Hogan Lovells

Global Accountants' Liability Update

APRIL 2015

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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 China, Denmark, England/Wales, France, Germany, Hong Kong, Italy, Mexico, the Netherlands, South Africa, 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 China, Denmark, France, Mexico, the Netherlands, Singapore, and the United States, which are summarized in the pages that follow.

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China

CICPA publishes guidance on professional judgment exercised by certified public accountants

On 26 March 2015, the Chinese Institute of Certified Public Accountants (the CICPA) published the Guidance on Professional Judgment of Chinese Certified Public Accountants (the Guidance). The Guidance applies to certified public accountants who work in accounting firms and may also provide useful guidance for other professional accountants (not certified as a member of CICPA) who prepare financial statements or conduct internal audits, etc.

This Guidance addresses six topics: (i) general principles; (ii) necessity of professional judgment; (iii) main fields of professional judgment of certified public accountants; (iv) how to make professional judgments for certified public accountants; (v) quality of professional judgment of certified public accountants, including the quality standard and influencing factors for professional judgment; and (vi) suggestions to improve the professional judgment of certified public accountants. The last section reflects input from accounting firms, certified public accountants, and the institutions responsible for formulating accounting standards.

The Guidance notes that the professional judgment of certified public accountants should be made within the framework of related laws, regulations, and professional responsibilities, and be based on specific facts and circumstances. Any professional judgment call that is not supported by the specific facts and business circumstances, or that lacks sufficient and proper audit evidence, fails to satisfy professional standards.

The Guidance also explains that CPAs should generally follow five steps to develop their business judgment: (i) identify the issue and object in need of professional judgment; (ii) collect and evaluate relevant information; (iii) identify possible solutions; (iv) evaluate options; and (v) finally make conclusions of professional judgment and issue the written record.

MOF's approval is no longer needed for overseas accounting firms to establish a representative office in China

On 19 March 2015, the PRC Ministry of Finance (the MOF) issued a Notice of Ministry of Finance on Removing Five Administrative Approval Items, responding to the Decision of the State Council on Issues Concerning Removing or Adjusting a Batch of Administrative Approval Items promulgated by the PRC State Council on 24 February 2015. One of the five actions reported in the 19 March notice waives a requirement for MOF approval for establishment of a resident representative office in China by foreign accounting firms (including those in Hong Kong, Macau, and Taiwan). According to the Notice, foreign accounting firms will no longer be required to obtain MOF's approval prior to registering a representative office in China.

MOF invalidates 39 normative documents relating to Accounting Standards

On 16 February 2015, the MOF issued the Notice of Ministry of Finance on Publishing the List of Some Normative Documents of Accounting Standards System that Have Been Abolished and/or Invalid, Cai Kuai [2015] No. 3. In accordance with this notice, 39 normative documents relating to accounting standards, including MOF Notice on Publishing the Methods for Accounting of Trust Business (Cai Kuai [2005] No. 1) and MOF Notice on Publishing Eight Accounting Standards including Accounting Standard for Intangible Assets (Cai Kuai [2001] No.7) have been abolished. View the full list of abolished documents.

CICPA issues Questions and Answers regarding Enterprise Internal Control Audits

On 5 February 2015, the CICPA issued the Questions and Answers regarding Enterprise Internal Control Audit, which addresses ten key questions that arise when a CPA conducts an "integrated audit" that incorporates both an audit of internal controls and an audit of financial statements. This publication discusses the similarities and distinctions between an internal control audit and financial statement audit, and describes how an accounting firm may develop a team to conduct an integrated audit. This information may be useful to CPAs seeking to minimize audit liability risks associated with integrated audits.

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Denmark

Danish Supreme Court reverses lower court's award of "deepening insolvency" damages against auditors

On 27 March the Supreme Court of Denmark issued its decision in a case filed by the liquidator of Memory Card Technology (MCT) against the Danish member firms of EY and PwC. EY and PwC had served as MCT's auditors. The case was a so-called "deepening insolvency" claim in which the liquidator alleged that because the auditors had failed to qualify their opinions, MCT's life was prolonged and its financial condition worsened, compared to what it would have been had MCT been liquidated earlier.

The trial court ruled against EY and PwC and awarded substantial damages. The Supreme Court reversed on causation grounds and entered judgment for the auditors. It ruled that the liquidator failed to prove that had the auditors qualified their opinions, MCT's board would have liquidated the company earlier or otherwise addressed the company's insolvency or its worsening financial condition. The Supreme Court also drew a clear distinction between claims of creditors and claims that can be pursued by a liquidator.

