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, France, Germany, Hong Kong, Italy, 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, the Netherlands, and the United States, which are summarized in the pages that follow.

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Recent Court Decisions

France

Paris Court of Appeal addresses statute of limitations for auditor negligence claims

An 11 September 2015 decision of the Paris Court of Appeal addresses the statute of limitations applicable to claims against external auditors.

In this case, a humanitarian organization entered two contracts with the European Commission in December 2003 to fund its Afghanistan operations. The defendant external auditor audited the organization in 2002, 2003 and 2004 and in 2005 was asked to audit the two EC contracts. His last work for the organization was completed in 2006.

In March 2007, the European Anti-Fraud Office began investigating irregularities within the organization's accounts. On the basis of the OLAF investigative reports, the EC asked the organization to reimburse the contracted funds. The organization then filed a warranty claim against its external auditor asserting that the reimbursement request was a consequence of negligent auditing of the EC contracts.

Two limitation periods can be applied to civil liability actions against external auditors:

(i) a special three-year limitation period for actions related to the legal missions of the external auditor; and

(ii) a standard five-year limitation period for actions related to the contractual missions of the external auditor.

The special three-year limitation period

Articles L. 822-18 and L. 255-254 of the French Commercial Code establish a three year limitation period for liability claims against external auditors relating to tasks carried out in the scope of their legal missions, as described in Articles L. 823-9 to L. 823-12 of the French Commercial Code.

The legal missions of external auditors are:

- certifying that the annual accounts of the person or entity are accurate and honest and providing proof of this analysis;
- verifying the values and accounting documents of a company, a parent company and subsidiaries;
- ensuring that the company's accounts comply with the applicable regulations;
- verifying that the company's accounts are consistent with the analytical financial reports, the information provided in the Board's management report or other documents reporting on the company's finances as well as with the financial reports provided to the shareholders;
- verifying equality between shareholders, associates and members of the Board;
- reporting, during the next general meeting any irregularities and inaccuracies uncovered in the performance of their mission.

This special three-year limitation period is to be interpreted on a narrow basis. As a consequence, when external auditors do not act within the scope of their legal missions, the standard five-year limitation period applies.

The standard five-year limitation period

French civil law provides for a standard limitation period of five years. This limitation period applies to every action against an external auditor relating to his or her actions that were not conducted as part of the auditor's legal missions, that is to say, to actions relating to contractual missions.

For example, audits conducted by external auditors on specific risks or on the analysis of the quality of the information system of a company are not within the scope of an auditor's legal missions and are therefore subject to the standard five-year limitation period.

In this case, the audits of the two funding contracts certified in 2005 were conducted on a contractual basis. The Court narrowly interpreted the scope of activities subject to the three-year limitation period and ruled that these audits were not conducted as part of the external auditor's legal missions and were thus subject to the standard five-year limitation period.

The auditor was nonetheless not found liable because the organization failed to establish a causal link between the auditor's actions and the request for reimbursement. In fact, the reimbursement of the funds was found to be the result of other irregularities, including fraudulent certificates made by the organization.

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Recent Court Decisions

The Netherlands

Unqualified audit opinion proves valuable in rebutting director's liability

On 26 May 2015, the Court of Appeal of 's-Hertogenbosch examined[1] the importance of an unqualified audit opinion in refuting a director's liability claim. In this matter, a Dutch holding company filed annual accounts on a consolidated basis and was liable for all obligations arising out of legal acts entered into by its subsidiaries (based on a so-called 403-statement). The most recent consolidated annual accounts included an unqualified audit opinion by the holding company's accountant.

Shortly after the consolidated annual accounts had been presented to the holding company's shareholders, it (as well as some of its subsidiaries) entered insolvency. The court appointed liquidator then sued a former director claiming that he:

- did not timely publish the latest consolidated annual accounts in the Trade Register (i.e. within 13 months after the end of the financial year to which the annual accounts relate); and
- failed to accurately keep the books, especially in relation to the subsidiaries as required by article 2:10 of the Dutch Civil Code.

