was brought due to the misconducts of the director and that there is no **causation** between the damage allegedly suffered by the director as a result of the D&O claim and the possible negligence of REY. The director was summoned for his own and specific misbehavior and not due to REY's liability.

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Recent Court Decisions

United States

PwC not liable for MF Global audit under in pari delicto doctrine

On 22 May 2015, the U.S. Court of Appeals for the Second Circuit affirmed a ruling of the Southern District of New York dismissing a class action against PricewaterhouseCoopers (PwC), alleging that it improperly audited MF Global Inc. (MF Global or MFGI) prior to the global financial giant's 2011 bankruptcy.

The Second Circuit panel's decision turned on the application of the doctrine of in pari delicto. In the MF Global case, the trustee appointed to oversee the liquidation of MFGI under the Securities Investor Protection Act had assigned MFGI's claims to the plaintiffs. In their complaint, plaintiffs alleged that PwC should have detected deficiencies in MF Global's internal controls that later enabled MF Global to misuse customer funds. Based on these allegations, the Second Circuit held that "[t]he allegation defeats the claim: a corporation that engages in malfeasance cannot sue outside accountants who negligently failed to detect or prevent that malfeasance."

The Second Circuit rejected plaintiffs' argument that the in pari delicto defense cannot defeat a claim if its application would defeat a federal regulatory function – here, the role of accountants in issuing reports under the Commodity Exchange Act. The court stated that the regulatory function doctrine was a federal common law concept that had no application under New York law. The court also found that MF Global's wrongdoing was "sufficiently linked" with PwC's alleged auditing failures for in pari delicto to apply.

The panel likewise affirmed the lower court's ruling as to professional negligence, which plaintiffs alleged on behalf of MF Global as well as on their own behalf as customers of MF Global. In evaluating plaintiffs' professional negligence claim, the panel held that PwC was not aware that these particular plaintiffs would rely on its representations and that the accounting firm never directly communicated with MF Global's customers, and thus New York's "near privity" requirement was not met.

The Second Circuit's ruling was issued in a summary order, which does not have precedential effect.

Interestingly, the Delaware Chancery Court recently issued a decision that also rules on the application of the in pari delicto defense in the audit context. In *Stewart v. Wilmington Trust SP Services, Inc.*, the receiver of an insolvent insurance company brought claims against the company's former auditor. Addressing the defendant's in pari delicto defense, the court rejected the receiver's argument that it is an "innocent party" and should not be subject to defenses that would be applicable to the company itself, finding "no support" in Delaware law for the argument. The court also rejected a broad "auditor's exception" to the in pari delicto defense, and dismissed the contract and negligence claims against the auditor. However, the court held that claims against auditors for aiding and abetting management's breach of fiduciary duty were not barred by in pari delicto. The court reasoned that "[t]he policy goals advanced by in pari delicto, while important enough to outweigh this Court's interest in

adjudicating breaches of contract and negligence claims at the periphery of a corporation's affairs, should not outweigh the importance of this Court's ability to adjudicate core fiduciary duty claims arising out of entities organized under Delaware law." The *Stewart v. Wilmington Trust* case is currently on appeal.

Auditors do not have duty to review foreign filings by U.S.-filing client, according to Second Circuit

Auditors received a welcome victory in March when Circuit Judges Walker, Cabranes, and Lohier held that an auditor could not be liable for fraud for failing to compare the U.S. and foreign filings of a client.

The Second Circuit Court of Appeals affirmed a ruling of the District Court for the Southern District of New York denying plaintiffs leave to file an amended complaint to allege securities fraud claims against Bagell, Josephs, Levine & Co., Friedman LLP, and EFP Rotenberg, LLP (the Auditor Defendants), auditors of Advanced Battery Technologies, Inc. (ABAT). The proposed amended complaint would allege that Auditor Defendants failed to detect material misstatements by ABAT, and that Auditor Defendants would have noticed the discrepancies if they had looked at ABAT's filings in China.

