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Global Accountants'
Liability Update

March 2021



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Our global team of securities and professional liability lawyers at Hogan Lovells is uniquely positioned to monitor legal developments across the globe that impact accountants' liability risk. We have experienced lawyers on five continents 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. We recently identified developments of interest in Hong Kong, Italy, the Netherlands, and the United States which are summarized in the pages that follow.



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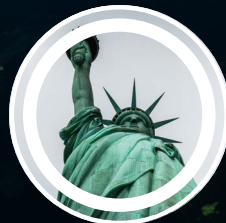
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Recent regulatory and enforcement developments

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Court rules on disclosure of disciplinary decisions

Accountants and other professionals should not expect that disciplinary decisions against them will remain confidential following a recent Hong Kong Court of First Instance (CFI) decision.

hearing of the Disciplinary Committee shall be heard in public unless the Disciplinary Committee (on its own motion or upon application) determines that in the interests of justice a hearing or any part therefore shall not be held in public”

In *The Registrar of the Hong Kong Institute of Certified Public Accountants (HKICPA) v The Disciplinary Committee of the Hong Kong Institute of Certified Public Accountants [2020] HKCFI 2553*, the court was asked to consider whether sanctions imposed against two accountants should remain private and whether the principle of “open justice” should apply to disciplinary proceedings. Though the accountants in question had already agreed to the publication of the full findings, the court continued to hear the case given the implications for the profession as a whole.

The court said that accountants played “an important professional role and function in the society and are generally respected and entrusted by the public.” There was therefore a “corresponding public interest to ensure their professionalism and integrity.”

The court agreed that the principles of open justice should apply to statutory disciplinary proceedings. Section 36(1A) of the Professional Accountants Ordinance (Cap. 50) (the PAO) says that “every

When considering whether to make a non-publicity order, the Disciplinary Committee should take into account factors such as the public interest in knowing the outcome of disciplinary proceedings, the public interest in the accountancy profession and the purpose of disciplinary proceedings in preserving the reputation and integrity of the profession and the discouragement of dishonest conduct.



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Court reaffirms that auditors generally don't owe duties to third parties

The CFI upheld a decision by the Professional Conduct Committee of the HKICPA dismissing a complaint lodged by the applicant against an auditor on the ground that no prima facie case had been shown.

The case of *Ng Shek Wai v Hong Kong Institute of Certified Public Accountants* [2021] HKCFI 46 arose from a dispute between the applicant, a flat owner, and the owners' management committee over building renovations. The applicant alleged that the management committee had been making overpayments to the renovation contractors, which the owners disputed.

To substantiate his claim, the applicant contacted the management committee auditor directly and requested the auditor seek further evidence from the committee about the alleged overpayment. The applicant also requested that the auditor modify the management committee's financial statements in the event that the committee failed to provide the requested evidence.

As both requests were declined by the auditor, the applicant lodged a complaint with the HKICPA asserting that the auditor had failed to observe, maintain or otherwise apply a professional standard contrary to section 34(1)(vi) of the PAO.

The complaint was ultimately dismissed by the HKICPA committee on the ground

that no prima facie case had been shown and that the auditor did not have a case to answer. The applicant then brought judicial review proceedings against the HKICPA claiming the decision should be quashed on the ground that the HKICPA had failed to provide sufficient reasons to justify the decision.

The court held that the HKICPA had provided sufficient and adequate reasons as required by law. In particular, the court commented that as the applicant was not the client of the auditor, the auditor owed no duties to the applicant.

Both the auditor and the HKICPA were under a duty of confidentiality to the management committee which compelled them to avoid disclosing the management committee materials to the applicant. The application for judicial review was dismissed with the costs of the application to be paid by the applicant to the HKICPA.

The decision reaffirms the well-established principle that the duties of an auditor primarily depend upon the contract between the auditor and their client, and therefore auditors do not normally owe duties to third parties. Auditors are also subject to a duty of confidentiality to their clients which is necessary to maintain the relationship of trust and confidence between the parties.



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Recent regulatory and enforcement developments

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Regulators pledge to enhance cooperation

The Securities and Futures Commission (SFC) and the Financial Reporting Council (FRC) have signed a memorandum of understanding (MOU) to strengthen the regulation of the capital markets through enhanced collaboration between the two regulators.

The MOU aims to reduce duplication of efforts and sets out the working arrangement between the two regulators in order to ensure the efficient and effective co-operation and coordination of the regulators' functions. Enhanced collaboration will apply to case referrals, joint investigations, mutual assistance, capacity building and exchange and use of information. To ensure their efforts are well coordinated, the two regulators have agreed to notify one another when preparing and issuing policies or guidelines.

