Hogan Lovells

Global Accountants' Liability Update

FEBRUARY 2015

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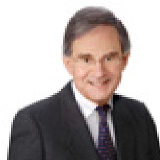
Welcome

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



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China

China establishes government service procurement procedures and requires annual regulatory filings from accounting firms

Qualified accounting firms can contract for government services

The PRC Ministry of Finance, Ministry of Civil Affairs and State Administration for Industry and Commerce jointly issued the Measures for Administration of Government Procurement of Services (Interim), which came into effect on 1 January 2015 (the Interim Measures). The Interim Measures establish procurement procedures through which government entities may purchase services from non-government entities to complete tasks currently provided by the government or needed by the government to perform its duties.

To be eligible to provide services in accordance with the Interim Measures, an accounting and audit services provider must be a legally established entity with capability to independently bear civil liability and have

- an independent and complete system of financial management, accounting, and asset management;
- facilities, personnel, and technical expertise necessary to provide the services contracted for;
- a favorable records of tax payment and social security contributions;
- no grave records of criminal violations; and
- a favorable credit standing.

Further guidelines are anticipated from the Ministry of Finance, which will formulate Guiding Catalogues for Government Procurement of Services. These Guiding Catalogues will include guidelines addressing procurement of accounting and audit services in accordance with the Interim Measures.

Additional service provider requirements may also be specified by the government through public bidding, selective bidding, competitive negotiation, or single-source procurement processes. Service providers selected through these processes will enter into procurement contracts with the government service purchasers.

The issuance of the Interim Measures is undoubtedly good news for private accounting and audit service providers because it establishes a regulatory regime that will enable these private entities to provide services to governmental entities.

Ministry of Finance issues notice about accounting firms' regulatory filings for 2014

On 13 January 2015, the PRC Ministry of Finance (the MOF) issued the Notice on Conscientiously Doing a Good Job for the Work Reporting and Filing by Accounting Firms for the Year of 2014 (the Notice) instructing provincial financial departments to supervise local accounting firms in their completion of required online reports.

According to the Notice, accounting firms should submit the required reports through an online system between 1 March and 31 May 2015. The required reports include:

- a basic information form
- a partners (shareholders) information form
- audited financial report for the year of 2014
- an overseas audit services information form
- a letter explaining the integrated management between the head office and branches of the accounting firm
- a letter explaining any inspections, penalties, or lawsuits related to the firm's accounting business

Accounting firms that fail to timely file the required reports will be identified as likely targets for heightened regulatory scrutiny.

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France

French Supreme Court confirms audit firms are not part of the legal profession

A French Supreme Court decision issued on 15 January 2015 clarified the boundaries between law and accounting firms and highlighted, once again, that audit firms are not part of the legal profession.

The case before the Court involved a contract between a French law firm (BRS & Partners) and a German audit company (Rödl & Partner GmbH). The December 2010 contract documented the audit company's promise to purchase 49% of the law firm's shares. The German audit company subsequently breached the contract and was sued by the French lawyers. The audit company alleged that the contract was unenforceable due to a 1990 statute (Statute no. 90-1258 passed on 31/12/1990) that allows that up to a 49% interest in a limited liability law firm (société d'exercice libéral à responsabilité limitée) may be held by people other than the lawyers working in the firm, *as long as they are part of the legal profession*. The audit firm thus asserted that accounting is not part of the legal profession.

The Paris Court of Appeal held that the contract was unlawful. One of the law firm partners appealed to the French Supreme Court, arguing that the Paris Court of Appeal applied French law but should have examined whether accounting is considered part of the legal profession under German law. The French Supreme Court upheld the decision by the Paris Court of Appeal concluding that an audit company, whether French or German, could not be considered part of the legal profession.

Bill that would permit audit firms to conduct legal work in conjunction with an audit mission progresses through Parliament

This Supreme Court holding is of particular interest because, as mentioned in our January Update, the French government recently introduced a bill that extends the ability of chartered accountants to perform missions traditionally handled by lawyers. The amendment in question was finally reviewed by the Members of Parliament on 4 February 2015. In the current version, the bill allows chartered accountants to provide only subsidiary legal advice as part of a primary audit mission.

We will monitor developments in the coming weeks as Parliament reviews this bill, particularly with respect to any modification in the scope of permitted legal services to be carried out by chartered accountants.