The causation part of the decision provides insight on the importance of developing this sort of "but-for" causation defence in a Civil Law jurisdiction. The Court rejected the credibility of the liquidator's argument and evidence that a qualified opinion would have led to different board action. It did so in light of the nature of the alleged audit failure, and within the context of the company's overall business operation.

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France

French courts apply statute of limitations to accountant liability claims

In February 2014, the Besançon and the Lyon Courts of Appeal handed down two notable and similar decisions regarding the liability of statutory accountants. More specifically, these courts had to rule on two legal issues, namely the limitation period within which one is entitled to file a claim against a statutory accountant, and the conditions under which a statutory accountant can be held liable for the bankruptcy of a company.

The facts are similar in the two cases brought before the Besançon and the Lyon Courts of Appeal: a company went bankrupt and the plaintiff — either its liquidator or its partner[1] — alleged that the statutory accountant was liable for the bankruptcy due to his/her negligence. The claims were dismissed by both the Lyon and the Besançon Courts of Appeal on the grounds of the limitation period relating to the liability of statutory accountants barred the claims.

Article no. L.822-18 of the French Commercial Code establishes a three year limitation period for claims asserting liability of statutory accountants. Cases in which the limitation period is at issue typically turn on the starting point of this limitation period. In this regard, Article L.822-18 of the French Commercial Code establishes that the limitation period begins following the act or event causing the loss or damage or, in the event that it had been concealed, after the discovery of said act or event.

In the case that was brought before the Besançon Court of Appeal, the defendant had certified the accounts in 1999 and was sued in 2009. In the case that was brought before the Lyon Court of Appeal, the statutory accountant was sued in 2010 based on accounts he had certified in 2006. In both situations, the time between the act or event causing the loss or damage — i.e. the wrongful certification of the accounts of the company — and the summons exceeded the three-year limitation period.

[1] The Lyon Court of Appeal held that the partner of a company that went bankrupt is not entitled to seek the statutory accountant's liability; only the liquidator is entitled to do so.

In order to avoid the dismissal of their claims, both plaintiffs alleged that the limitation period did not begin at the time of the wrongful certification of the accounts of the company but at the time the mistakes were discovered. According to the plaintiffs, both statutory accountants were aware that the accounts were inaccurate but attempted to conceal their inaccuracies. The judges of the Lyon Court of Appeal refused to postpone the limitation period and held in a short decision that the plaintiff's claim could not go forward. On the contrary, the Besançon Court of Appeal considered very carefully the issue relating to the limitation period. The court provided interesting details regarding the conditions under which the limitation period can be postponed in statutory accountants' liability cases:

- First, plaintiffs must prove that the statutory accountant wrongfully certified the accounts submitted by the head of the company. However, negligence is not tantamount to concealment and, therefore, negligence is not enough to justify the postponement of the starting point of the limitation period.

- The Besançon Court of Appeal further reasoned that the start of the limitation period could be postponed only if the plaintiffs prove that the statutory accountant had purposefully certified incorrect accounts. There must be a clear intention on the part of the defendant to conceal the irregularities at stake.

The Besançon Court of Appeal found that the plaintiff did not provide sufficient evidence to prove the defendant's bad faith. Therefore, the standard of proof is rather high and it appears difficult for plaintiffs to delay the commencement of the limitation period.

Although the decisions of both courts turned on the application of the statutory limitation period and therefore neither court reached a holding as to when wrongful certification of a company's accounts gives rise to accountant liability, the courts' discussion of the liability standard is nonetheless interesting. The Besançon Court of Appeal did not address liability directly, but it implied that, even if the statutory accountant led the company to bankruptcy due to her/his negligence, liability would not attach absent proof of the accountant's bad faith. In the claim brought before the Lyon Court of Appeal, the plaintiff claimed that the inaction of the statutory accountant gave the illusion that the company's accounts were accurate. He alleged that the scope of a statutory accountant's powers within a company is very wide and therefore includes a duty to be proactive. The defendant countered that a statutory accountant is not entitled to interfere in the management of a company and that therefore she/he cannot be held liable for the bankruptcy sustained by a company. The court did not find it necessary to resolve this dispute.

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Mexico

Mexican court upholds statutory sanctions for violations of public accounting law

Background

Article 52 of the Federal Tax Code (Code) provides that public accountants issuing an opinion about the financial statement of a natural person or a company must fulfill the following requirements

- register before the tax authorities,
- comply with the rules of the Code,
- be independent and impartial,
- submit the opinion by electronic means provided by the government authority, and
- be up-to-date with his/her tax obligations.