The Court of Appeal nullified the lower court's decision, which had granted the liquidator's claim, reasoning that:

- the consolidated accounts were published in a different (and more efficient) way and thus, failure to publish them in the Trade Register should not have been taken into account;
- the consolidated annual accounts contained an unqualified auditor's opinion.

The court emphasized that because the bookkeeping was sufficient to secure an unqualified audit opinion, the liquidator's claim against the director needed to specifically explain how the annual accounts were defective. This opinion underscores the fact that an unqualified audit opinion provides significant protection to corporate directors.

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[1] Court of Appeal 's -Hertogenbosch 26 May 2015

Recent Court Decisions

United States

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Southern District of New York addresses remaining securities claims against Ernst & Young in Lehman Brothers securities cases

Judge Lewis Kaplan issued two decisions this month on summary judgment motions of Ernst & Young (EY) in connection with the claims of the remaining opt-out plaintiffs from the settlement involving the bankruptcy of Lehman Brothers Holdings Inc. (Lehman).

On 10 September 2015, Judge Kaplan granted EY's motion for summary judgment dismissing claims asserted by Arthur Abbey for losses sustained in connection with warrants issued by Lehman. When the warrants became worthless as a result of Lehman's bankruptcy, Abbey brought claims against EY under Section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act) and Rule 10b5 thereunder, and common law, alleging that he was "fraudulently induced" to purchase the warrants.

In its summary judgment motion, EY argued that Abbey had not presented any evidence of loss causation. Abbey argued that because his claim was based on a theory of fraudulent inducement, causation was sufficiently established by evidence that but for the fraudulent statements he would not have acquired the warrants. Abbey relied on Second Circuit precedent predating *Dura Pharmaceuticals* and the Private Securities Law Reform Act (the PSLRA). Judge Kaplan rejected this argument, holding that theories of "fraudulent inducement" that rely exclusively on transaction causation do not survive *Dura Pharmaceuticals* and the PSLRA.

On 18 September 2015, Judge Kaplan issued another decision on motions for summary judgment filed by EY to dismiss the complaints of the only remaining opt-outs in the securities litigation. The court held that plaintiffs' claims survived EY's motion for summary judgment. The plaintiffs had brought claims under Section 10(b) of the Exchange Act and Section 11 of the Securities Act of 1933, alleging that EY's unqualified audit opinions on the financial statements of Lehman were false and misleading and that these statements contributed to the substantial losses plaintiffs, as Lehman stockholders, suffered when Lehman failed.

Plaintiffs' allegations related principally to statements regarding Lehman's use of "Repo 105" transactions, and its effect on Lehman's reported net leverage. Lehman recorded "Repo 105" transactions as sales, rather than financings, which decreased Lehman's reported net leverage ratio. Plaintiffs alleged that Lehman used Repo 105 transactions near the end of its quarterly reporting periods solely to lower its net leverage. They alleged that the net leverage was an indicator of the company's ability to absorb any losses sustained by its riskiest assets, and thus the Repo 105 transactions presented Lehman as being in a stronger position than it actually was.

With respect to EY, plaintiffs alleged that EY had violated Section 10(b) and Section 11 by making materially misleading statements because Lehman's SEC filings contained EY's representations that EY had conducted its audits in accordance with PCAOB standards and that, in its opinion, Lehman's financial statements were presented fairly and in accordance with GAAP. The parties agreed that both of these statements were statements of opinion.