But, as the Court of Appeals held, these allegations are insufficient to state a claim for securities fraud. The proposed amended complaint did not satisfy fraud's scienter requirement, as the allegations did not "give rise to a strong inference of either fraudulent intent or conscious recklessness, rather than mere negligence." The Second Circuit panel accordingly affirmed the denial of leave to amend the complaint.

EY gets OSG investor suit dismissed

Ernst & Young LLP (EY) won an important victory last month, in having a case dismissed by Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York, which had been brought by investors in Overseas Shipholding Group Inc. (OSG).

OSG investors originally brought suit against EY, PricewaterhouseCoopers, Deutsche Bank Securities Inc., Goldman Sachs & Co. and other bond underwriters for harm arising out of OSG's 2012 bankruptcy. The other defendants settled with plaintiffs in February, and the case proceeded solely against EY on claims arising under section 11 of the Securities Act of 1933. EY had served as OSG's outside auditor for 40 years and last reviewed OSG's financial statements in 2007 and 2008, and was replaced by PricewaterhouseCoopers in 2009. The alleged misstatement of the company's financial statements was contained in an 8K filing in 2012, which stated that the company's financial statements for "at least" the prior three years could not be relied upon.

In a motion for summary judgment, EY argued that plaintiffs could not establish "loss causation" because the disclosure of the alleged misstatement referred to the period 2009-12, after EY had discontinued auditing the company, and thus the corrective disclosure did not refer to EY's opinions. The court agreed, rejecting the plaintiffs' argument that the 8K's use of the words "at least" three years constituted a reference to periods earlier than the 2009-11 period. The court also held that because the 8K did not refer to the EY audit reports, it did not constitute a "materialization of the risk" of any alleged misstatements by EY.

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Recent Regulatory and Enforcement Developments

United Kingdom

UK adopts new small company accounting and filing requirements
The UK government recently approved new regulations that change what information small and medium-sized companies are required to file at Companies House. Companies must comply with the new regulations for fiscal years beginning on or after 1 January 2016, but early adoption is permitted for fiscal year beginning on or after 1 January 2015.

Abridged accounts
The new rules allow small companies (excluding charities) to prepare abridged (rather than full) accounts for members. Small companies can choose to abridge the balance sheet, the profit and loss account, or both. Any decision to abridge the balance sheet and/or profit and loss account requires that directors obtain approval by each and every shareholder each year.

Filing requirements
Under the new rules, small or medium-sized companies may no longer file an abbreviated version of their full accounts (abbreviated accounts) at Companies House. Instead they must file the version of the accounts they prepare for members (which may be full or abridged). Small companies, however, will still have the option not to file profit and loss accounts and/or the directors' report at Companies House.

Small companies that choose to abridge their balance sheet and or profit and loss statements will have to deliver to Companies House a statement that all the members of the company consented to the abridgement.

Impact on audit report
The new rules also affect the audit reports filed at Companies House. Small companies choosing not to file a profit and loss statement with Companies House should not file an auditor's report on those accounts. Instead, specific information regarding the audit report will need to be disclosed in the notes to the balance sheet filed at Companies House. The rules also eliminate the special auditor's report that is currently filed with abbreviated accounts.

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Recent Regulatory and Enforcement Developments

Mexico

Mexico pushes date for compliance with U.S. Foreign Account Tax Compliance Act to 15 September

Background
The Foreign Account Tax Compliance Act (FACTA) was enacted by the 111th United Sates Congress in 2010 to prevent U.S. taxpayers from using foreign accounts to evade U.S. taxes. FACTA aims to detect tax evasion through stronger asset-reporting controls.

Since FACTA is a national law, U.S. authorities need to execute agreements with foreign governments to ensure its effectiveness. On November 19, 2012, the U.S. Department of the Treasury and the Ministry of Finance and Public Credit of the United Mexican States (MFPC) signed an agreement to improve international tax compliance including FACTA enforcement within the Mexican territory.