This provision also sets forth that, if the public accountant does not satisfy any of the previous requirements, or if he does not comply with the procedure to audit, he will be admonished or his qualifications to perform any public accountant activity may be suspended for up to three years. In addition, if he/she were to participate in the commission of a tax-related felony or if he/she does not disclose, upon request of the authority, the work papers used in the audit of the financial statements of the taxpayer, his/her registration as a public accountant will be revoked.

When this provision was enacted, many public accountants initiated amparo proceedings (constitutional challenges) alleging that the sanctions set forth in the Code were excessive and in breach of Article 22 of the Mexican Constitution. Therefore, the petitioners asserted that article 52 of the Code should be invalidated.

March update

In March 2015, a Collegiate Circuit Court issued a ruling that the sanctions challenged are not excessive and not in breach of article 22 of the Constitution. The court found that the ratio legis is to safeguard the general interests by ensuring the correct performance of the tax collection and related activities. Moreover, the Collegiate Court stated that the sanctions are not excessive and are a proportional penalty for inappropriate and unprofessional behavior.

The court's ruling is binding only on the parties, and does not have precedential effect. Because this precedent is not binding, another court could rule differently. If that were to happen, the conflict would likely be resolved by the Supreme Court of Justice.

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The Netherlands

Media reports on financial authority's actions to enhance the quality of statutory audits

The AFM's accountancy aims for 2015

On 4 March 2015, the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten) (the AFM) published its plans for 2015 to enhance the quality of governance, reporting and auditing within the accountancy profession. These include urging the Big 4 audit firms to develop additional action plans to address quality problems with their statutory audits. Such quality problems were identified by a September 2014 AFM inquiry. The AFM anticipates implementing actions recommended by the Big 4 in 2015 but did not specify the required content of the requested action plans.

The AFM also announced that it will start a preliminary inquiry in the first half of 2015 to examine the integrity within audit firms. This action is prompted by the fact that the AFM received various indications that audit firms are dealing with integrity issues. The exact nature of the integrity issues to which the AFM is referring is unclear, but it has stated that the inquiry will examine the possible involvement of audit firms in criminal matters. Following the preliminary inquiry, the AFM may take additional action in the third and fourth quarter of 2015.

Suitability test for supervisory directors of OPI audit firms will not be applied before the beginning of 2016

In its September 2014 report, which identified problems with Big 4 audit reports, the AFM called for legislation that would require audit firms that audit Organizations of Public Interest[2] (OPI audit firms) establish a supervisory board. The AFM further announced its intention to scrutinize the suitability of members of such supervisory boards as well as members of the board of directors of OPI audit firms.

Following the AFM's report, the Dutch Minister of Finance stated that the quality of the statutory audits needed to be enhanced quickly and he vowed to take prompt action. It was therefore expected that a suitability test for OPI auditors, would come into force quickly. However, it now appears that no draft legislation is yet initiated and that no change is imminent. On 25 March 2015, the AFM announced that it will not start testing the suitability of such directors until 2016. The AFM states that it will wait for legislation to be enacted before scrutinizing the suitability of directors of OPI audit firms. However, in anticipation of further legal developments, the AFM is currently working on an assessment framework for the suitability test and it that it expects to inform the OPI audit firms about the scope of the future suitability test before the summer of 2015.

Until the suitability test comes into force, supervisory directors of OPI audit firms must only demonstrate reliability. This requires that future supervisory directors provide the AFM documentation relating to prior criminal, financial, and administrative actions. The AFM will scrutinize these submissions against records from the Tax and Customs Administration, the National Public Prosecutor, and possibly also foreign supervisory authorities. An interview with the respective candidate may also be part of the procedure.

Various involved parties have criticized the course of events. At this moment, OPI audit firms do not know what criteria future supervisory directors will need to meet. However, once in force, the suitability test will likely apply to currently serving supervisory board members who were or will be appointed before the standards are set. OPI audit firms thus run the risk that the AFM will dismiss such supervisory directors when relevant legislation comes into force.

A member of the House of Representatives has posed some critical questions to the Minister of Finance regarding inter alia the uncertainty the delay in enacting the standards is causes within the accountancy branch. The Minister of Finance has not yet answered these parliamentary questions.