Applying the Supreme Court's recent decision in Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, ––– U.S. ––––, 135 S. Ct. 1318, 191 L.Ed.2d 253 (2015), the court held that to allege adequately that a statement of opinion or belief is false within the meaning of the securities laws, a plaintiff must plead facts that, if true, would be sufficient to show one of two things: that (1) the opinion or belief itself "constitutes a factual misstatement" or (2) the opinion or belief is "rendered misleading by the omission of discrete factual representations." Under this rule, a plaintiff who asserts that the opinion or belief in itself is an "untrue statement of a material fact" must do more than allege that the underlying fact is false; rather, such a plaintiff must plead facts that, if true, would be sufficient to show that the speaker did not "actually hold[ ] the stated belief." Similarly, a plaintiff who asserts that the speaker "omit[ted] to state a material fact necessary in order to make" its opinion or belief "not misleading" "cannot state a claim by alleging only that [the] opinion was wrong";

instead, a plaintiff who asserts that the defendant omitted to state a fact (or facts) necessary to make a statement of opinion or belief "not misleading" must "call into question the issuer's basis for offering the opinion." To do so, a plaintiff "must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."

Analysing the evidence in the light of these standards, the court found that certain "red flags" demonstrated that summary judgment would be inappropriate on the question of whether EY made false or misleading statements in violation of Section 10(b) and Section 11. According to the court, some of the evidence would permit a jury to infer that EY had information in hand that strongly suggested that Lehman's quarter- and year-end balance sheets were misleading as to its net leverage ratio by virtue of its use of Repo 105 transactions, improving its balance sheets and presenting a misleading picture of its financial condition.

The court also found:

- EY could be liable under Section 11 for false and misleading statements made by Lehman (as opposed to EY's own opinions), since EY "certified" Lehman's financial statements within the meaning of Section 11. EY will remain free to raise the "due diligence" defense as appropriate.
- With respect to scienter, the same red flags that supported a denial of summary judgment as to whether EY made false or misleading statements required denial of summary judgment as to the issue of scienter.
- Plaintiffs presented enough information to withstand summary judgment on the issue of loss causation. The court found that the element of causation could be met if plaintiffs showed that Lehman's collapse flowed from investor panic over the quality of the balance sheet and the Repo 105 transactions made the balance sheet look healthier than it was, even if the Repo 105 transactions themselves did not cause the entirety of the loss directly. On that basis, the court found that the alleged misrepresentation was within the "zone of risk" that caused the plaintiffs' injury.
- Plaintiffs' claims for common law fraud and professional negligence under New York law were dismissed under the Securities Litigation Uniform Standards Act.

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Recent Regulatory and Enforcement Developments

Hong Kong

Hong Kong enters six tax information exchange agreements with Nordic countries

Hong Kong has entered six new Tax information Exchange Agreements (TIEAs) with Nordic jurisdictions, which will take effect 4 December 2015. Hong Kong began entering TIEA's at the recommendation of the Organisation for Economic Cooperation and Development (OECD), which recently warned that Hong Kong risked being labelled as an uncooperative tax jurisdiction if it did not agree to exchange tax information with jurisdictions that would not also agree to avoid double taxation.

Prior to mid-September 2015, the Hong Kong Government had entered 32 comprehensive agreements for avoidance of double taxation (CDTAs)[2]. It has been the Government's policy priority to pursue CDTAs with trading and investment partners to facilitate the flow of trade, investment and talent between Hong Kong and the rest of the world. These agreements also provide for an exchange of information for tax purposes.

While Hong Kong continues to strive to expand its network of CDTAs, it has now also begun to negotiate TIEAs with jurisdictions that have no interest in entering a CDTAs with Hong Kong.

Hong Kong's first TIEA was entered with the United States and took effect 20 June 2014. Its newest TIEAs are with:

- Denmark,
- Faroes,
- Greenland,
- Iceland,
- Norway, and
- Sweden.

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2 Hong Kong's 32 CDTA partners include Belgium (2003), Thailand (2005), the Mainland of China (2006), Luxembourg (2007), Vietnam (2008), Brunei, the Netherlands, Indonesia, Hungary, Kuwait, Austria, the United Kingdom, Ireland, Liechtenstein, France, Japan, New Zealand (2010), Portugal, Spain, the Czech Republic, Switzerland, Malta (2011), Jersey, Malaysia, Mexico, Canada (2012), Italy, Guernsey, Qatar (2013), Korea, South Africa and the United Arab Emirates (2014).