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Germany

German court holds that professional liability insurer bears burden to prove knowing breach of professional duties in order to deny coverage on this basis

In an insurance coverage dispute between a professional liability insurer and its insured, the German Federal Court of Justice (Bundesgerichtshof) held that the insurer bears the burden of proof if it wants to deny coverage on grounds that the policyholder knowingly breached its professional duties (BGH, Dec. 17, 2014, docket no: IV ZR 90/13, 2015 WM 185). The Federal Court held that an insurer must present facts to the court that indicate that the policyholder knowingly breached its professional duties towards its client to meet this burden. The court recognized an exception to this requirement if the duty breached by the policyholder is expected to be known by every professional.

This decision departs from a decision of the Higher Regional Court of Saarbrücken (Oct. 31, 2007, docket no: 5 U 510/06, 2007 ZfS 219, Dec. 20, 2006, docket no: 5 U 65/06, 2006 ZfS 522), which previously held that a policyholder has the burden to present facts explaining that it did not knowingly breach its duties in order to prevent an insurer from denying coverage. The Federal Court’s ruling clarifies that the insurer bears the burden to prove the knowing breach of professional duties.

In the case at hand the professional acted as insolvency administrator. However, the standards set by the Federal Court will also apply to professional liability insurance for auditors. German professional liability insurance policies typically provide no coverage for damages if the policyholder knowingly breached its professional duties vis-à-vis its client. Insurers therefore regularly allege that a policyholder knowingly breached duties owed to its clients. If a claim by a client establishes that the professional has breached its duties towards the client, this finding has a binding effect for a subsequent insurance coverage dispute between the professional and the insurer. However, the question whether the duty was breached knowingly needs to be decided by the court handling the subsequent coverage dispute.

The decision of the German Federal Court of Justice makes it more difficult for insurance companies to deny professional liability insurance coverage because they may no longer simply allege that the policyholder knowingly breached its professional duties but must prove the alleged breach was made knowingly.

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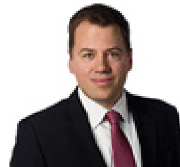

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Hong Kong

Hong Kong financial institutions may continue to rely on CPAs to conduct consumer due diligence

As anticipated in our December Update, an amendment to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO) came into effect on 23 January 2015.

The amendment extends a provision of the AMLO that allows financial institutions to rely on an intermediary, which may be a certified public accountants, to carry out customer due diligence (CDD).

The AMLO intermediary provision was intended to be in place temporarily until statutes on par with the AMLO could be adopted to regulate the practices of CPAs and other intermediaries. It was due to expire on 31 March 2015 and has now been extended until 31 March 2018.

Please refer to our December Update for further background.

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Mexico

Mexico establishes rules for audits of holding companies

Background

On 11 January 2014, the new Act Governing Financial Groups (Ley Para Regular las Agrupaciones Financieras) (the Act) came into force. The Act lays out the basis for the organization of Holding Companies and the operation of Financial Groups.

The Act defines a holding company as a business entity with express authorization from the Secretariat of Finance and Public Credit to be organized as such. A financial group is a business group comprised of a holding company and two or more entities under its control devoted to rendering financial services.

The purpose of this new Act is to strengthen the government supervision of financial groups by expanding regulatory authority.

Developments in January 2015

On 9 January 2015, the National Banking and Securities Commission (Commission) issued the General Rules Applicable to the Holding Companies of Financial Groups Governing the Subjects that Jointly Belong to the National Supervising Commissions (Rules).

These Rules establish criteria auditors must meet in order to audit holding companies. In addition, the Rules specify certain procedures relating to the rendering of audit services to holding companies.

The Rules require that holding companies operating within a financial group retain a certified external auditor to audit its financial statements. Such external auditors are required to, among other things

- be independent from the audited holding company. The applicant is deemed not to be independent if any of the following conditions exist: (i) more than 10% of the external auditor's income is from the holding company; (ii) the external auditor or another member of the auditor's firm works or has worked (in the year immediately previous to his designation as auditor) for the holding company as counsel, general director, or employee; (iii) the external auditor's firm and the holding company belong to the same group of companies; or (iv)the holding company owes fees to the external auditor's firm for audit services or for other services;
- be a registered external auditor before the Secretariat of Finance and Public Credit;
- have at least five years of experience auditing financial activities;
- not be engaged in a pending legal dispute with the holding company;
- not previously have been convicted of white-collar crimes;
- not have been or have an offer to become a member of the board or to hold a managerial position in the holding company, its subsidiaries, affiliates, or any other related company in the group; and
- have the benefit of a manual or processes in place at his or her firm describing auditing activities for companies in the financial industry.

