Hogan Lovells

Global Accountants' Liability Update

MAY 2015

Contents

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 France, Germany, Hong Kong, Italy, 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

Recent Court Decisions

France

French appellate court finds accountant liable for client's tax penalties

On 16 April 2015, the Orléans Court of Appeal handed down a decision addressing an accountant's liability for a client's tax adjustments.

In this case, the client, a restaurant, was subject to a tax audit in 2011. The audit identified several tax violations, including incorrect VAT returns. The restaurant's managers then initiated proceedings against their accountant, asserting that the accountant was liable for its tax penalties because

- the accountant accepted unofficial documents for the purpose of calculating the restaurant's VAT;
- the accountant did not provide the participants of the general meetings with the minutes of said meetings; and
- the accountant issued inaccurate pay slips.

Under French law, the scope of an accountant's liability is tied to the wording of the engagement letter, which defines the scope of the work entrusted to the accountant. The Court explained that the contract between an accountant and his/her client must be analyzed before assessing whether the accountant has met his or her obligations to the client.

The court also explained that regardless of the scope of an accountant's engagement, he or she has a duty to provide certain information and advice. These inherent duties include

- a duty to warn clients of any accountancy irregularities; and
- a duty to provide clients with information about, and advise on, the tax, social, or financial options that are available to them.

The Orléans Court of Appeal ruled that the accountant could not be held liable for not having issued the minutes of the general meetings and for having issued inaccurate pay slips because the accountant's engagement was only for the presentation of the accounts and did not include an audit of the company's financial statements. Issuing reports and checking the pay slips of the restaurant was therefore not part of the accountant's engagement.

However, the Court of Appeal ruled that the accountant was liable for failure to comply with the duty to provide information and advice to the clients. Indeed, the court pointed out that, for five years, the accountant had wrongfully accepted unofficial documents provided by the clients to calculate VAT, and never requested additional information or notified the restaurant's managers that these documents had no probative value. The court acknowledged the good faith of the claimants who did not seem to be aware that official documents had to be provided to the French tax authorities.

To assess the damages to be paid by the accountant to the claimants, the Orléans Court of Appeal relied on the concept of "loss of opportunity" ("perte de chance"). The claimants were awarded damages for the loss of the opportunity to avoid tax penalties or, at least, to pay a smaller fine and the accountant was ordered to pay €23,360 (50 percent of the amount of the tax adjustments).

This decision underscores that the French courts will examine engagement letters to determine the scope of accountants' liability in tax adjustment matters. However, accountants also have some inherent duties to provide information and advice to their clients.

For more information on this subject, contact:

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

Recent Court Decisions

Germany

German Federal Constitutional Court to decide on the constitutionality of Sec. 56 of the German Insolvency Statute according to which only natural persons but no legal entities can be appointed as insolvency administrators

The German Federal Constitutional Court (BVerfG) will soon issue a decision on the constitutionality of Sec. 56 of the German Insolvency Statute. According to Sec. 56, only independent natural persons can be appointed as insolvency administrators. Thus, accounting firms, law firms, and tax consulting firms cannot act as insolvency administrators. In 2013, a German law firm lodged a constitutional complaint asserting that this provision infringed its right of equality before law as well as its right of occupational freedom.

In response to a request from the BVerfG, the Institute of Public Auditors in Germany issued a letter on 9 March 2015 indicating that it sees no serious difficulties in allowing legal entities to act as insolvency administrators. The institute noted that strict professional codes for accountants, lawyers, and tax consultants would ensure that the responsible representatives of such entities would act independent from any conflicts of interests.

The decision, which is eagerly awaited, is expected later this year. If the BVerfG grants the constitutional complaint, this would create new business opportunities for accounting firms and others and could lead to significant market changes. Insolvency administrators at smaller firms who act as such in their individual capacity strongly oppose the admission of legal entities to serve as insolvency administrator.

For more information on this subject, contact:

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

Recent Court Decisions

Italy

Italian Supreme Court limits accountant's right to indemnification from client's directors and statutory auditors

The Italian Supreme Court issued a judgment on 17 April 2015 that addresses the important question of whether an accountant can seek indemnification from a client's directors and statutory auditors.