According to the Chairman of the SFC, closer collaboration between the SFC and the FRC will be important when combating persistent problems with false or misleading financial statements and other corporate misconduct. It is hoped that by working closely together to maintain the integrity of Hong Kong's capital market, the audit quality of listed companies can be improved.

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Updated conduct standards for statutory auditors

The Italian National Council of Accountants and Accounting Specialists (Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili - “CNDCEC”) recently published a new version of the “Norms of conduct for Unlisted Companies’ Board of Statutory Auditors” (Norms of Conduct). The document is based on the guidelines provided by CNDCEC Accountants’ Ethical Code, which entered into force on 1 January 2021.

Each provision contains a set of principles, as well as essential references to applicable laws and regulations. The provisions also include application criteria, designed to provide the Board of Statutory Auditors (BSA) with operational tools for the performance of its functions. Finally, the Norms of Conduct contain brief comments that address interpretative issues that often emerge in practice.

Compared to the previous provisions, which were adopted in 2015, the new Norms of Conduct introduce relevant amendments concerning:

- The criteria for the assessment of potential situations of incompatibility, lack of independence or conflicts of interests, which now include considerations relating to civil unions, and explicitly exclude any issue of independence where the professionals

concerned form part of a single firm for the mere purpose of costs’ sharing (Norm 1.4);

- The accountants’ duty of control on the board of directors, which is now more focused on principles of legal compliance and measures’ adequacy (Norm 3.4);
- Specific duties of confidentiality that apply when handling information that “might benefit competitors” (Norm 3.10);
- The exchange of information between directors and statutory auditors, with the introduction of specific duties to that purpose (Norms 4.2 and 5.2);
- The role of the BSA in the approval of financial statements, including the possibility for statutory auditors to refrain from elaborating a proposal regarding the approval of the draft financial statements in case of no-opinion by the external auditor (Norm. 7.1);
- The rules for handling cases of directors’ mismanagement, which also expands the situations in which the BSA may convene a Shareholders’ Meeting (Section 6);



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- The advisory role of the BSA, which is further enhanced (Section 8);
- The role of the BSA in case of directors' inactivity or substitution (Section 9) and in the course of extraordinary operations (Section 10);
- The role of the BSA in situations of potential or actual financial distress, which include the statutory auditors' duty to promptly disclose any risk that the company may cease to operate as a going concern (Section 11).



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The Netherlands

Accounting reforms continue to take shape

[Last March we updated you about reports](#) issued by the Committee Future Accountancy Sector (*Commissie toekomst accountancysector*) (Cta) and the Monitoring Committee Accountancy (*Monitoring Commissie Accountancy*) (MCA) that aimed to identify measures to improve the quality of statutory audits in The Netherlands. In response to these reports, the Minister of Finance proposed measures to improve the quality of the accounting sector in a letter sent to the House of Representatives in March 2020 (the first letter). Some of the measures identified by the Minister of Finance require legislative and regulatory changes.

In a second letter to the House of Representatives dated 2 February 2021, the Minister of Finance reported on related developments, including the progress of the quartermasters (*kwartiermakers*). The quartermasters were appointed by the Minister of Finance and tasked with facilitating the implementation of a number of the proposed accounting reform measures identified in the first letter. Among these measures is the establishment of audit quality indicators (AQIs) and the further investigation of models such as *audit only*, *joint audit*, and the *intermediaries*.

Below we summarize a number of key developments laid down in the second letter.

The Quartermaster Progress Report

The quartermasters have presented their first progress report to the Minister of Finance. Setting up the AQIs has been a priority for them and they have established four working groups to advise them in this regard. The working groups have delivered their initial ideas, including a set of possible AQIs. A broad consultation will take place, after which the quartermasters will send a set of widely supported AQIs to the Minister of Finance. This is expected to happen this spring. The quartermasters are of the opinion that the initial proposal on the AQIs to the Minister of Finance must be made by the quartermasters themselves and must ultimately be established by Ministerial Regulation. They advise that, in the future, the NBA should evaluate the AQIs periodically and, if necessary, update them in the interim.

