Hogan Lovells

Global Accountants' Liability Update

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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, Japan, Mexico, the Netherlands, Singapore, South Africa, Spain, the UAE, Egypt, Qatar 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, Hong Kong, Italy, Japan, Mexico, the Netherlands, Spain, and the United States, which are summarized in the pages that follow.

Douglas M. Schwab
Of Counsel, San Francisco
douglas.schwab@hoganlovells.com
T +1 415 374 2309

Dennis H. Tracey, III
Partner, New York
dennis.tracey@hoganlovells.com
T +1 212 918 9524

China

China relaxes pricing controls for audit services

On 17 December 2014, the National Development and Reform Commission (NDRC) issued the *Notice of the National Development and Reform Commission on the Opinions for Opening up Parts of the Service Fees* (Opinions), relaxing limitations on fees accounting firms may charge for audit services. The Opinions permit accounting firms to adopt market pricing for audit services. The new regulations apply to audit services, including: (1) review of accounting statements of enterprises, and issuance of audit reports; (2) verification of enterprise capital, and issuance of capital verification reports; (3) and audit services in connection with merger/consolidation, division, or liquidation of enterprises, and issuance of relevant reports, etc.

Before the Opinions became effective on 17 December 2014, accounting firms were required to comply with government-guided prices for the above mentioned audit services in accordance with Article 4 of *Administrative Measures for Charging of Service Fee by Accounting Firms* (Administrative Measures) issued by NDRC on 27 January 2010. Article 4 required that prices for audit services be reasonably determined within the prescribed benchmark price and floating range established by local branches of NDRC. A special rule established in the *Rules for the Bid Invitation of Accounting Firms for the Audit Entrustment* issued by Ministry of Finance (MOF) dated 26 January 2006 and the *Notice of the Ministry of Finance on Further Implementing the Administrative Measures for Charging of Service Fee by Accounting Firms* issued by MOF on 1 September 2011, allowed accounting firms bidding for services to reduce their initial bid price to meet special requirements identified by the entrusting party as long as the revised bid preserved good practice quality. All bidding prices were also required to be greater than 75% of the minimum limitation of the government-guided price prescribed by the local branch of NDRC; otherwise the bid was treated as abandoned.

After the Opinions became effective, the fees charged by accounting firms shall generally be market regulated, whether they are established through competitive bidding or not. The benchmark prices and floating price range established by the local branches of NDRC are no longer applicable. However, it is still uncertain whether NDRC will issue new regulations limiting the reductions accounting firms can make to their bid prices when bidding for audit services contracts.

Therefore, under the newly issued Opinions, the limitations on the fees charged for audit services by accounting firms will be relaxed to some extent. However, accounting firms are still required to: (1) provide qualified and reasonably pricing for audit services; (2) publish and post their price lists, a complaint telephone number, and other information in prominent positions on their business premises; (3) refrain from providing service or charging fees forcibly; charging fees for services not provided; or charging more fees by providing less services; and (4) refrain from charging any unspecified fees beyond the published prices.

For more information on this subject, contact:

Roy G. Zou
Partner, Beijing
roy.zou@hoganlovells.com
T +86 10 6582 9488

France

No accountant liability when client overpays taxes calculated on erroneous data provided by client

A noteworthy decision about chartered accountants' liability was handed down by the Grenoble Court of Appeal on 18 December 2014. The court held that chartered accountants cannot be held liable for incorrect annual tax returns when their client provides them with incorrect monthly figures.

In this case, the defendant (KPMG) was charged by the client with inaccurately presenting the client's annual accounts and tax returns. For six years, the client had communicated incorrect data to KPMG and, therefore, paid more taxes than necessary. The client asserted that the auditor was liable because checking the accuracy of the annual accounts was part of its mission.

In its decision, the Grenoble Court of Appeal concluded that KPMG was not liable because its mission to check the accuracy of annual accounts did not imply the verification of the accuracy of the monthly account information transmitted by the client. Furthermore, the court established that KPMG had previously advised the client as to how to calculate the monthly figures. This decision does not represent a new precedent but tends to clarify in greater detail the boundaries of the liability of chartered accountants in France.