Recent Regulatory and Enforcement Developments

United States

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SEC charges BDO USA and five partners in connection with false and misleading audit opinions

On 9 September 2015, the United States Securities and Exchange Commission (SEC) filed and settled charges against BDO USA and five of the firm's partners for ignoring red flags and issuing misleading unqualified audit opinions about the financial statements of its client General Employment Enterprises (GEE)—an employment staffing services company whose stock trades on the NYSE MKT—for the fiscal years ending September 30, 2009 and 2010. In connection with the settlement, BDO agreed to admit wrongdoing, pay disgorgement of its audit fees and interest totalling approximately $600,000, and pay a $1.5 million penalty, in addition to implementing new quality control measures. The five partners also agreed to public company accounting suspensions of varying periods and to pay penalties ranging from $10,000 to $30,000 per person to settle their individual charges.

According to the SEC, toward the end of BDO's 2009 audit of GEE, BDO learned that $2.3 million (comprising approximately half of GEE's assets and substantially all of its cash) was unaccounted for when GEE's CFO advised BDO, in November 2009, that (a) a purported CD at a New York bank had not been repaid by the bank after the stated maturity date in mid-October, (b) GEE was missing documentation supporting the CD, and (c) a bank employee had told GEE's CFO that the bank had no record of a CD. When following up on this matter, BDO received multiple conflicting stories from GEE management and board members regarding the CD, along with suspicious documentation of the CD, although GEE ultimately received a series of payments equalling the amount of the CD from three entities unaffiliated with the bank (pursuant to a purported assignment agreement). In response to these findings, BDO issued a letter to GEE stating that BDO did not have sufficient audit evidence to formally conclude the audit and demanded an independent investigation into the issues relating to the CD.

After receiving the letter, GEE's then-CEO resigned, and the newly appointed CEO, who had personal business connections with BDO (which handled audit or tax work for his private company and three public companies for which he served as a board member), requested that BDO conclude the audit without the independent investigation. In support of his request, the new CEO pointed to the change in management and the fact that the Company had recovered full control of the $2.3 million. This request was made despite admissions by the new CEO and the Audit Committee Chair that "some inappropriate actions" were taken at GEE. After consulting internally, BDO agreed to withdraw its letter and issued an audit report with an unqualified opinion on GEE's 2009 financial statements that were filed with the SEC. Those financial statements classified the $2.3 million purported CD as a cash equivalent.

After the issuance of GEE's 30 September 2009 financial statements, BDO learned that the president of the bank that purportedly had issued GEE its $2.3 million CD had been criminally charged with participating in a conspiracy with, among others, GEE's then-CEO and the then-majority shareholder and chairman of GEE's board of directors, and that the purported CD never existed. Rather than being invested in a CD, GEE's $2.3 million was diverted as part of a transaction conducted pursuant to that conspiracy. According to a criminal Complaint filed against the president of the bank, the government alleged that a counterfeit CD was issued to hide the improper diversion of GEE's funds from its auditors and board of directors. Notwithstanding these revelations, BDO never considered the impact of this and other related information on GEE's 2009 financial statement and subsequently did not consider this information when issuing an unqualified opinion on GEE's financial statements included in GEE's 2010 financial statements that were filed with the SEC.