No “flying hours criterion”

In its report dated 14 January 2020 the MCA laid out its findings regarding the accounting sector and made, amongst others, a recommendation to introduce a “flying hours criterion” that would require an accounting firm to conduct 10 statutory audits per year in order to retain its licence. Should this measure be implemented, 30% of the accounting firms would lose their license. The Minister of Finance has indicated that he expects other measures



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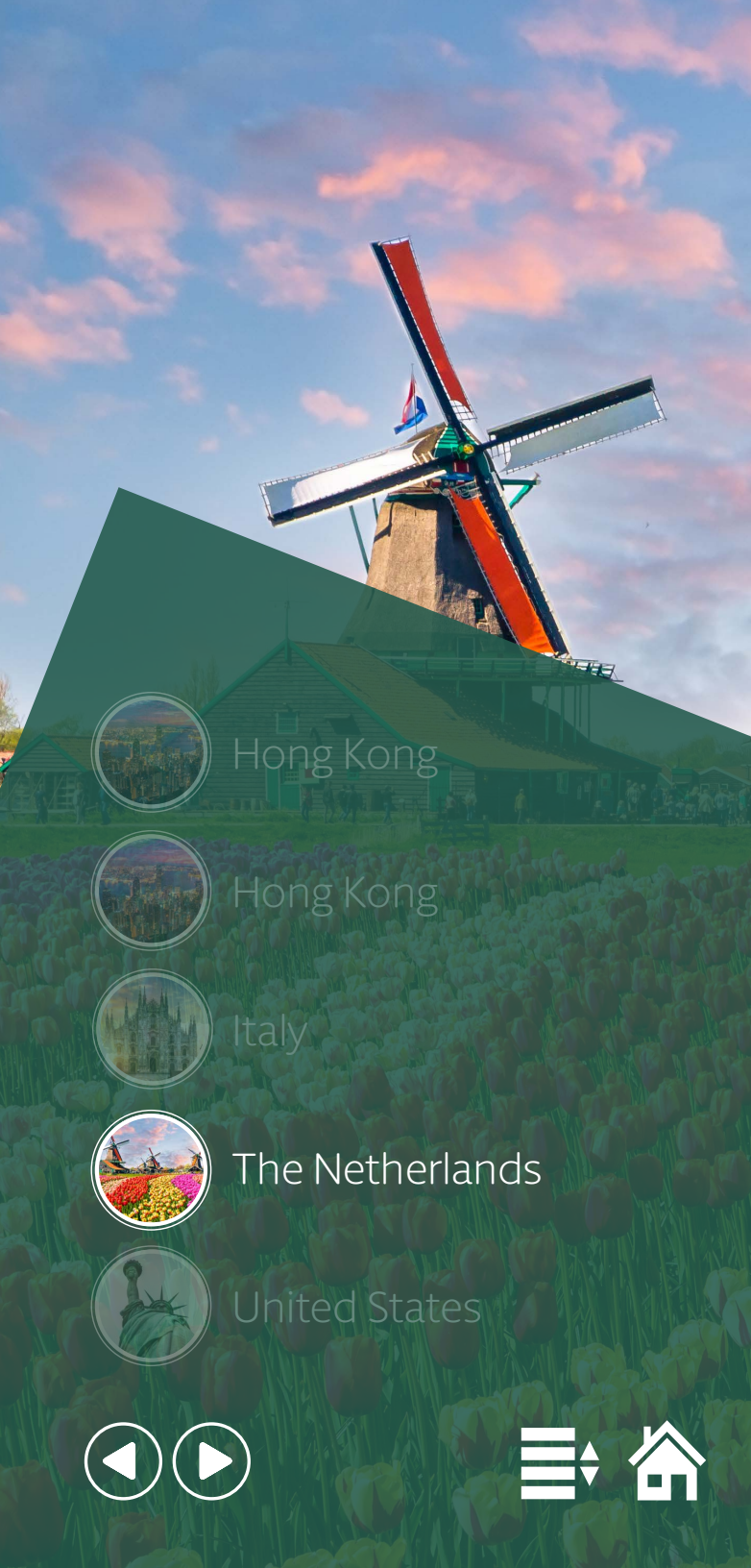


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that have already been taken (and will be taken) will strengthen the quality of statutory audits and that the enhanced supervision will lead to a higher level of quality in the entire sector. He thus wants to await the effects of these measures, before taking additional action such as the flying hours criterion. Notably, as of 1 January 2022, the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten) (AFM) will supervise the entire accounting sector and no longer only the firms that hold licenses to audit public interest institutions (PIEs).

Intensified supervision of PIE audit firms

The supervision of the PIE audit firms will be intensified. The intensification of supervision could consist of multiple measures. The Minister of Finance has discussed with the AFM the extent to which intensification is feasible, the preconditions for this and the timeframe. It is agreed that the primary focus will be on increasing the frequency of investigations at PIEs audit firms. The AFM will start intensifying its supervision on 1 January 2022.

Alternative models

In our [March update](#), we mentioned that the Minister of Finance authorized the quartermaster to further investigate alternative models such as *joint audit*, *audit only*, and *intermediaries*. The Minister of Finance instructed the quartermaster to look for parties willing to participate in an experiment with intermediaries.