Draft bill could expand accountants' permissible scope of work

We also note that the Ministry for the Economy will submit a new bill to the French Assembly at the end of January. This bill reduces the scope of the activities that cannot be handled by accountants, such as prohibitions on legal and tax advice and the drafting of private deeds (actes sous seing privé).

For more information on this subject, contact:

Thomas Rouhette
Partner, Paris
thomas.rouhette@hoganlovells.com
T +33 1 53 67 47 47

Hong Kong

Hong Kong set to extend provision that allows financial institutions to rely on CPAs to conduct customer due diligence

An amendment to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO) was proposed by the Financial Services and Treasury Bureau on 24 December. The amendment would extend a provision of the AMLO that allows financial institutions to rely on certified public accountants to carry out customer due diligence (CDD).

The AMLO originally came into operation on 1 April 2012. It requires that financial institutions comply with specific CDD measures and record-keeping requirements. Schedule 2 to the AMLO permits a financial institution to carry out any CDD measure through an intermediary, which may be *a certified public accountant practicing in Hong Kong*, if

- the intermediary consents in writing to be the financial institution's intermediary; and
- the financial institution is satisfied that the intermediary will on request provide a copy of any document, or a record of any data or information, obtained by the intermediary in the course of carrying out the CDD measure without delay.

This 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. Without the amendment, a sunset clause will cause it to expire on 31 March 2015.

The amendment, which will likely come into effect on 23 January, would extend the provision permitting financial institutions to rely on qualified intermediaries to carry out CDD measures until 31 March 2018. In the meantime, the government will continue to work with the relevant sectors of specified intermediaries to enhance and strengthen their anti-money laundering/counter-terrorist financing compliance.

For more information on this subject, contact:

Allan Leung
Partner, Hong Kong
allan.leung@hoganlovells.com
T +852 2840 5061

Italy

Italian law establishes criminal and civil liability for specific auditing tasks

Italy recently adopted a law that exposes auditors to expanded criminal and civil liability relating to specific auditing tasks.

An Italian law enacted in 2013, Article 3 of Law Decree no. 145 of 2013, provides favorable fiscal treatment for companies and enterprises that invest money in research and development through 2019. Such companies qualify for a tax credit equal to 25% of their increased expenses — as compared to their expenses in the previous 3 years. In order to obtain these benefits, companies must provide specific accounting documentation, which must be certified by "*the entity authorized to legal auditing or by the Board of Statutory Auditors or by a professional accountant entered in the Register or Auditors.*"

Article 1, paragraph 35 of the Law no. 190 of 23.12.2014, amends the 2013 law to clarify that the person in charge (and responsible) for the auditing activity relevant to the certification of said documents is subject to liability pursuant to Article 64 of the Italian code of civil procedure (which applies to Court Appointed Experts). As a result, partners and other professionals of an accounting firm might be: (1) liable in cases of gross negligence for the damage they caused and might also be arrested or sanctioned with a criminal fine of approximately 10,000 Euros; (2) charged pursuant to a number of criminal provisions concerning embezzlement (articles 314 et seq.), refusal of office duties (article 366), perjury of the expert (article 373); and (3) suspended from their professional activity.

For more information on this subject, contact:

Andrea Atteritano
Of Counsel, Rome
andrea.atteritano@hoganlovells.com
T +39 06 6758 23 1

Japan

Japan amends Companies Act to expand company auditor authority and authorize new derivative actions

On 25 November 2014, the Ministry of Justice announced that an amendment of the Companies Act, which was first published on 27 June 2014 (No.90 of 2014, Amendment), is expected to enter into force on 1 May 2015. This Amendment will impact accountants' liability in several ways.

Authority of company auditors to appoint/dismiss accounting auditor expanded

Currently, only directors (or the board of directors in case of a company with a board of directors) have the power to make proposals at shareholders' meetings. However, company auditors — the board of company auditors at a company with a board of company auditors, or the audit committee at a company with an audit committee — have the power to dismiss an accounting auditor(s) under certain conditions.

The Amendment will enable company auditors to make proposals at a shareholder's meeting regarding the retention or dismissal of accounting auditors.