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[2] An Organization of Public Interest is defined as a (i) legal entity established in the Netherlands of which the securities are traded on a regulated market; (ii) bank established in the Netherlands which is granted a bank license in accordance with the Financial Supervision Act (FSA); (iii) central credit institution established in the Netherlands which is granted a licence in accordance with the FSA; (iv) reinsurer, life insurer, or non-life insurer established in the Netherlands which is granted a license in accordance with the FSA; or (v) company, institution, or public authority which are regarded as bodies by which — as a consequence of their size or function in social and economic life — an audit failure can have a substantial influence on the confidence in the public function of the audit opinion.

Singapore

On 15 May 2015, pursuant to the Accounting and Corporate Regulatory Authority (Amendment) Act 2014, corporate service providers will need to comply with a new regulatory framework aimed at enhancing controls against money laundering and terrorist financing. Although the new framework's regulations are still being finalized, Singapore's Accounting and Corporate Regulatory Authority (ACRA) has published non-binding, draft guidelines that address how to comply with this framework.

Under the draft guidelines, corporate service providers are to register with ACRA and implement a robust compliance program that touches on: (i) different levels of due diligence measures; (ii) transaction monitoring and reporting; (iii) employee recruitment and training; (iv) record keeping; and (v) auditing.

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United States

PCAOB to reorganize auditing standards
The Public Company Accounting Oversight Board (PCAOB) announced last month that it had adopted amendments to reorganize auditing standards applicable to public companies.

According to a 31 March 2015 news release, the PCAOB recently approved a reorganization of its auditing standards in order to allow users to "navigate the standards more easily." The standards will now be organized by topic, rather than chronology. According to PCAOB Chairman James Doty, these topics "generally follow the flow of the audit process, making their use easier and more efficient for auditors." The five main topical categories consist of: General Auditing Standards, Audit Procedures, Auditor Reporting, Matters Relating to Filings Under Federal Securities Law, and Other Matters Associated with Audits. The reorganization does not change substantive requirements or impose new requirements on auditors.

The PCAOB approved the reorganization after issuing an original proposal and then a supplemental request for comment in the previous two years. Subject to SEC approval, the amendments will take effect on 31 December 2016.

Internal control audits becoming more effective, according to PCAOB
A PCAOB member stated in March that internal control audits showed progress in 2014 compared to years prior.

Speaking to a conference of the Institute of Internal Auditors, PCAOB member Jeanette Franzel said, "Preliminary results of the 2014 inspections indicate that some improvements have been seen in the area of auditing internal control." The PCAOB is "starting to see a downward trend in the number of findings and the nature (severity) of findings in some firms, and this includes findings in the area of auditing internal control over financial reporting." More specifically, Franzel reported that there had been improvements in risk assessments of material misstatement and "identification of the appropriate controls to address those risks." Still, Franzel noted that the PCAOB continues "to find persistent deficiencies in the testing of those controls, particularly controls that have a review element associated with them."

Franzel was also careful to remind her audience that work remains to be done, "[M]ore strides still need to be made by audit firms here, as auditing internal control is still the most frequent area of inspection findings."

FASB moves to delay revenue recognition rules
After considerable debate and public comment, the Financial Accounting Standards Board (FASB) has moved to delay by one year the implementation of its new revenue recognition rules.

The FASB voted in March to propose pushing back the effective date of the board's new revenue recognition standard. The new rules had been slated to take effect in 2016, but now companies and their auditors will likely have more time. For public companies using American Generally Accepted Accounting Principles for their financial statements, the FASB wants to delay implementation of the new standard until reporting periods beginning after 15 December 2017. Non-public entities would have an additional year past the public company effective date. FASB staff will now draft a proposed update officially delaying the implementation date, and the board will vote following a 30-day comment period.

The new revenue recognition rules are "intended to simplify and make more consistent how companies record their revenue," according to the Wall Street Journal. But the process of simplification actually turned out to be complex for many companies, leading corporations such as Verizon Communications Inc. and Adobe Systems Inc. to request a delay. The FASB now hopes the new timeline "gives the companies sufficient time to implement" the standards.

Supreme Court raises bar for challenging executives' opinion statements
In its recent opinion in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, the United States Supreme Court held that an opinion stated in a registration statement does not violate Section 11 of the Securities Act unless either (i) the issuer did not sincerely hold the challenged opinion or (ii) if the opinion would imply, to a reasonable investor, a false statement concerning the inquiry conducted by, or the knowledge of, the issuer. The complaint must adequately allege the

"particular (and material) facts" omitted from the securities registration statement.