In addition to the elaboration of the AQIs discussed above, the design of the experiment with the intermediary model has also been prioritized by the quartermasters. The broad outlines for the design of the experiment are in place. Exploratory discussions for participation in the experiment have also been held. Various accounting organizations have responded positively to participation in the experiment. At this stage, potentially participating audit clients have a lot of question about the practical implementation of the experiments. Therefore, it remains uncertain whether enough audit clients are willing to take part in the experiment.

Furthermore, the preparations for the tendering of (i) the research into the further effects of the joint audit model, (ii) the study of the further effects of the audit only model (including ring fencing) and (iii) the measurement of the effects of the aforementioned experiment with the intermediary model are in full swing. It is expected that these contracts will be awarded in the spring of 2021. The results of the study into the joint audit model are expected this autumn and those into the audit-only model around the end of this year. The experiment with the intermediary model will take longer.

Fraud and continuity

Management reports currently contain information on continuity only if there is significant uncertainty in this respect. Accounting firms feel great reluctance to explicitly reporting on this subject,



as the fear exists that every reference is immediately seen as a *red flag*. The Minister of Finance agreed that improvements are required and instructed the quartermasters to look into this as well. The quartermasters are in consultation with the NBA. The NBA has taken the initiative to require auditors to provide more detail in auditor's reports about what the auditor has done and – in regard to the specific engagement – has seen in respect of these topics. The quartermasters and the NBA are also looking for further measures that can be taken within the existing regulatory framework



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United States

SEC sanctions two accountants in connection with College of New Rochelle audit

On 23 February 2021, the U.S. Securities and Exchange Commission (SEC) [announced](#) that it had reached a settlement agreement with the two former KPMG auditors in conjunction with allegations of improper professional conduct in connection with an audit for the College of New Rochelle, a not-for-profit college that is now defunct.

In March 2019, the SEC charged the College of New Rochelle's controller with defrauding municipal securities investors by fraudulently concealing the College's financial condition, which was adversely impacted by decreased enrollment. In the course of concealing the College's declining financial state, the controller provided the College's auditors with inaccurate, incomplete, and contradictory information in connection with the audit of the College's financials for the 2015 fiscal year. The controller's fraud led to an overstatement of the College's 2015 net assets by \$33.8 million, an overstatement that the SEC found "impacted virtually every amount reported on the College's balance sheet." In connection with a bond offering in 1999, the College was required to provide its audited financial statements to the Municipal Securities Rulemaking Board (MSRB) to be posted in the MSRB's public system.

For the 2015 fiscal year, the College's auditors issued an unqualified audit opinion. Now, the SEC has instituted and settled

proceedings against the [engagement partner](#), Christopher Stanley, and the [engagement manager](#), Jennifer Stewart, involved in the 2015 audit of the College's financial statements. According to the SEC's orders, the two individuals were responsible for an audit opinion issued on the College of New Rochelle's 2015 financial statements without completing necessary portions of the audit. In particular, the SEC alleged that the individuals failed to "obtain sufficient appropriate audit evidence," "properly prepare audit documentation," "properly examine journal entries for evidence of fraud due to management override," "adequately assess the risk of material misstatement," "communicate significant audit challenges to those charged with governance," "properly supervise the audit," and "exercise due professional care and professional skepticism."

Based on these failures, the SEC's order found that the individuals violated GAAS. The SEC's order concludes that the individuals violated Section 4C(a)(2) of the Securities Exchange Act of 1934 and Rule 102(e)(1)(ii) based on "repeated instances of unreasonable conduct." Without admitting or denying the findings, the engagement partner and manager agreed to a suspension from practice before the SEC for three years and one year, respectively.



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SEC administrative hearing results in sanctions against three auditors

On 8 February 2021, after an evidentiary hearing over the course of 25 days, SEC Administrative Law Judge Jason S. Patil issued a 123-page [initial decision](#) that recommended sanctions be imposed against three former partners of Anton & Chia LLP, a PCAOB registered accounting firm based in California that had gone bankrupt.

The SEC's allegations relate to audit or interim review engagements for three Anton & Chia clients during 2013 - 2015: Accelera Innovations, Inc., Premier Holding Corporation, and CannaVEST Corp (now known as CV Sciences).

The Respondents in the administrative proceeding were: Gregory Wahl, the managing partner of Anton & Chia during the relevant period, who served as engagement partner for Accelera's audits and interim reviews; Michael Deutchman, who served as either the engagement partner or engagement quality review partner on multiple reviews of Accelera's financial statements; and, Georgia Chung, who was co-owner of Anton & Chia and served as the engagement quality reviewer for CannaVEST's 2013 first quarter interim review.