In addition to this intergovernmental agreement, the United States, through the Internal Revenue Service, must also execute agreements with the Mexican Financial Institutions in order to compel them to collect and present the information required by FACTA, such as

- name and tax identification number of the U.S. person;
- account number; and
- average monthly balance of the account.

On 31 December 2014, the MFPC issued the Miscellaneous Tax Rules for 2015 (the Rules). Article 3.5.6 of the Rules, in conjunction with articles 54, 55, 56, 134, and 136 of the Mexican Income Tax Law, required that Mexican financial institutions submit the required information by 31 May 2015.

May's update
On 14 May 2015, the MFPC issued the Second Amendment to the Rule pushing the date by which Mexican Financial Institutions must present the information required by FACTA to 15 September 2015.

Any financial institution that does not comply with FACTA will be retained 30% over the payments coming from the United States, no matter who is the beneficiary of the payment (the financial institution or its clients). This retention also applies to financial institutions that don't sign an agreement with the Internal Revenue Service.

Furthermore, the sanctions established by the Mexican Federal Tax Code apply. According to article 82, the fines for not presenting tax declarations range from MXP$1,240 up to MXP$430,000.

As a result of these U.S. and Mexican regulations, it is important that the accountants of Mexican financial institutions supervise adequate collection and submission of the information required by FACTA by 15 September 2015 in order to avoid fines or retentions.

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Recent Regulatory and Enforcement Developments

The Netherlands

Accounting firms and associations comment on proposed amendments to Audit Firms Supervision Act

Last month, we reported on proposed legislation that would amend the Audit Firms Supervision Act (Wet toezicht accountantsorganisaties) in order to implement the Directive 2014/56/EU[1] (the Directive) and bring it in line with the EU Regulation No 537/2014[2] (the Regulation).

At least 10 interested parties have provided comments on the proposed legislation to the Ministry of Finance. The Netherlands Institute of Chartered Accountants (Nederlandse Beroepsorganisatie van Accountants or NBA) authored an extensive letter noting that:

- The use of terms and definitions in the proposed legislation is unclear and not in line with the terms and definitions used in the Directive and Regulation.
- The independence rules are not strict enough: in anticipation of the EU Directive and the Regulation, the Netherlands adopted additional rules in 2013 requiring separation of audit and non-audit services to be performed at Organizations of Public Interest (OPIs) (article 24b of the Audit Firms Supervision Act). The NBA is concerned that the proposed legislation will adversely ease these rules. Because of the proposed legislation it will become possible that:
  - Dutch audit firms auditing OPIs or members of the Dutch network of audit firms auditing OPIs may perform non-audit services at affiliated entities of the respective OPIs in other member states. This is currently not allowed in the Netherlands.
  - Foreign members of the network of a Dutch audit firm may perform non-audit services to OPIs in the Netherlands. This is currently not allowed in the Netherlands.
- The proposed legislation provides insufficient legal protection to accountancy firms and external accountants performing statutory audits. Specifically, the NBA noted that article 30bis of the Directive permits a competent national authority to impose a prohibition to (a member of) an audit firm. Member states are free to choose whether they will assign the power to impose such a prohibition to the national supervising authority or to the judiciary. In the proposed legislation, the Netherlands choose to assign this power to the Netherlands Authority for the Financial Markets. However, the NBA believes that this should be the task of a judge rather than of the national supervisory authority.
- The proposed legislation does not sufficiently explain the choices made in relation to topics on which member states are free to decide to maintain stricter national rules than prescribed by the EU Regulation.
- There are additional possibilities to further improve the implementation of the rules regarding the performance of auditing services in other member states.

EY, PWC, KPMG, and several smaller parties endorsed the position taken by the Netherlands Institute of Chartered Accountants.