New derivative action permitted

The Amendment establishes a new derivative action that enables stock holders of the sole parent company to state a claim for liability against directors, company auditors, accounting auditors etc. of the child company under certain circumstances. This new derivative action, however, will not apply to foreign companies because child companies or parent companies are limited to companies established under Japanese Laws.

Prior to this Amendment, owners of stock in a parent company who claimed to have suffered damages due to the negligence of a child company's director relied on Article 429 of the Company Act, which establishes "liabilities for the third party" and Article 709 of the Civil Code, which establishes "general tort liabilities." Article 429 of the Company Act, like the new provision discussed above, sets out liabilities applicable only to companies established under Japanese Law. However, Article 709 of the Civil Code is applicable regardless of where the companies are legally established.

Disclosure

Companies that limit the authority of auditors in their non-public Articles of Incorporation must make such limitations public on their commercial registry.

For more information on this subject, contact:

Eiichiro Kubota
Partner, Tokyo
eiichiro.kubota@hoganlovells.com
T +81 3 5157 8247

Mexico

Mexican regulations set certification requirements for auditors who contract with the National Banking and Securities Commission

Background

On 10 January 2014, the Credit Organizations and Auxiliary Activities General Act (Ley General de Organizaciones y Actividades Auxiliares del Crédito) was amended. This statute governs activities of financial institutions and sets forth criminal and monetary sanctions for institutions (and their officers) who fail to comply with their duties under this act and, more importantly, who foster or tolerate money laundering and terrorism.

Through the amendment, the National Banking and Securities Commission (Commission) was appointed to oversee the activities carried out by financial institutions in order to verify compliance and proper management of resources. As a consequence, the Commission was also empowered to design and put in place requirements that external auditors must meet to be hired as auditors to assist the Commission in its oversight and verification activities.

Developments in December 2014

In our November Update, we outlined regulations issued by the Mexican Treasury Department and Commission that set forth the certification requirements for those that wish to provide auditing services relating to compliance with the Anti-Money Laundering Act services to private parties.

On 1 December 2014, the Commission issued the final regulations, which entered into force 2 December 2014, establishing certification requirements auditors and accountants must meet in order to provide auditing services to the Commission. Such auditors will aid in the Commission's inspection duties with regards to money laundering and financing of terrorism and must meet inter alia the following standards

- individuals must have a degree and relevant experience related to the matter;
- companies must have such verification activities in their by-laws or articles of incorporation and have relevant experience in the field;
- individuals or firms must not render other services to the inspected companies; and
- auditors must obtain certification before the Commission in money laundering related matters.

The Commission will enter into a services agreement with qualified auditors. Agreements will be awarded through public bids or direct appointment under the Public Sector's Acquisition, Leasing and Services Act (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público).

If an appointed auditor breaches the services agreement, acts in bad faith or commits fraud, or makes false representations before the Commission, the auditor could be liable for breach of contract damages as well as for administrative and even criminal sanctions under this act and the Federal Criminal Code.

For more information on this subject, contact:

Omar Guerrero Rodríguez
Partner, Mexico City
omar.guerrero@hoganlovells.com
T +52 55 5091 0162

The Netherlands

The Netherlands takes action to ensure auditor independence

There were two noteworthy developments in the laws and regulations for accountants and accounting firms in the Netherlands in December 2014.

Accounting Bodies Regulation

On 1 January 2015, the amended Accounting Bodies Regulation (Verordening accountantsorganisaties) (the ABR), came into effect. Following recent adoptions of European legislation, more specifically the adoption of Directive 2014/56/EU[1] and Regulation (EU) No 537/2014[2], the Netherlands Institute of Chartered Accountants (Nederlandse Beroepsorganisatie van Accountants) (the NICA), has adopted the renewal of the ABR in accordance with these European guidelines.

The amended ABR, which also conforms to the rules of the International Federation of Accountants, contains rules relating to the independence, quality control system, and ethical business operations for accounting bodies. The most important amendment of the ABR consists of an entire new chapter establishing standards for the independence of accounting bodies.