Factual background
In this case, two companies instructed KPMG to perform an audit. KMPG's mandate agreement expressly obligated it to audit cash and reconcile bank balances. The companies alleged that KPMG breached its duty by failing to report some shareholders' missing payments, which were relevant to a capital increase approved by shareholders. The companies sought compensation for damages in an amount at least equal to the missing payments.

KPMG sought dismissal of all the plaintiffs' claims or, alternatively, indemnification by former directors and statutory auditors (joined as third parties in the proceedings) in the event of an unfavorable decision. In the course of the proceedings, KPMG also filed an action in recourse against the former directors and statutory auditors.

Court's decision
The lower courts upheld the plaintiffs' claims and dismissed KPMG's indemnification claim and action in recourse. This decision was affirmed by the Supreme Court of Cassation, which reasoned:

1. Concerning the **breach of accounting principles**: it is not necessary to prove the breach of accounting principles if the omitted conduct is in breach of a specific obligation mandated by an agreement between auditors and audited companies. KPMG was expressly engaged to audit cash and reconcile bank balances. Its failure to report the missing payments was considered a breach of its obligations under the agreement. The court stated that, in such context, KPMG's conduct amounts to per se negligent conduct.

2. Concerning **causation**: Auditors have the burden to prove a lack of causation between the (omitted) activity and the damage. The Supreme Court clarified that the judge has authority to examine the evidence to determine whether the alleged damages would have been avoided if the auditor had conducted the omitted work. According to the Supreme Court, the lower courts correctly concluded that causation existed. In addition, KPMG did not provide evidence to the contrary, as required under the Italian rules governing the burden of proof.

   Based on previous precedents (e.g. the 1993 case *Banca Popolare di Milano v. KPMG*, Court of Milan) an accounting firm that has been proved to be negligent in carrying out an audit may not be held liable absent evidence that the damages sought were a direct consequence of the negligent conduct. This new Supreme Court decision clarifies that the judge may verify causation on his own motion and the auditors have the duty to prove the that no causation exists if the breached obligations are clearly within the scope of the mandate agreement).

3. Concerning **indemnification claim and action in recourse**: the action in recourse was dismissed on procedural grounds as untimely filed. With reference to the indemnification claim, the court stated that an accounting firm is obligated to scrutinize the actions of the directors and statutory auditors — not just conduct a "*mere formal inspection*." The court further noted that "*if the audit activity had been carried out diligently, this would have revealed the fraud or, in general, the misconduct of the statutory auditors and directors*." As a result, although the claimed damaged were caused by the negligence of both the accounting firm and the internal bodies, the accounting firm cannot avoid liability for its own actions by seeking indemnification from the directors and statutory auditors.

For more information on this subject, contact:

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

Recent Court Decisions

Mexico

Mexican court identifies requirements for audited financial statements needed to support insolvency application

Background

The Mexican Insolvency Act provides that a company seeking an insolvency judgment declaration must support its request with documents evidencing its lack of capacity to meet its financial obligations. Section 20 of the Mexican Insolvency Act specifies that the following documents must support the request

- audited financial statements for the last three years;
- report explaining the reasons that led the company to its insolvency status;
- list of the company's creditors and debtors;
- list of all assets of the company; and
- list of current litigation in which the company is involved.

If the company seeking the protection of an insolvency proceeding fails to produce these documents, a court may not grant it insolvency status.

April update

On 10 April 2015, the Third Collegiate Circuit Court in Mexico City issued a non-binding precedent describing the requirements that audited financial statements the company produces must meet in order to be considered valid

- the person issuing the financial statements of the company must have an accounting degree regardless if he or she is an independent accountant or auditor or belongs to an auditing firm; and
- this accountant must sign the financial statements.

Additionally, the court considered that for this statement to be valid, the accountant must have the following credentials

- be registered before the Mexican tax authorities;
- have a professional degree recognized by the Ministry of Public Education; and
- be certified by an authorized public accountant association empowered to do so.

Despite being a non-binding precedent, other courts may adopt the same criteria identified in this decision. Failing to meet these requirements could potentially jeopardize a commercial entity's ability to secure a declaration of insolvency.