In its 36-page Order, the SEC found that BDO violated Section 4C(b) of the Securities Exchange Act of 1934 (the Exchange Act) and Rule 102(e) promulgated thereunder by engaging in "improper professional conduct." The improper conduct was BDO's ignoring red flags surrounding the purported CD and issuing audit reports in both 2009 and 2010 containing unqualified opinions, in violation of the following professional standards:

- AU § 230, for failure to exercise due professional care and an attitude of professional skepticism in its 2009 and 2010 audits;
- AU §§ 326 and 333, for failure to obtain sufficient competent evidential matter concerning the purported CD;
- AU §§ 316 and 317, for failure to determine whether fraud or potential illegal acts may have impacted GEE's fiscal year 2009 and 2010 financial statements;
- AU §§ 326 and 334, for failure to obtain sufficient audit evidence to determine whether the assignment agreement was a related party transaction; and
- AU § 561, for failure to investigate newly discovered facts in 2010.

The SEC also found that BDO violated Section 10A of the Exchange Act by failing to plan, design, and carry out audit procedures to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statements amounts, and that BDO violated Section 13(a) of the Exchange Act and Rule 13a-1 promulgated thereunder because BDO knew or should have known that its unreasonable conduct would contribute to GEE's filing of inaccurate 2009 and 2010 Form 10-Ks.

In addition to the penalties outlined above, the SEC required BDO to:

- Perform and complete a review and evaluation of the sufficiency and adequacy of its quality controls set forth in its audit manual, including its policies and procedures set forth therein for audit and interim review procedures;
- Engage an Independent Consultant to review of BDO's policies to determine whether BDO's policies are adequate and sufficient to provide reasonable assurance of compliance with all relevant SEC regulations and PCAOB standards and rules;
- Have its CEO certify to the SEC staff in writing that (i) BDO has adopted and has implemented or will implement all recommendations of the Independent

Consultant, if any, and (ii) the Independent Consultant agrees with BDO's adoption and implementation of the recommendations;

- Require each audit professional serving public company audits to complete a minimum of 24 hours of audit-related training on topics relating to the Order and a minimum of 8 hours of fraud-detection training; and

- With respect to each of the calendar year periods 2017 and 2018, have BDO's chief compliance officer certify that BDO has assessed whether BDO's policies are adequate and sufficient to provide reasonable assurance of compliance with all relevant SEC regulations and PCAOB standards and rules by, among other things, testing the firm's implementation of BDO's policies during the twelve months preceding the certification.

SEC charges two Grant Thornton entities with violations of auditor independence rules

On 1 October 2015, the U.S. Securities and Exchange Commission (SEC) filed and settled two separate cease-and-desist proceedings in connection with its findings that two Grant Thornton International Ltd. (GT International) member firms violated auditor independence rules. The violations arose after Grant Thornton Audit Pty Limited, Australia (GT Australia) and Grant Thornton India LLP (GT India) audited companies whose subsidiaries had retained Grant Thornton Mauritius (GT Mauritius) partners to serve on their boards of directors. The audits thus violated PCAOB independence rules. The SEC orders, the allegations of which were neither admitted nor denied, provide for censure and monetary sanctions against GT Australia and GT India, both of which have agreed to cease and desist from future violations of the independence rules.

According to the SEC, GT Australia and GT India were engaged to conduct audits of the financial statements of two foreign public issuers. Both GT Australia's client (Australia Client) and GT India's client (India Client) were the corporate parents of subsidiaries incorporated in Mauritius. Anex Management Services Limited (Anex) — a Mauritius-based company that provided services to non-domestic corporate groups — assisted Australia Client (before it retained GT Australia) and India Client (after it had retained GT India) with the incorporation of their Mauritius subsidiaries. At all relevant times, Anex was owned by two GT Mauritius partners. Because the law of Mauritius requires Mauritius-based corporations to have at least two residents of Mauritius on their boards, on Anex's recommendation, the two GT Mauritius partners became directors of the subsidiaries. By virtue of their directorial positions, the GT Mauritius partners had, among other things, signatory authority over the bank accounts of the relevant subsidiaries, and were vested with responsibility related to the statutory audits of the companies.