Pursuant to these rules, accounting bodies will inter alia be obliged to

- refrain from performing a statutory audit in the event of certain specific situations in which the independence of the accounting body cannot be guaranteed while the respective situations are not repairable by any measures;
- appoint an officer within the accounting body that supervises the compliance with the rules of independence prescribed by law, more specifically the rules laid down in the Accountancy Profession Act (Wet op het accountantsberoep);

- inform its employees on the legal rules regarding independence and provide for education in this respect; and
- follow certain strict procedures in which the Netherlands Authority for the Financial Markets (AFM) shall be involved, in case an accounting body will continue to perform a statutory audit while due to special circumstances the accounting body is no longer compliant with the rules of independence prescribed by law.

In addition, the ABR prescribes that if an accounting body wishes to terminate an audit due to the fact that it is engaged in legal proceedings with the instructing party, the accounting body is obliged to liaise with the AFM prior to the termination of the audit on the timing of the termination as well as the manner of transferring the audit to another accounting body.

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

2 Regulation (EU) no 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC.

These new rules apply to every accounting body that holds an AFM permit for performing statutory audits. Accounting bodies that fail to comply with these new rules will be subject to disciplinary proceedings that could result in it loss of AFM permit.

Audit Firms (Supervision) Act

On 11 December 2014, an amendment to the Audit Firms (Supervision) Act (Wet toezicht accountantsorganisaties) was enacted and most of the new rules included in this amendment entered into effect on 1 January 2015.

The most important amendment extended the prohibition for accounting firms to perform non-audit services for an Organization of Public Interest[3] (Organisatie van Openbaar Belang) (OPI) for which it also performs statutory audit services. As of 1 January 2015, accounting firms will also be prohibited from performing non-audit services for *affiliated entities* of OPI's for which they perform statutory audits. In addition, according to the amendment, accounting firms forming part of an "associative network"[4] will be prohibited from performing statutory audits for an OPI in the event

- another Dutch body of that associative network performs non-audit services for the respective OPI or for a Dutch affiliated entity of the respective OPI; and
- a foreign firm of the associative network of the accounting body performs non-audit services for the OPI or for an affiliated entity of the respective OPI established in the Netherlands.

3 An Organization of Public Interest is defined as a: (1) legal entity established in the Netherlands of which the securities are admitted to trading on a regulated market; (2) bank established in the Netherlands which is granted a bank license in accordance with the Financial Supervision Act (FSA); (3) central credit institution established in the Netherlands which is granted a license in accordance with the FSA; (4) reinsurer, life insurer, or non-life insurer established in the Netherlands which is granted a license in accordance with the FSA; and (5) 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.

4 The amendment does not define "associative network," however from the explanatory notes on the amendment decision it follows that it refers to accounting bodies that form part of the same legal concern.

This amendment takes aim at big accounting firms that are usually organized through several legal entities providing services under a common name. It acknowledges that users of financial information should not be expected to distinguish between the authorized accounting firms and the associated network.

This statutory amendment was passed because it was believed that existing requirements to assess independence when another firm within its network performs non-audit services to the OPI or its affiliates were too subjective and open to influence by corporate and financial incentives.

For more information on this subject, contact:

Manon Cordewener
Partner, Amsterdam
manon.cordewener@hoganlovells.com
T + 31 20 55 33 691

Spain

Spanish Ministers Council analyses draft Audit Act

As we have previously reported, a draft Audit Act (Act) is progressing through the Spanish parliamentary process. The draft Act has now passed the public hearing stage and has been revised to incorporate some of the 24 comments and remarks received. In the next stage, the draft Act will be analyzed by the State Council (Consejo de Estado) before being approved by the Ministers Council and sent to the Parliament for discussion and approval.

On 26 December, the Spanish Ministers Council published an analysis of a report issued by the Ministry of Economy concerning the draft of the Act. That analysis explained that the objective of the Act is to enhance the quality of audit reports so as to improve confidence in and the reputation of the Spanish economy.

It would require that every Public Interest Entity have an Audit Committee. Public Interest Entities include credit entities, insurance companies, public companies (including those operating in the Alternative Stock Exchange Market, known in Spain as MAB), collective investment entities, pension funds, and mutual guarantee entities. The members of these audit committees would be non-executive directors, the majority of whom must be independent. They shall

- inform the Board of Directors of the audit result;
- supervise the financial information provided;
- authorize services to be rendered by auditors;
- examine the threats to the auditors' independence; and
- be liable for the appointment of auditors.