The rules also require that external auditors auditing a holding company comply with the International Auditing Standards and the standards issued by the Mexican Institute of Public Accountants. Moreover, an external auditor must issue his opinion in accordance with the methodology set forth in the International Audit Standard 805 and with the Bulletin 7030 (published by the Mexican Institute of Public Accountants). All the documents and materials used by the external auditor to issue his or her opinion on the financial statements must be retained for five years.

Failure to comply with any of these requirements may give rise to a fine ranging from 200 times the minimum wage to 10,000 times the minimum wage under § 155 of the Act. Furthermore, under § 157 of the Act, if the external auditor hides, alters, or declares false information before the government entity supervising the audited company or carries out any other activity entailing untruthful, deceitful, or incomplete information, such external auditor could be sentenced to prison for two to 10 years.

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The Netherlands

In January 2015, there were three interesting judicial and regulatory developments in the Netherlands.

Interlocutory opinion provides guidance regarding accountant's duty of care to third parties

On 20 January 2015, the court of appeal of Arnhem-Leeuwarden issued an interlocutory opinion addressing accountants' duty of care towards third parties. The parties have been given the opportunity to express their views on damage and causation before the court of appeal renders its final judgment. Despite the interlocutory nature of the opinion, it provides important guidance with respect to the Dutch view on the accountant's duty of care towards third parties.

In this case, the client, X.B.V., had instructed its accountant to prepare a financial report to aid the client in restructuring the business. This engagement did not concern a statutory task. The instruction to the accountant noted that the financial report "was done in the context of the valuation and development with regard to the shareholders of X.B.V."

Shortly after the presentation of the financial report to X.B.V., the shares held by the spouse of the deceased shareholder (Appellant), with whom the company had been in conflict about the sale and the price of the respective shares, were sold. The Appellant claimed that the accountant had breached its duty of care to the Appellant by preparing the financial report without the Appellant's participation. The financial report was allegedly issued with the purpose of providing the board of X.B.V. with a valuation of the shares in X.B.V., which led to the forced sale of the shares held by the Appellant.

The defendants – including the accountant – disputed the claim and argued that an accountant does not have a duty of care towards third parties when performing non-statutory tasks. In addition, defendants argued that the accountant had not been instructed to value the shares and did not know, and could not have known, that its report would be used as a basis for the valuation of Appellant's shares.

The court identified several factors that determine when an accountant has a duty of care towards third parties, including the extent to which the accountant should have anticipated that its report would shape the conduct of third parties and the social and economic importance of the accountant's report.

The court also explained that an accountant has a duty to take precautions to prevent unintended uses of its reports. This duty includes preventing a third party or the client from attaching a wrongful meaning to its report. In this respect, the court referred to the measures included in the Dutch "Standard 3400" (Rules for accountants regarding research of future financial information). These rules provide inter alia that an accountant should include statements in its report indicating to whom the report is addressed and that third parties should not attach importance to the report.

The court further stated that in the event that an accountant has taken measures to guarantee that third parties may not rely on a financial report prepared by it, the accountant does not generally have a duty of care towards third parties who nevertheless make use of the accountant's report. However, even when an accountant has taken such measures, when the accountant knows, or should have known, that its report might be used by third parties, or might be used by the intended users for a purpose other than the intended purpose, the accountant is obliged to take precautionary measures to avoid unintended use of the report. Such measures could include warning the respective third party or objecting to an unintended use of the report.

Applying these standards to the case before it, the court held that the accountant had a duty of care towards the Appellant. The court also noted that Appellant — as holder of shares in X.B.V. — may not be a third party at all. The court further held that the accountant breached this duty by failing to explicitly state in the report that it should not in any way be used for the valuation of X.B.V. shares. The court explained that in this case, the accountant should have anticipated that its report might be used as a basis for the valuation of the shares of X.B.V., especially given the fact that it was noted to the accountant that "the

financial report was done in the context of the valuation and development with regard to the shareholders of X.B.V."