After the subsidiaries were incorporated, GT Australia conducted audits for Australia Client for the four fiscal years ended June 30, 2011; GT India conducted an audit for India Client for the fiscal year ended March 31, 2013. Each GT entity issued audit reports stating that it "conducted [its] audit in accordance with the standards of the Public Company Accounting Oversight Board (United States)." Australia Client and India Client included these reports in their required filings with the SEC—a registration statement (Australia Client) and annual reports (Australia Client and India Client).

According to the SEC, and despite the representations in the audit reports, neither GT Australia nor GT India was actually independent of their respective clients. The SEC found that the GT entities lacked independence because (1) partners of GT Mauritius sat on the boards of the Mauritius-based subsidiaries of their publicly held parents, Australia Client and India Client; and (2) GT Mauritius's related party—Anex—provided prohibited non-audit services to the audit clients of GT Australia and GT India.

The SEC also found that GT Australia and GT India had failed to comply with their own independence procedures. Under GT International's internal guidelines, member firms proposing to audit SEC-registered companies must submit an International Relationship Check (IRC), which is circulated to other member firms located where the potential client and its related entities have a presence. The IRC is meant to reveal whether a GT member firm—or one of its "network firms"—has an existing relationship with a potential client. Under GT International's definition, Anex was a "network firm," because it was under the common control of two GT Mauritius partners. GT International's global audit manual further required member firms to obtain annual independence confirmation letters from member firms in countries where SEC-registered audit clients have subsidiaries.

The SEC determined that, for the 2008 through 2011 audits, GT Australia failed to comply with these independence checks with respect to Australia Client's Mauritius presence; nor did GT Australia make efforts to learn about the activities of the GT Mauritius partners with respect to the client's Mauritius presence.

Regarding GT India, the SEC found that, although GT India had inquired through an IRC whether the GT Mauritius office had potential conflicts with its client's subsidiary, a GT Mauritius employee incorrectly responded to the IRC, stating the following: "[w]e have no relationships [with India Client] to report." The SEC also found that GT India failed to seek a confirmation letter from the GT Mauritius office regarding independence, as required by GT International conflict-check procedures.

Given these factual findings, the SEC determined that both GT Australia and GT India had violated, and had caused their clients to violate, the Securities Exchange Act of 1934 (the Exchange Act) and related rules.

- First, the SEC found that GT Australia and GT India violated Rule 2-02(b)(1) of Regulation S-X. Rule 2-02(b)(1) requires each accountant's report to state whether the audit was made in accordance with generally accepted auditing standards, which in turn require auditors to maintain strict independence from clients. Although both GT entities stated they were independent from their clients in the auditor reports they issued, according to the SEC, they were not independent.

- Next, the SEC found that GT Australia and GT India caused their clients to violate Exchange Act Section 13(a) and Rule 13a-1, promulgated thereunder, because the GT entities' clients represented to the SEC that their filings—comprising a registration statement and annual reports—contained audited financials that had been examined by an independent accountant. As the SEC found, however, independence was lacking, so these representations were inaccurate.

- Finally, the SEC determined that GT Australia and GT India each engaged in "improper professional conduct" under Exchange Act Section 4C(a)(2) and Rule 102(e)(1)(ii), promulgated thereunder. According to the SEC, the GT entities' violated the statute and rule by engaging in "highly unreasonable conduct"—which is considered higher than negligence, lower than recklessness—with respect to an issue of accountant independence.

Based on these violations, and pursuant to the settlement orders:

- GT India and GT Australia agreed to cease and desist from committing or causing any violations and any future violations of Rule 2-02(b)(1) of Regulation S-X, Section 13(a) of the Exchange Act, and Rule 13-1 promulgated thereunder;

- The SEC censured GT India and GT Australia; and

- The SEC imposed monetary sanctions on GT Australia and GT India. GT Australia agreed to pay disgorgement of $88,683, plus prejudgment interest of $13,520, and a penalty of $75,000, while GT India agreed to pay disgorgement of audit fees in the amount of $128,905, plus prejudgment interest of $8,977, and a penalty of $50,000.