In addition, the draft Audit Act provides for a 10-year maximum term for audit firm appointments and reduced fees when auditing Public Interest Entities.

For more information on this subject, contact:

Joaquin Ruiz Echauri
Partner, Madrid
joaquin.ruiz-echauri@hoganlovells.com
T +34 91 349 82 00

United States

SEC considers optional use of IFRS by U.S. Companies

The Securities and Exchange Commission (SEC) is considering allowing American companies to voluntarily supplement their financial statements with material audited in accordance with International Financial Reporting Standards (IFRS).

SEC Chief Accountant James Schnurr recently revealed that he is pursuing a proposal to give companies the option of providing IFRS-prepared supplementary information in SEC filings while retaining Generally Accepted Accounting Principles (GAAP) as the primary accounting standard for U.S. companies. Only foreign private issuers are currently allowed to use IFRS, while U.S. companies are restricted in their use of "non-GAAP" financial measures, such as IFRS, in financial statements. Schnurr's proposal would permit American companies who believe that their investors would benefit from IFRS-based information to provide it in addition to GAAP-based information. Companies who do not see benefits to investors from IFRS use, though, would not be required to take on the attendant compliance costs.

While full adoption of IFRS has not been ruled out, Schnurr's voluntary adoption proposal looks likely to go forward. SEC Commissioner Daniel Gallagher has called it a "brilliant" next step, while the Financial Accounting Standards Board agreed that "voluntarily providing IFRS information on a supplemental basis, subject to audit, SEC review, and other regulatory scrutiny, could be an important tool" for American companies. Steven Jacobs, a partner in Ernst & Young's Professional Practice Group, predicts that issuing IFRS-based information will benefit American companies competing with foreign private issuers because such companies might "want to have comparable information to their peers." A change in the law still seems to be some way off, since, according to Schnurr, "any rulemaking proposal that the Commission decides to consider would be subject to the normal notice and comment process."

Big Four accounting firms, SEC progress toward settlement of China dispute

The SEC Enforcement Division and Chinese affiliates of the Big Four accounting firms see light at the end of the tunnel in a long-running dispute over the Big Four's competing regulatory requirements regarding disclosure of client audit documents.

On 15 December the SEC granted the Big Four's Chinese affiliates and the Enforcement Division a 70-day extension of the briefing schedule for an appeal of an administrative order preventing the Chinese affiliates from auditing U.S.-listed companies. The SEC originally sought work papers from the Chinese affiliates of Ernst & Young, Deloitte, KPMG, and PricewaterhouseCoopers regarding audits of Chinese clients listed in the United States; the auditors all rejected the request, citing strict Chinese laws treating such information as "state secrets." In January

2014, an administrative judge found the firms to be in violation of the Securities Exchange Act of 1934 and Section 106 of the Sarbanes-Oxley Act, and he barred the firms for six months from appearing or practicing as auditors before the SEC.

The recently-granted extension to the briefing schedule is the parties' third, but it is expected to be their last. In fact, the parties have been talking since June and "the substantial progress already made towards settlement has increased significantly" since the previous extension request. With the Big Four firms' opening brief now due by 26 February 2015, many expect a settlement before that date.

SEC sanctions Hong Kong-based audit firm for ignoring red flags

The SEC imposed sanctions on Hong Kong-based audit firm Baker Tilly Hong Kong Limited (Baker Tilly), as well as two auditors, for improper audits of a client's year-end financial statements.

The SEC originally filed fraud charges against Baker Tilly audit client China North East Petroleum Holdings (CNEP) in November 2012. After its investigation, the SEC concluded that Baker Tilly, its director Andrew Ross, and its former director Helena Kwok, "ignored red flags surrounding approximately US$59 million in related-party transactions reflected in internal accounting records" suggesting that these transactions "involved a high risk of fraud." Baker Tilly's audit of that year's financials led to financial statements that failed "to adequately disclose the magnitude of the related-party transactions" and to disclose that the beneficiaries of those transactions were the CNEP CEO and his mother.