This decision underscores that accountants operating in the Netherlands should always define restrictions on the use of their products in as much detail as possible. Such statements should explicitly state the purpose of accountant's product and any purpose for which it should not be used. A general statement that "the accountant's product cannot be used for other purposes" may not be sufficient to meet an accountant's duties to third parties.

Disciplinary action implies limits on accountants' duty of confidentiality

On 23 January 2015, the Accountancy Division — the disciplinary court for accountants in the Netherlands — issued an interesting decision addressing an accountant's confidentiality obligation.

The complaint against the accountant was filed by the Public Prosecution Service (Openbaar Ministerie) following a criminal investigation of a dairy farmer who allegedly committed tax fraud. Between February 2006 and February 2008, the accountant had filed for tax refunds on behalf of the farmer. In August 2008, the farmer confessed to the accountant that the invoices on which these filings were based were falsified. The accountant did not disclose this fact to tax authorities until 2011.

The Accountancy Division ruled that the accountant should have reported the fraud to the tax authorities on its own initiative, although this would have led to the accountant breaching its obligation of confidentiality. According to the court, it is in the public interest that fraud involving public funds be disclosed promptly, especially if the fraud covers a substantial amount (in this case €2.2 million).

Until 31 December 2013, the Dutch Code of Conduct Regulation (the CCR) included a rule requiring accountants to disclose confidential information in certain situations. However, this rule was not included in the Accountants Code of Conduct Regulation (the ACCR), which replaced the CCR on 1 January 2014. In the wake of this disciplinary decision, commentators are advocating an amendment of the ACCR to include a rule requiring disclosure of confidential information in certain situations.

Enhanced audit statements for Organizations of Public Interest

The Netherlands Institute of Chartered Accountants (Nederlandse Beroepsorganisatie van Accountants) (the NICA) published a new standard — the so-called "Standard 702N" — for audit statements for Organizations of Public Interest[1] (Organisatie van Openbaar Belang) (OPI). This standard was adopted in an effort to conform to standards established by the International Auditing and Assurance Standards Board (the IAASB), which will be effective for audits of financial statements for periods ending on or after 15 December 2016.

The new NICA standard requires audit firms to elaborate in more detail on the manner in which the audit has been performed and to identify "key audit points," summarizing the most important findings. The new standard was the subject of a pilot study during the 2013 fiscal year, through which large accountancy firms tested the expanded audit statement with some of their clients, including Dutch listed companies. The initial outcomes were positive and led to the introduction of the new Dutch Standard for all OPI's in 2014.

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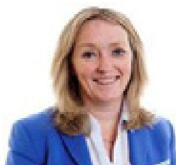

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[1] An Organization of Public Interest is defined as a (i) legal entity established in the Netherlands of which the securities are admitted to trading on a regulated market; (ii) bank established in the Netherlands which is granted a bank license in accordance with the Financial Supervision Act (FSA); (iii) central credit institution established in the Netherlands which is granted a license 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 according to further determined categories are regarded as bodies by which — as a consequence of their size or function in social and economic life — a faulty performed statutory audit can have a substantial influence on the confidence in the public function of the audit opinion.

Singapore

The Accounting and Corporate Regulatory Authority (ACRA), Singapore's regulatory agency that oversees business entities and accountants, announced that all applicants seeking to register as public accountants must have at least 2,500 hours of qualifying experience (e.g. tasks related to the planning, leading, or reporting of conclusions of audit engagements). The rationale behind this requirement is to ensure that public accountants are capable of effectively performing tasks upon which the public relies (e.g. audits of financial statements). This practical experience requirement took effect on 1 February 2015.

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United States

Outside auditors not liable under Section 10(b) for relying on third party tax preparer

The federal district court for the Southern District of New York ruled in November that a corporation's outside auditor is not liable under Section 10(b) of the Securities Exchange Act of 1934 for relying on the tax opinion of a third party CPA.

Judge Shira Scheindlin, in *In re OSG Securities Litigation*, 2014 WL 6748286 (S.D.N.Y. Nov. 28, 2014), denied a motion by securities class action plaintiffs to amend their complaint to add Section 10(b) claims against Ernst & Young (EY) and PricewaterhouseCoopers (PwC). The plaintiffs alleged that EY and PwC were reckless in failing to investigate a third party's tax liability assessment of Overseas Shipholding Group, Inc. (OSG).