For more information on this subject, contact:

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

Recent Regulatory and Enforcement Developments

Hong Kong

Hong Kong Institute of CPAs adopts new whistleblowing policy

The HK Institute of Certified Public Accountants is introducing a new whistleblowing policy to further strengthen its corporate governance framework. Reports on any suspected fraud, unlawful acts, impropriety, and irregularity in matters related to the Institute can be submitted to a dedicated email address or be marked "Strictly Confidential" and addressed to the Chairman of the Institute's Audit Committee.

Proposed reform to audit regulation - update papers

In our November 2014 Update, we reported that the public comment period on a legislative proposal that would expand the regulation of auditors had closed in September 2014 and that a bill would be introduced in 2015. The proposed legislation would empower the Financial Reporting Council (FRC) to inspect and investigate listed entity auditors as well as grant it authority to exercise disciplinary power over these auditors and oversee certain functions of the HK Institute of Certified Public Accountants.

The FRC is due to give its annual briefing to the Legislative Council Panel on Financial Affairs on 4 May. For this purpose, two papers have been prepared: "Progress Report on the work of the Financial Reporting Council" prepared by the FRC and "Background brief on the work of the Financial Reporting Council" prepared by the Legislative Council Secretariat. The two papers provide detailed updates on the recent work of the FRC, including its response to the above mentioned legislative proposals.

For more information on this subject, contact:

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

Recent Regulatory and Enforcement Developments

The Netherlands

Dutch bill to amend the Audit Firms Supervision Act is proposed and published for comment

On 28 April 2015, the Dutch Minister of Finance published a legislative proposal for the Implementation Act of the Directive and Regulation on statutory audits of annual accounts (the Implementation Act). This proposed legislation would amend the Audit Firms Supervision Act in order to implement the Directive 2014/56/EU[1] (the Directive) and bring it line with the EU Regulation No 537/2014[2] (the Regulation).

The proposed legislation is open for public comment until 26 May 2015. It is not yet clear when the Implementation Act will go into force but it will presumably be before the 17 June 2016 deadline set by the EU Directive.

The Implementation Act includes the following measures in accordance with the EU directive

The EU directive strives to strengthen the investor's trust in the correctness of published financial statements and consolidated financial statements by improving the quality of statutory audits. Thus the Implementation Act includes the following:

- Additional requirements to enhance the independence of accountants, such as
  - provisions preventing an accountant from being involved in decision-making of his or her audit client;
  - provisions prohibiting an accountant from entering into a transaction in financial instruments which are issued, guaranteed, or otherwise supported by an audit client unless the clients offer diversified collective investments; and
  - provisions preventing an accountant from taking on a leadership role with an audit client within a year of completing an audit.
- Requirements to enhance the professional-critical attitude of accountants: the Directive defines a '*professional-critical attitude*' as an attitude which holds an investigating mind, alertness to circumstances which can indicate possible deviations as a result of mistakes or fraud, and a critical assessment of the audit information. According to the Implementation Act, a new article in the Audit Firms Supervision Act will reference certain standards for professional-critical attitude set out in a governmental decree but this decree is not yet available.
- Requirements that statutory audits be performed in accordance with international audit standards. To date, the European Commission has not adopted international audit standards. Until international standards have been adopted, Member States are allowed to comply with national audit standards. When international audit standards have been adopted, the national standards will be amended accordingly.
- Uniform requirements for the content of the accountant's audit opinion, such as
  - the accountant's obligation to provide a description about the scope of the statutory audit, specifying which directives have been complied within the audit; and
  - the accountant's obligation to explicitly declare material uncertainties which relate to events or circumstances which might cause obvious misgivings (gerede twijfel) about the capacity of the audited client to continue its business.
- New powers for the Netherlands Authority for the Financial Markets
  - taking enforcement measures in instances where an accountant does not perform its audit in accordance with the legal requirements prescribed in article 2:393 paragraph 5 of the Dutch Civil Code;
  - imposing a prohibition on certain persons to hold a position at an audit firm or OPI; and
  - instructing an audit firm/accountant to end the performance of an audit assignment with immediate effect in case of specific circumstances.

[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.