As a result of their settlement with the SEC, Ross and Kwok are barred from practicing before the SEC as accountants for three years, and they must pay civil penalties of US$20,000 and US$10,000, respectively. Baker Tilly must disgorge its US$75,000 audit fee plus prejudgment interest. Finally, Baker Tilly may not accept any new U.S. audit clients until its compliance with SEC regulations and PCAOB standards has been certified by an independent consultant.

PCAOB releases 2014-2018 strategic plan, targets improved transparency, and economic analysis

The Public Company Accounting Oversight Board (PCAOB) recently released its 2014-2018 strategic plan, outlining the ways in which the Board seeks to improve its own performance and the reliability of accounting practices in the coming years.

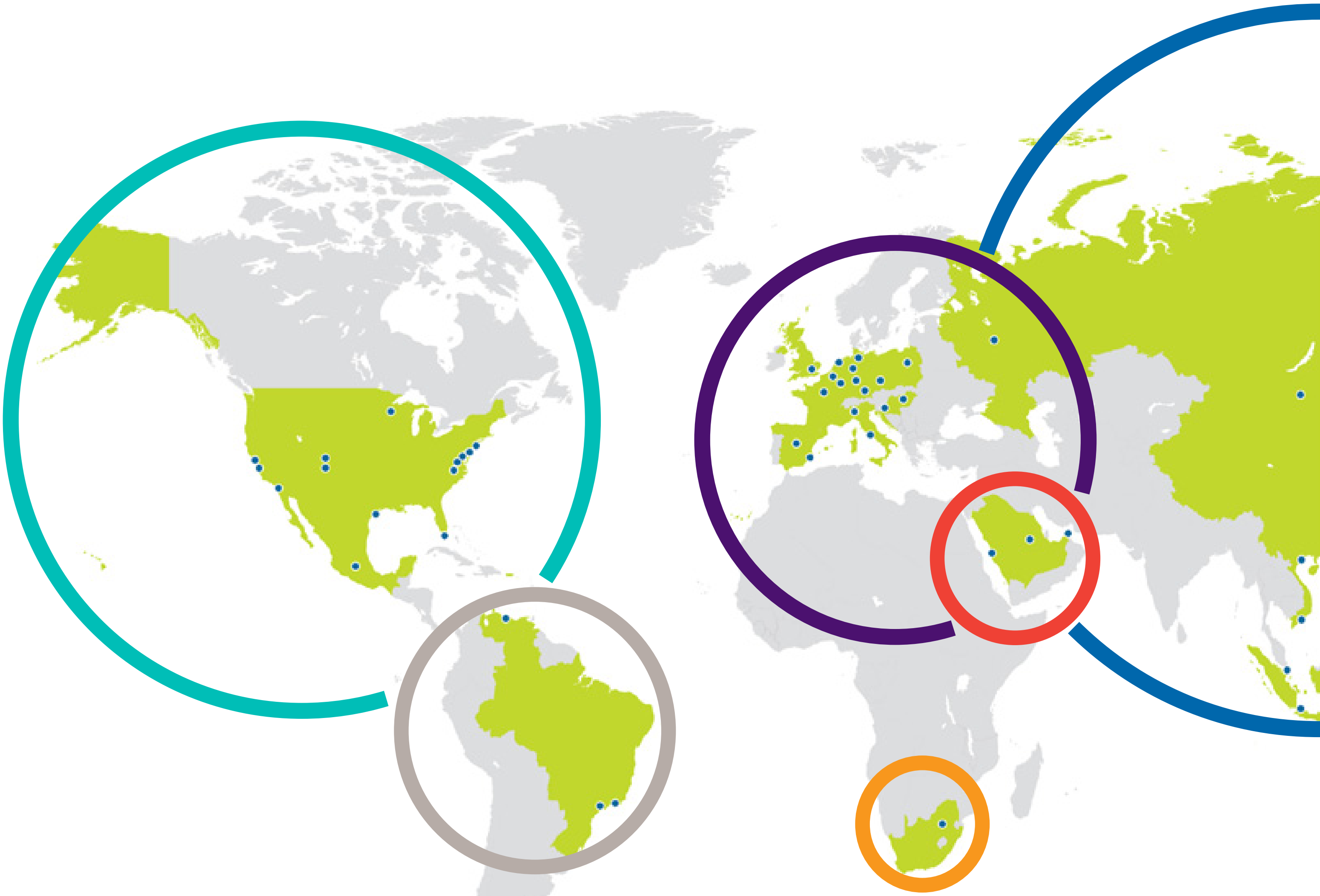
One of the PCAOB's 2015 "priority projects" is the "further integration of economic analysis into the PCAOB's programs." According to PCAOB Chairman James Doty, this goal builds on the PCAOB's 2013 establishment of the Center for Economic Analysis. The Board's economic analysis will go beyond mere auditing practices to consider "the levers that move auditor incentives" and "the economic impact of [regulators'] own actions."