The court held that although EY and PwC were legally required to perform audit procedures with respect to claims made by OSG management, the firms were not required to similarly investigate statements, such as tax opinions, made by third-party tax preparers. Judge Scheindlin's decision rested on her conclusion that third party tax preparers — unlike corporate management — do not have any incentive to distort financial statements. Instead, such third party tax preparers owe their clients a duty of care and face potential liability for performing erroneous calculations. Therefore, it was reasonable for EY and PwC to rely on the third party tax opinions, and they were not reckless under Section 10(b).

Court maintains high bar for Section 10(b) claims against auditors

Last month, another federal judge dismissed Section 10(b) and Rule 10b-5 claims against EY's Chinese affiliate.

Judge Alison Nathan of the Southern District of New York granted the motion to dismiss filed by Ernst & Young Hua Ming (EYHM) in a class action suit over SinoTech Energy Ltd.'s initial public offering. Plaintiffs alleged that EYHM was reckless in failing to detect SinoTech's overstated assets and revenues accomplished through the use of shell companies. Specifically, plaintiffs alleged that EYHM failed to expand its audit in light of disclosed material weaknesses and therefore violated Generally Accepted Auditing Standards (GAAS). Judge Nathan held that the purported class failed to state a claim because the complaint did not plead with sufficient particularity that EYHM acted recklessly; the "mere allegation that EYHM violated GAAS" without correlating fraudulent intent is insufficient to show recklessness.

These cases show that courts still take the Securities Exchange Act's scienter requirement seriously in Section 10(b) suits.

IAASB releases updated auditor reporting standards

The International Auditing and Assurance Standards Board (IAASB) released updated standards intended to overhaul auditor reports going forward.

In January, IAASB released new and revised auditor reporting standards designed to change how auditors report the results of their audits. The goal of the new standards is to make auditor reports more transparent for investors and other key stakeholders. To that end, in accordance with ISA 701, auditors must now report "Key Audit Matters," which include "[t]hose matters that, in the auditor's professional judgment, were of most significance in the audit …." This new provision will be effective for all audits of financial statements for periods ending on or after 15 December 2016.

Separately, the Public Company Accounting Oversight Board has been working on updated standards to improve auditors' reports in the U.S, and is currently considering a proposal to require disclosure of "critical audit matters."

FASB considers delaying revised revenue recognition standard

The Financial Accounting Standards Board (FASB) is debating whether or not to delay implementation of planned changes to its customer contract revenue recognition standard.

The FASB released the revised standard jointly with the International Accounting Standards Board (IASB) last May in an effort to "improve and converge one of the most important areas of financial reporting," according to FASB Chairman Russell Golden, and to "eliminate a major source of inconsistency in GAAP." The new standard created a five-step process for revenue recognition based on the transfer of control of goods or services. For U.S. public

companies, these new revenue recognition rules were set to take effect for reporting periods beginning after 15 December 2016.

Last month, the FASB announced that it is considering deferring the effective date of the new rules, but the Board did not hint at a new effective date. The FASB has received "roughly 1,400 comment letters" regarding challenges in implementing the new standards from companies such as Adobe Systems, Inc. and Symantec Corp. The FASB plans to announce whether or not it will delay the rules' implementation in the second quarter of 2015.

Chinese Big Four and SEC reach settlement

After months of wrangling, the Securities and Exchange Commission (SEC) and Chinese affiliates of the Big Four accounting firms settled a dispute stemming from the affiliates' objections to disclosing certain documents to the American regulatory agency. The settlement was announced by the SEC on 6 February 2015.

Under the terms of the settlement, the firms will pay fines of US$500,000 each and the SEC action pending against them will be stayed for four years. The stay avoids the immediate threat of a six-month bar on auditing work, which had been recommended by an Administrate Law Judge hearing the original proceeding. During the four year stay, if future document productions do not meet specified criteria, the SEC may: (1) issue an automatic six-month bar preventing the settling parties from performing certain audit work; (2) resume the current proceeding; or (3) commence a separate proceeding against any single firm. The original proceeding will be dismissed at the conclusion of the four years if it is not resumed in accordance with the settlement agreement.