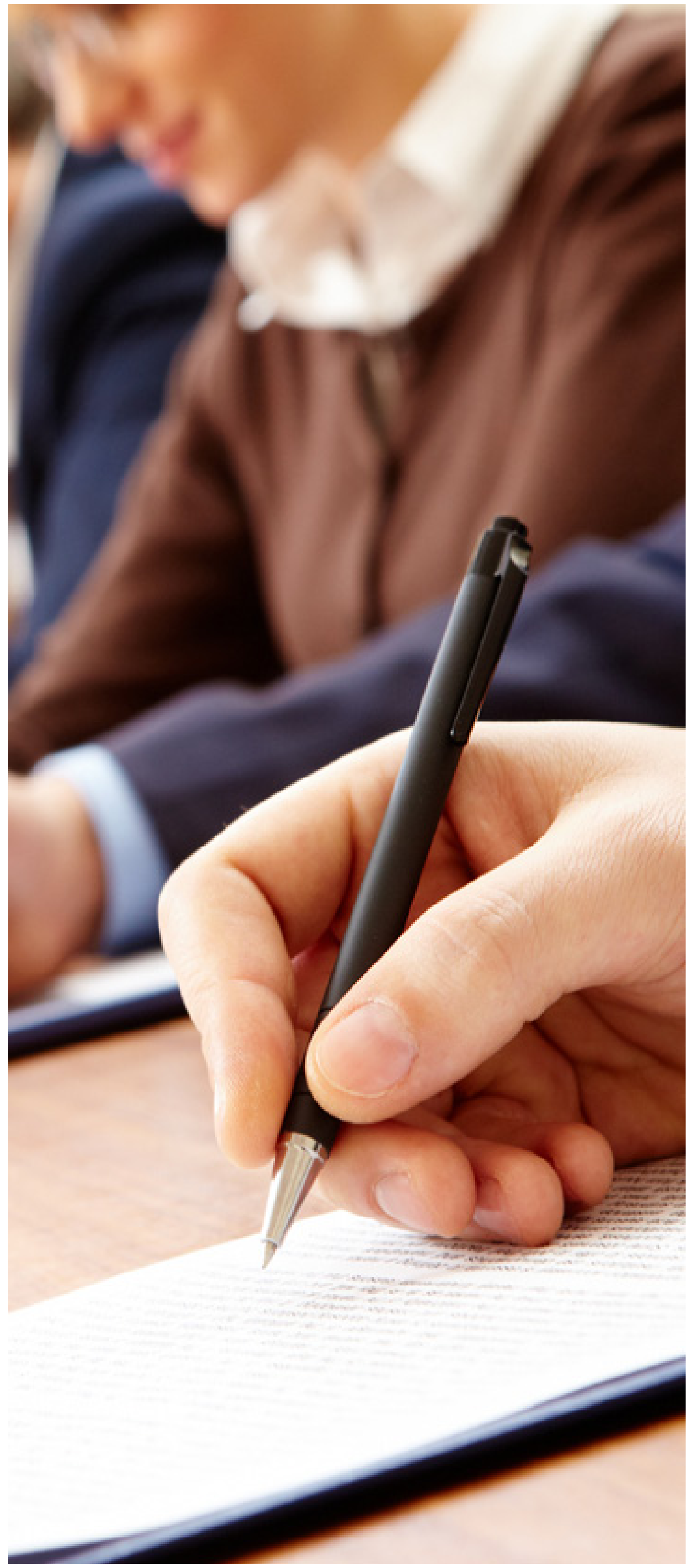
The Implementation Act includes the following measures in accordance with the EU Regulation

The Regulation contains specific requirements for statutory audits of Organizations of Public Interest[3] (OPI) and aims to improve the integrity, independence, objectivity, responsibility, transparency, and reliability of accountants and audit firms conducting the statutory audits for OPI's. Because of the direct effect of the Regulation, rules following from the Regulation do not need to be transposed into national law.

Pursuant to the Regulation there are a few topics on which the Member States are free to decide to maintain stricter national rules than prescribed by the Regulation. From the explanatory memorandum on the draft Implementation Act, it follows that The Netherlands wishes to maintain its (stricter) national rules on the following topics:

- Separation of auditing and other services in respect of OPI's: the Regulation provides for a non-exhaustive list of services that may not be provided to an OPI by audit firms/accountants that perform statutory audit services to such OPI (in order to protect the independency of the accountant performing the statutory audit), The Netherlands choose to maintain a general prohibition to perform other activities with an OPI when it is assigned to perform statutory audit services with that respective OPI.