Interested parties furthermore suggested that:

- Substantive provisions should be adopted in relation to the accountant's right of appeal to decisions by the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten. According to article 30 of the Directive, member states shall ensure that decisions taken by the competent authority in accordance with the Directive and Regulation (EU) No 537/2014 are subject to a right of appeal. Currently, the proposed Dutch legislation does not provide substantive provisions in relation to this right of appeal.
- The effective date of the maximum assignment period of five years for external accountants auditing an OPI should be postponed. It appears that in the financial year of 2015, a lot of external accountants will be auditing an OPI entity for the fifth, sixth, or seventh consecutive year. When the proposed legislation goes

[1] Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts.

[2] 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.

into effect, these respective OPIs will therefore need to assign a new external accountant. In addition, as of 1 January 2016 a maximum assignment period of 10 years is applicable to audit firms auditing an OPI. The undesired consequence of these two separate circulation obligations is that an OPI could be audited by three different external accountants over a period of three financial years. Interested parties assert that this will adversely impact the quality of external audits.

The Ministry of Finance has not yet responded to the comments of the interested parties.

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Recent Regulatory and Enforcement Developments

Singapore

Singapore requires ACRA approval for auditors' resignation prior to end of contract term

The Accounting and Corporate Regulatory Authority (ACRA), Singapore's regulatory agency that oversees business entities and accountants, announced that some provisions of the Companies (Amendment) Act will be coming into force on 1 July 2015. One such provision requires that auditors of public interest companies and their subsidiaries apply for and obtain ACRA's consent when seeking to resign before the end of the term of appointment. ACRA has published a document that provides guidelines on this requirement.

The guidelines explain that the rationale behind this requirement is to ensure that (i) companies are not "unfairly left in the lurch without their auditors," and (ii) auditors can resign when companies choose not to hold general meetings to appoint a replacement. It defines public interest companies as:

- companies listed or in the process of listing on the Singapore Exchange or a securities exchange outside of Singapore;
- selected financial institutions (e.g. (i) companies that are part of the banking and payment system, (ii) insurers and insurance brokers, (iii) capital market infrastructure providers, and (iv) capital markets intermediaries); and
- large charities or institutions of public character that are companies.

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Recent Regulatory and Enforcement Developments

Spain

Spain's draft Audit Act continues to progress through Parliament despite opposition

Despite significant opposition, on 20 May 2015 the Commission of Economy and Competitiveness of the House of Representatives (Congreso de los Diputados – one of the two Chambers of the Spanish Parliament) approved the draft Audit Act with 23 votes in favour (Partido Popular), 15 against (PSOE and CiU), and two abstentions (UPyD and the rest of the left-wing). Thus, the bill continues its parliamentary procedure and will now be debated in the Senate.

The draft Audit Act requires that Public Interest Entities (EIPs)[3] change auditors every 10 years and limits the ability of audit firms that audit EIPs to provide some 11 incompatible services to the EIPs they audit.

An audit company's engagement to audit an EIP may extend four years beyond the 10-year term limit if (i) after 10 years, a public tendering is held and (ii) the four additional years of audit services are provided as a joint audit with another entity. With regard to the limitations on other services to EIPs, compensation for non-audit services conducted over three or more consecutive years cannot exceed 70% of the average fees for audit services earned in the prior three years (excluding those paid services required by national law or EU). In addition, to prevent auditing companies from becoming financially dependent on a single audit client, generally the fees earned from any EIP cannot exceed, in the last three years, 15% of total revenue earned by the auditing firm.

The draft Audit Act is progressing through Parliament despite criticism from the Spanish Institute of Chartered Accountants (ICJCE) and the Registry of Auditors of the General Board of Economists (REA-REGA), which have expressed their concerns that the Act appears to be progressing toward approval without (i) an agreement concerning the amendments posed by the political parties and (ii) without considering the suggestions made by the Council of the State. In addition, Deloitte, which audits 16 companies of the Spanish Stock Exchange Index, has been urging a longer transition period before implementation of the 10-year rotation period.

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[3] EIPs include credit entities, insurance companies, listed companies (including those operating in the alternative stock market), and other companies such as collective investment entities, pension funds, and mutual guarantee companies.