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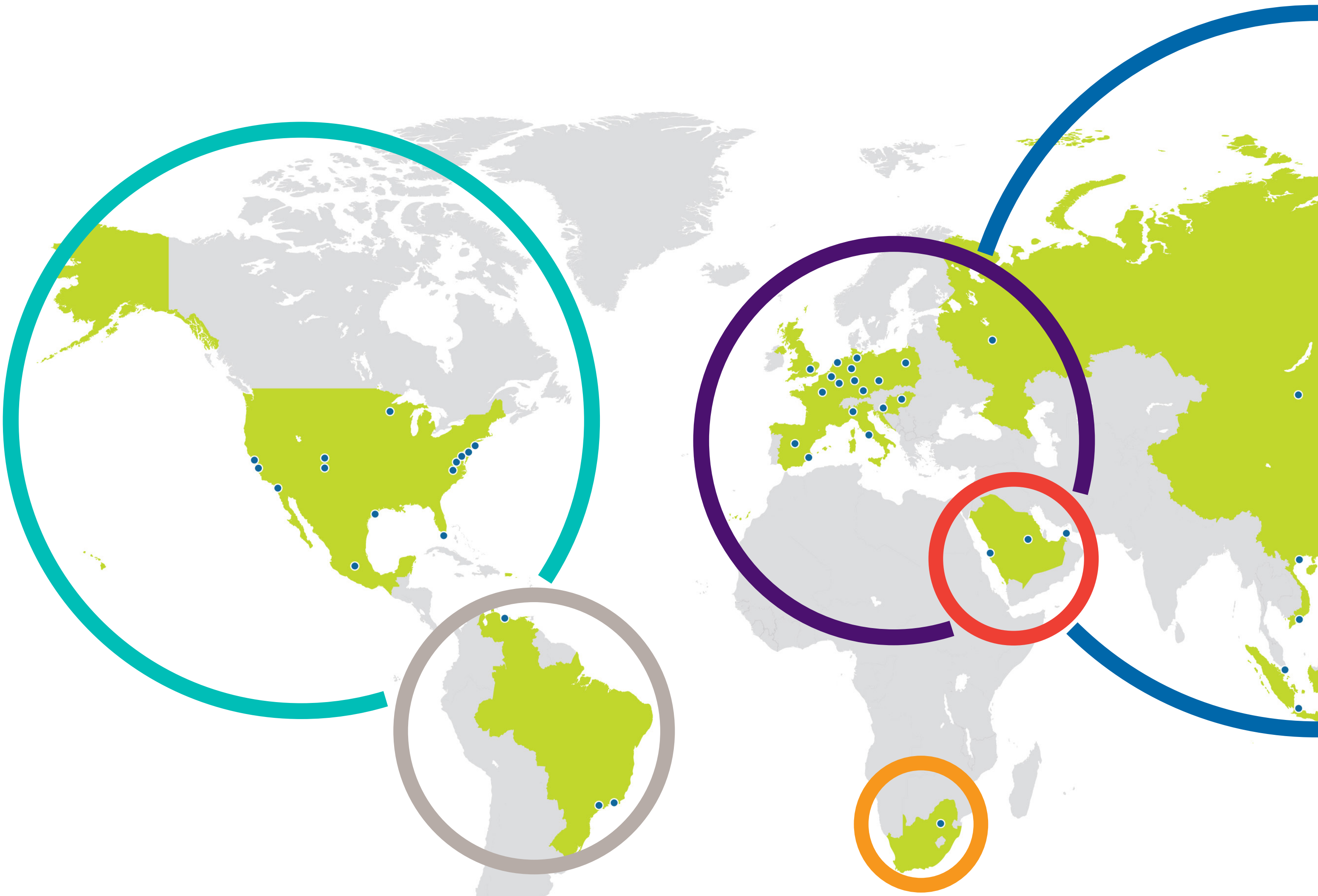

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