Omnicare has already been applied in the context of audit opinions. On March 31, 2015, in *Special Situations Fund III QP, LLP v. Deloitte Touche Tohmatsu CPA*, Judge Ramos of the Southern District of New York dismissed a complaint against a Big Four accounting firm, relying in part on the *Omnicare* decision. In the *Special Situations Fund* case, shareholders alleged that Deloitte and its Shanghai unit violated Section 10(b) of the Securities Exchange Act by issuing an audit opinion in the face of "red flags" allegedly suggesting that the financial statements were misstated. Finding that plaintiffs failed to demonstrate that Deloitte "subjectively knew" its audit opinions were false, Judge Ramos dismissed the suit with prejudice. And citing *Omnicare*, Judge Ramos held that "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong."

PWC Not "Controlling Person" in Audit of Chinese Mobile Firm

PricewaterhouseCoopers (PwC) secured an important victory last month when a federal judge held that it could not be held liable for claims that its Chinese affiliate failed to uncover malfeasance by an audit client.

In *In re NQ Mobile Securities Litigation*, Judge Pauley in the Southern District of New York dismissed claims against PwC International alleging liability for purportedly misleading audit opinions issued by PwC China, which plaintiffs said should have known that NQ Mobile, a Chinese mobile device company, was misstating its financial results, including reported revenue. Plaintiffs claimed PwC International was a "control person" of PwC China under Section 20(a) of the Securities Exchange Act of 1934. The court held that PwC International was not a control person, since Plaintiffs failed to demonstrate that PwC International "possessed the power to direct or cause the direction of the management and policies of a person…." The court found that plaintiffs' conclusory allegations that PwC International was "responsible for enforcing policies across the network of PwC firms" was insufficient.

Judge Pauley also found that the plaintiffs had failed to adequately plead that PwC International exerted actual control over the 2011 and 2012 audits. A control person "must not only have actual control over the primary violator, but have control over the transaction in question." Plaintiffs' complaint was "bereft of allegations of culpable participation or PwC International's culpable state of mind." These insufficiencies led the Court to dismiss Plaintiff's complaint against PwC International.

Federal judge certifies class of former Madoff investors in suit against PwC

A judge in the Southern District of New York once again certified a class of approximately 1,000 investors who lost billions investing indirectly with Bernie Madoff.

In *Anwar v. Fairfield Greenwich Limited*, District Judge Victor Marrero granted class certification on 3 March to a class of individuals and businesses who claim to have lost at least US$7.5 billion due to their investments with Fairfield Greenwich Ltd. With respect to PwC, the complaint alleges that PwC's audit reports with respect to Fairfield Greenwich Ltd., the largest feeder fund that invested funds in Madoff, was misleading, asserting common law claims for negligence and negligent misrepresentation. The investors claimed that PwC owed them a duty of care under New York law, and that their claims are sufficiently similar as to be appropriate for class certification. Judge Marrero agreed that common issues would be involved in the determination of whether PwC owed plaintiffs a duty under New York law and whether plaintiffs relied on PwC's audit reports. PwC has filed a motion to stay further proceedings while they appeal to the Second Circuit Court of Appeals. Interestingly, on 19 June 2014, the Second Circuit vacated an earlier grant of class certification by Judge Marrero in this case, finding that Judge Marrero failed to "look at each claim and determine whether they can all be lumped together into a class."

Courts of Appeal come to aid of auditor defendants

Two Circuit Courts of Appeal recently handed down highly favorable rulings for auditors sued under U.S. securities laws.

The Courts of Appeals for the Second and Eleventh Circuits each held that the scienter requirements of Section 10(b) of the 1934 Securities Act and Rule 10b-5 require plaintiffs to allege either that an audit firm's audit amounted to "no audit at all" or that the auditor missed signs of fraud that were "so obvious" that it could not have been unaware of them. This was the first time either Circuit has adopted the "no audit at all test" in a published opinion.

In the Second Circuit case, *In re Advanced Battery Technologies Inc.*, the plaintiff alleged that two audit firms ignored significant discrepancies between Advanced Battery Technologies' foreign filings and its corresponding SEC filings. Plaintiffs claimed that this oversight amounted to an "extreme departure from the reasonable standards of care" by the audit firms. However, the Second Circuit required allegations of conduct that "approximate[s] an actual intent to aid in the fraud being perpetrated by the audited company….," allegations which plaintiffs did not make. The Second Circuit noted that Generally Accepted Auditing Standards do not "requires an auditor to inquire about or review a company's foreign regulatory filings."