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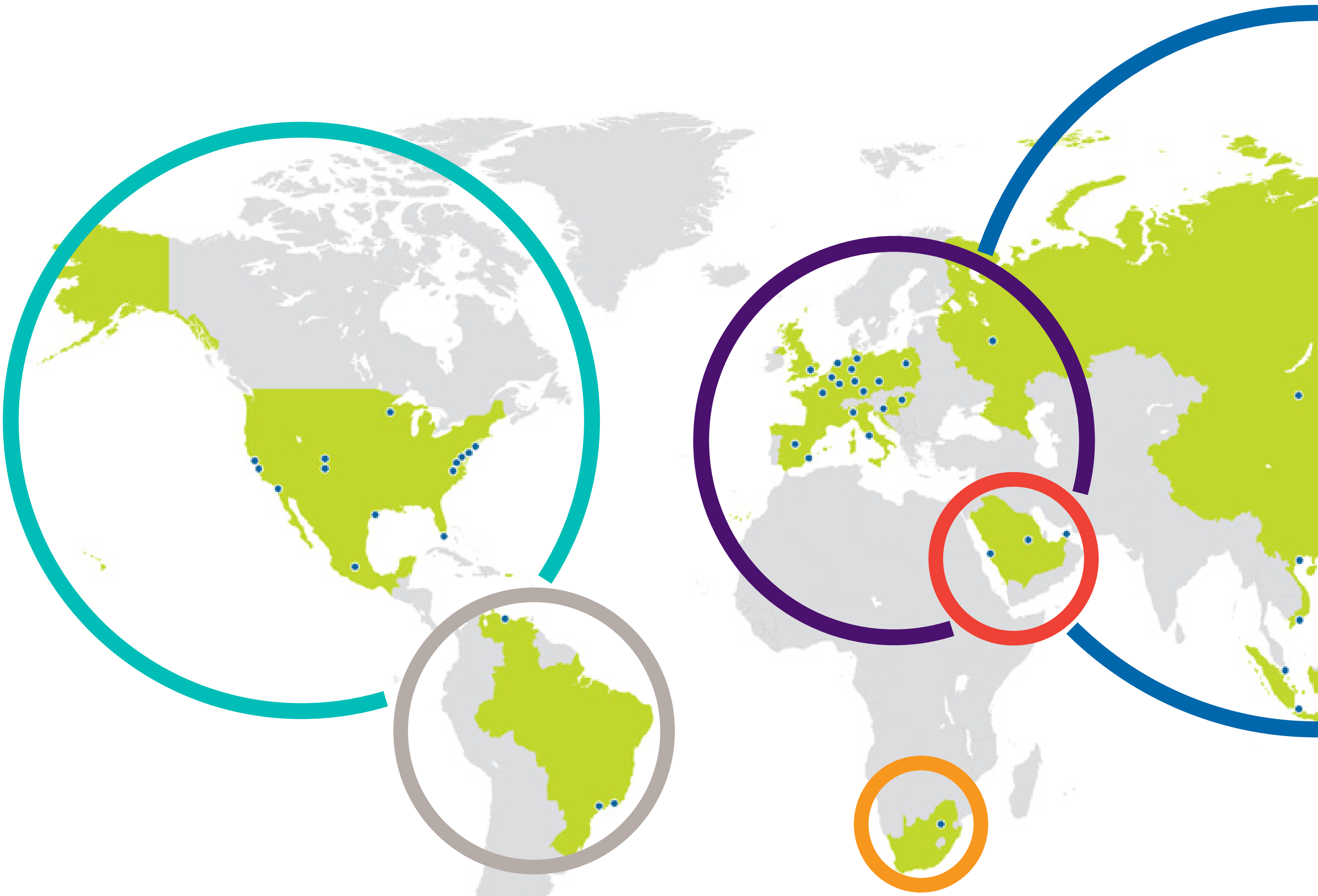

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