Among the Board's most important stated objectives is improving "transparency" in the audit process. According to the strategic plan, the PCAOB is implementing initiatives such as improvements in "the timeliness, content and readability of inspection reports and general reports" and "coordination with the SEC's initiatives" in order to improve audit transparency. In addition, following on an earlier PCAOB proposal, the Board also plans to implement a requirement for "identification of audit partners and other accounting firms participating in audits."

For more information on this subject, contact:

Pooja A. Boisture
Associate, New York
pooja.boisture@hoganlovells.com
T +1 212 918 3232

Our Global Accountants' Liability Team



North America

Douglas M. Schwab
Of Counsel, San Francisco
douglas.schwab@hoganlovells.com
T +1 415 374 2309

Dennis H. Tracey, III
Partner, New York
dennis.tracey@hoganlovells.com
T +1 212 918 9524

George A. Salter
Partner, New York
george.salter@hoganlovells.com
T +1 212 918 3521

Omar Guerrero Rodríguez
Partner, Mexico City
omar.guerrero@hoganlovells.com
T +52 55 5091 0162

Peter J. Dennin
Partner, New York
peter.dennin@hoganlovells.com
T +1 212 918 3611

Pooja A. Boisture
Associate, New York
pooja.boisture@hoganlovells.com
T +1 212 918 3232

South Africa

Clive Rumsey
Partner, Johannesburg
clive.rumsey@hoganlovells.com
T +27 11 286 6907

Asia

Maurice Burke
Partner, Singapore
maurice.burke@hoganlovells.com
T +65 6302 2558

Eiichiro Kubota
Partner, Tokyo
eiichiro.kubota@hoganlovells.com
T +81 3 5157 8247

Allan Leung
Partner, Hong Kong
allan.leung@hoganlovells.com
T +852 2840 5061

Roy G. Zou
Partner, Beijing
roy.zou@hoganlovells.com
T +86 10 6582 9488

Middle East

Mohamed ElGhatit
Senior Associate, Dubai
mohamed.elghatit@hoganlovells.com
T +971 4 377 9211

Europe

Andrea Atteritano
Of Counsel, Rome
andrea.atteritano@hoganlovells.com
T +39 06 6758 23 1

Manon Cordewener
Partner, Amsterdam
manon.cordewener@hoganlovells.com
T + 31 20 55 33 691

Alexei Dudko
Partner, Moscow
alexei.dudko@hoganlovells.com
T +7 495 933 3000

Ruth Grant
Partner, London
ruth.grant@hoganlovells.com
T +44 20 7296 2207

Jon Holland
Partner, London
jon.holland@hoganlovells.com
T +44 20 7296 2694

Kim Lars Mehrbrey
Partner, Dusseldorf
kim.mehrbrey@hoganlovells.com
T +49 211 13 68 473/476

Thomas Rouhette
Partner, Paris
thomas.rouhette@hoganlovells.com
T +33 1 53 67 47 47

Joaquin Ruiz Echauri
Partner, Madrid
joaquin.ruiz-echauri@hoganlovells.com
T +34 91 349 82 00

Nina Tulloch
Senior Associate, London
nina.tulloch@hoganlovells.com
T +44 20 7296 5667

www.hoganlovells.com

Hogan Lovells has offices in:

Alicante
Amsterdam
Baltimore
Beijing
Brussels
Budapest*
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
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