The plaintiffs in the Eleventh Circuit case, *Brophy v. Jiangbo Pharmaceuticals Inc.*, similarly claimed that an audit firm was liable for failing to identify misrepresentations in financial statements and undisclosed material conflicts. The court held that the plaintiffs failed to allege facts sufficient to meet the "no audit at all" standard, and in fact, "failed to articulate a theory of the fraud with any particularity."

These cases confirm the high bar required to satisfy the recklessness standard under Section 10(b) for claims based on alleged failure to comply with professional standards.

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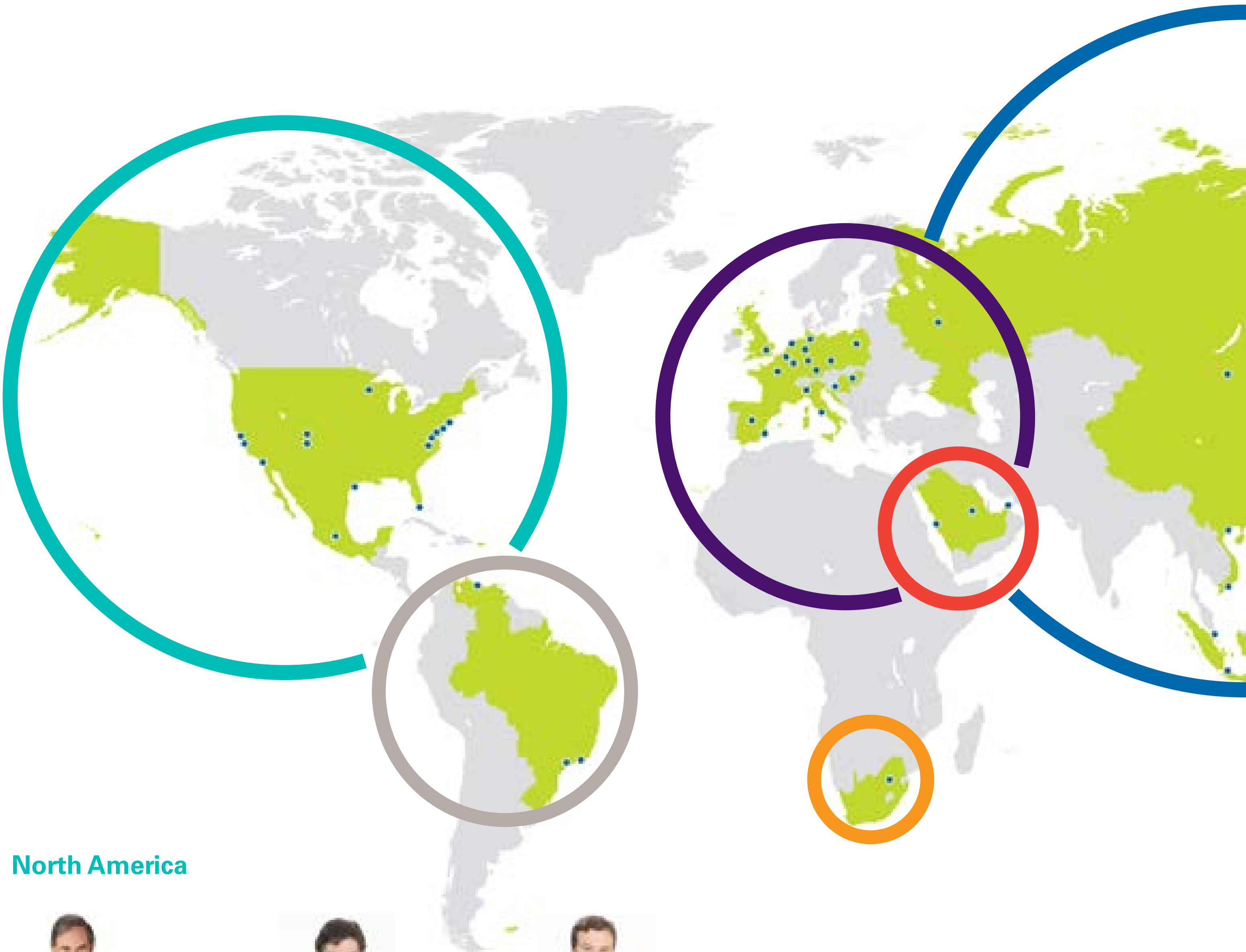

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