- Maximum assignment period of five years for external accountants auditing OPI's: pursuant to article 17 of the Regulation an accountancy firm may be assigned to perform statutory audits at a respective OPI for a maximum period of ten years. The Netherlands will adopt this rule. However, pursuant to article 17 paragraph 7 of the Regulation, an external accountant (within the assigned accountancy firm) may be involved



3 An Organization of Public Interest (OPI) 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.

in the statutory audit of a respective OPI for a maximum period of seven years, but Member States may decide to apply a shorter maximum period. The Netherlands choose to apply a maximum period of five instead of seven years, thus applying a stricter regime.

Letter of the Dutch Minister of Finance to clarify the scope of accountants' obligations to report suspected fraud

In our February and March Updates, we reported on the 23 January 2015 decision[4] of the Accountancy Division addressing an accountant's confidentiality obligation. In that decision, the Accountancy Division ruled that the accountant in question should have reported its client's tax fraud to the tax authorities thereby breaching its confidentiality obligation. Considering the substantial amount of the fraud (in this case €2.2 million), the court concluded that the public's interest in discovering the fraud promptly justifies a breach of confidentiality.

As mentioned in our March Update, this decision resulted in a public debate on the scope of the accountant's obligation to report suspected fraud. Prior to this decision, accountants believed they only had an obligation to report unusual transactions and suspected fraud to the Dutch Financial Intelligence Unit (the FIU) and not also to the tax authorities. The Accountancy Division's decision requires, however, a report to the tax authorities when there is 'substantial' fraud. Since the lower limit of this reporting obligation is not clear, some interested parties called for legislation clarifying the parameters of this 'new' reporting obligation.

On 7 April 2015, the Dutch Minister of Finance wrote a letter to the parliament asserting that new legislation clarifying the parameters of this reporting obligation is not necessary. The Minister outlined the current framework of legislation and regulations and explained that 'any' fraud has to be reported to the identifiable 'users' of the information provided by accountants. In case of the Accountancy Division's decision, the tax authorities were users of the accountant's information, as the accountant had filed for tax refunds on behalf of the farmer who committed fraud.

The Minister further explained that pursuant to article 16 of the Accountants Code of Conduct and Practice, an accountant has the obligation to maintain confidentiality, unless there is a legal or professional right or obligation to disclose such information to third parties. An obligation to disclose exists when an accountant must avoid being connected with substantive incorrect information, such as fraud. Accountants must distance themselves from such information through an oral announcement to the identifiable 'users' of its information and a written note in the respective files.

The Minister's letter did not tie this disclosure obligation to the size of the fraud, but stated that any *substantive incorrect information*, such as fraud, must be disclosed. The obligation to report is thus not limited to 'substantial' fraud, as stated in the Accountancy Division's decision.

For more information on this subject, contact:

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

[4] Accountancy Division 23 January 2015, case number 13/2415 Wtra AK.

Recent Regulatory and Enforcement Developments

Spain

Spain continues to debate draft Audit Act

The National Competition and Market Commission recently announced its view that the draft Audit Act's permissive 10 year term limit for audit companies auditing Public Interest Entities is too long to ensure the independence of the audit firms. The commission called for a review of this term limit as well as clarification of the distribution of supervisory powers between the Spanish Institute of Accountants and Auditors (ICAC) and the Commission.

The President of the Spanish Institute of Chartered Accountants recently announced the institute's own critique of the Act noting that the wording is getting more and more different from the EU Directive each day. In this regard the institute expressed concern the Spanish Draft Act has defined Public Interest Entities (EIP) too broadly. For example, the Directive imposes a 10 years term limit for audit firms appointed to audit an EIP, and a 1 to 9 years term for the all other entities. The Institute pointed out that if the vast majority of entities are considered EIPs, the Spanish Act largely erases this distinction. Moreover, the Institute criticized the fact that the Act eliminates the "information stage envisaged for disciplinary proceedings before the ICAC." This stage currently allows some public bodies such as the State Attorneys, the Court of Auditors, Scholars or the General Intervention Board of the State Administration (IGAE) to give their opinion on a particular disciplinary proceeding. Many consider this public input on certain cases very useful.