The Big Four's Chinese affiliates originally argued that they were prohibited from disclosing audit documents to American regulators under strict Chinese laws. In the settlement, the parties agreed to a set of procedures that would govern future document requests by the SEC to the Chinese affiliates. The settlement's framework for future disclosure requires production of documents to the China Securities Regulatory Commission, and continues to allow Chinese authorities to review and object to production of documents to U.S. regulators.

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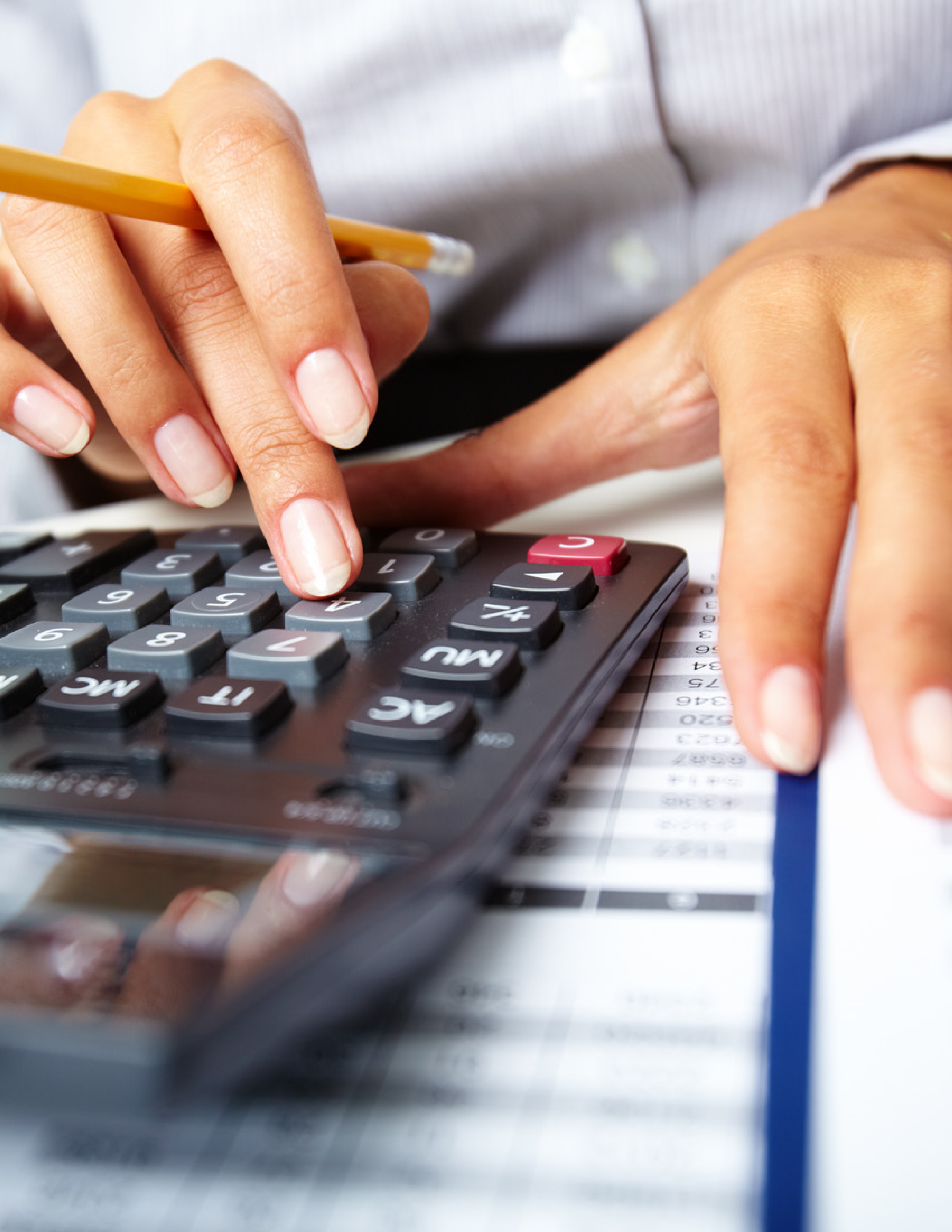

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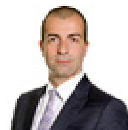

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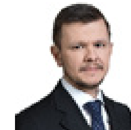

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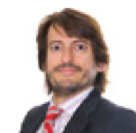

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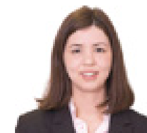

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