With respect to Anton & Chia's clients, the ALJ found that Accelera vastly inflated its financial position and results by treating another company's revenues, assets, and liabilities as its own; Premier inflated and provided an unsupported valuation of an otherwise worthless promissory note and further improperly allocated the entire

purported value of an acquired company to goodwill; and, CannaVEST greatly overstated its assets due to its improper valuation of an acquired company.

The ALJ found a wide range of professional misconduct by the Respondents in performing the audits or interim reviews of the clients at issue. Among the highlights, the ALJ held that Respondents egregiously deviated from multiple PCAOB standards and ignored numerous red flags indicating the companies' financial statements and public filings contained material misstatements; moreover, that Wahl and Deutchman were reckless in not knowing that the statements in Anton & Chia's reports for Accelera and Premier were false and misleading; and, that, in its audit reports, the firm misrepresented that it had conducted its work in accordance with PCAOB standards and that the companies' financial statements fairly presented their financial positions according to GAAP.

The ALJ rejected of Respondents' defenses, including Constitutional arguments that the proceeding violated the Appointments Clause and the right to due process, and that the proceeding was time barred. In addition, the Respondents challenged the SEC's accounting and auditing expert as lacking expertise on relevant topics and being biased; while the ALJ rejected Respondents' arguments and found the expert's opinions generally helpful, the ALJ did not rely on the SEC expert's opinions about specific violations of GAAP or PCAOB standards.



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The ALJ concluded that the following sanctions are warranted against the Respondents: cease-and desist orders against Wahl and Deutchman; \$160,000 in civil penalties against Wahl and \$40,000 against Deutchman; Wahl and Deutchman are permanently denied the privilege of appearing or practicing before the Commission as accountants, and Chung

is denied the privilege of appearing or practicing before the Commission as an accountant with the right to reapply after one year.

The Respondents have filed a petition for review by the Commission of the ALJ's initial decision.

SEC amends regulation S-K, impacting requirements for management's discussion and analysis

In late 2020, the SEC adopted several amendments to Regulation S-K that modify an issuer's requirements for the type of information that must be included in the "Management's Discussion and Analysis" (MD&A) section of several different SEC filings, including Forms 10-K and 20-F, the annual filings that all public companies listed on U.S. exchanges must file. The amendments will impact an auditor's review of an Issuer's MD&A information.

In particular, the SEC has adopted the following changes.

Elimination of selected financial data. Previously, companies were required to provide a table that included specific financial data for the past five years. The SEC has eliminated this requirement, finding that the cost of preparation was no longer justified given the public availability of the same data on EDGAR, the SEC's online database, and the requirement that companies disclose material trends in the MD&A.

Modification of quarterly tabular data requirement. The SEC initially proposed to also eliminate the requirement for the MD&A to include two years of quarterly operating data in tabular form. In response to public comments received, the final rule will instead replace that requirement with a requirement for disclosure of material retrospective changes, guided by certain principles. This new requirement will be triggered by, for example, correction of an error, reorganizing entities under common control, or impact of a change in an accounting principle.

Capital resources. Prior to amendment, Regulation S-K focused on disclosure of material commitments for capital expenditures. As revised, Regulation S-K requires companies to disclose their material cash requirements for known obligations, including, but not limited to, capital expenditures.

Critical accounting estimates. In the past, the SEC has offered guidance stating that the MD&A should not only discuss





critical accounting policies, but also critical accounting estimates. In these new amendments, the SEC now explicitly requires disclosure of critical accounting estimates, which are defined as estimates “that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant.” The amendment is designed to give investors “greater insight on the uncertainties involved in creating and applying an accounting policy and how significant accounting policies of registrants faced with similar facts and circumstances may differ.”

The amendments also impacted a variety of other areas, including the need for a contractual obligations table, objectives of the MD&A, requirements for discussion of full fiscal years, known trends or uncertainties, and off balance sheet arrangements.

The SEC’s final rule is available [here](#).

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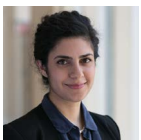
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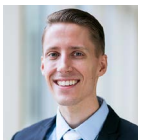
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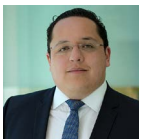
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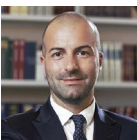
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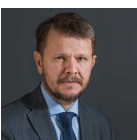
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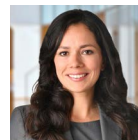
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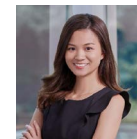
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