On the 24 April 2015 the term for partial amendments was finished. During this parliamentary stage EY succeeded in securing permission to continue auditing several companies including Telefónica or Iberdrola for five more years. In addition, the government will delay the "rotation." The act envisages that those companies which have not changed audit firms 20 years or more will have to change auditors by 2020; and those which have had the same audit firms more than 10 years but less than 20 years must change auditors in 2023.

The act will soon be debated by the Economy Commission and by the parliamentary Senate.

For more information on this subject, contact:

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

Recent Regulatory and Enforcement Developments

United States

PCAOB reaches cooperative agreement with Hungarian counterpart

The Public Company Accounting Oversight Board (PCAOB) announced on 16 April that it reached an agreement with the Auditors' Public Oversight Authority (APOA) of Hungary "for the oversight of audit firms subject to the regulatory jurisdictions of both regulators." The cooperative agreement provides for joint inspections by PCAOB and APOA, as well as data protection measures during such inspections. The agreement will take effect immediately.

The PCAOB's goal, according to its Chairman, James R. Doty, is to "further strengthen PCAOB's cooperative arrangements in Europe…." Indeed, the PCAOB has entered into similar agreements with the relevant regulators in Denmark, Sweden, Finland, France, Germany, the Netherlands, Spain, and the United Kingdom.

2014 sees rise in accounting-related class action suits

A review of high-profile litigation in 2014 reveals that class actions against accounting firms are up since last year.

According to an April study by PricewaterhouseCoopers (PwC), accountants faced an increase in federal class actions suits last year. Indeed, "[w]ith financial crisis-related litigation largely played out, accounting-driven federal securities class actions are on the rise — both in total number of cases (53, up from 46) and as a percentage of all cases filed (31%, up from 29%)." Nearly 40 percent of the accounting-related suits "included allegations of improper revenue recognition." The PwC report also identifies several "emerging issues" for auditors in 2015: "heightened enforcement of anti-corruption statutes, the rise in cyber-breaches, and new complexities in financial markets."

Another April study conducted by Cornerstone Research similarly reported that "allegations of accounting fraud surged 47 percent in securities class-action lawsuits last year over 2013." Accounting settlements dwarfed non-accounting settlements in 2014: US$907.8 million in accounting settlements compared to US$160.2 million in non-accounting settlements. With "overall securities class-action suits remain[ing] almost the same," the increase in accounting-related cases indicates that there is an increased focus on accounting fraud.

SEC sheds some light on use of in-house judges
The Securities and Exchange Commission (SEC or the Commission) recently issued public statements about its preference for administrative hearings over federal court proceedings.

SEC Chair Mary Jo White testified before members of Congress on 5 May and addressed concerns about the Commission's use of appointed administrative judges. She declared that "the appearance of fairness is important," and told a U.S. Senate appropriations panel that she was considering whether the Commission should implement public guidelines to make its forum-selection process more clear and transparent. As the *Wall Street Journal* reported in October, the Commission had a 100 percent success rate in front of its appointed administrative judges in 2013-2014, compared to only a 61 percent success rate in federal court. The *Journal* released updated numbers in May which indicate that the Commission's success rate in administrative hearings was 90 percent from October 2010 through March 2015, compared to only a 69 percent success rate in federal court over the same period.

The SEC's practice of using administrative courts has even raised issues of constitutionality. The U.S. Court of Appeals for the District of Columbia Circuit heard a case last month in which the use of administrative courts by the SEC was challenged as violating the equal-protection and due-process requirements of the Constitution. Lower courts have previously denied similar requests on procedural grounds.

Soon after Mary Jo White's testimony, the SEC released guidance on 8 May enumerating the factors the Commission considers in choosing the appropriate tribunal for prosecution. Among the relevant factors are: the availability of claims, legal arguments, and forms of relief in each forum; whether any charged party is a registered entity or is associated with a registered entity; the time and cost of litigation in each forum; and "[f]air, consistent, and effective resolution of securities law issues and matters." According to the guidance, when deciding where to prosecute, "the Division recommends the forum that will best utilize the Commission's limited resources to carry out its mission."

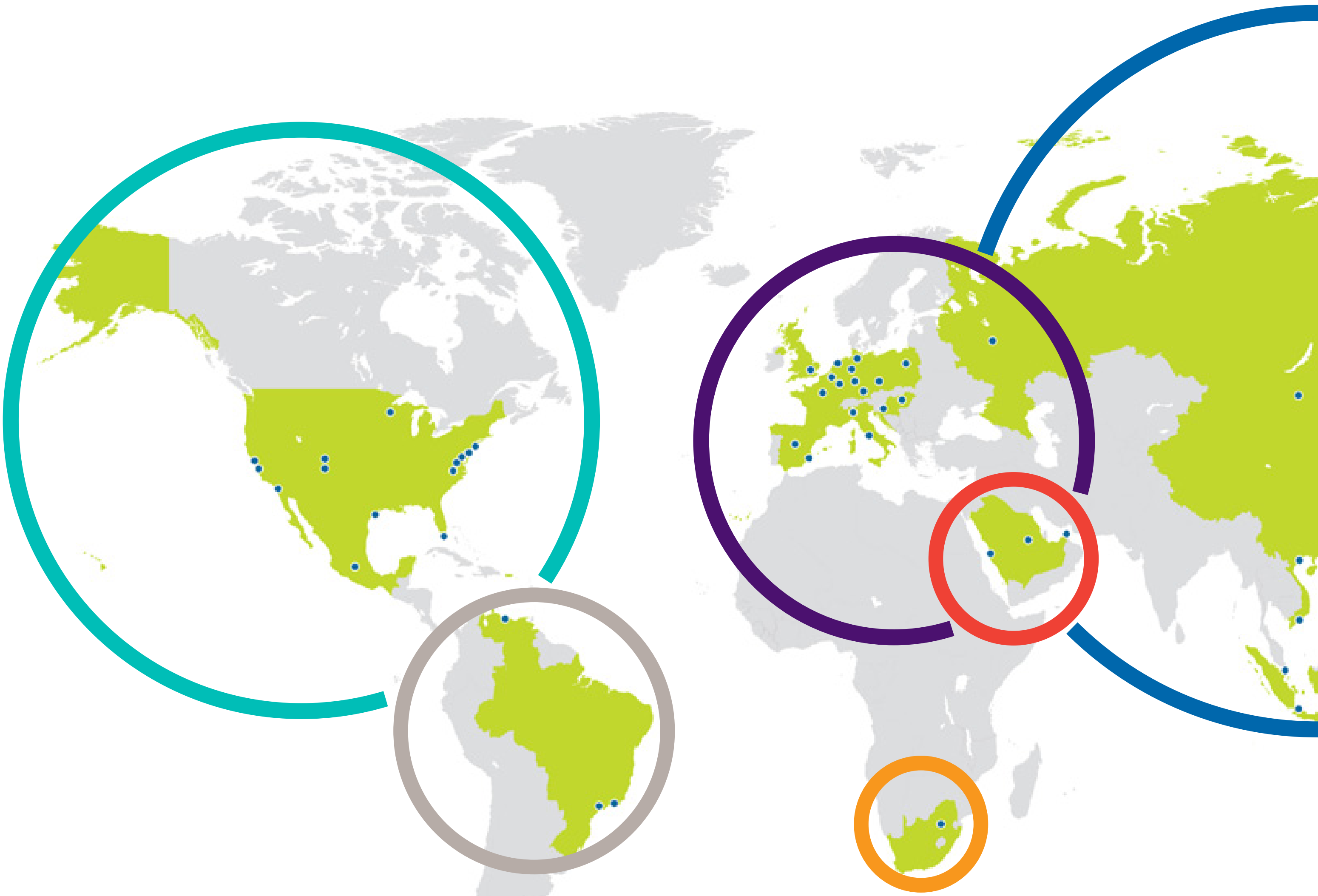
Given that the new SEC guidance only vaguely outlines its internal procedures, many practitioners continue to call for more transparency.

For more information on this subject, contact:

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

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

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
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