UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of Deloitte Touche Tohmatsu Certified Public Accountants Ltd., Respondent.	Administrative Proceeding File No. 3-14872 The Honorable Cameron Elliot Administrative Law Judge

RESPONDENT DTTC'S MOTION TO DISMISS
THE COMMISSION'S ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS
AND MEMORANDUM IN SUPPORT

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Respondent Deloitte Touche Tohmatsu CPA Ltd. ("DTTC") respectfully moves for an order dismissing the U.S. Securities and Exchange Commission's ("SEC" or "Commission") Second Corrected Order Instituting Administrative Proceedings Pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice ("OIP").

PRELIMINARY STATEMENT

This Rule 102(e) proceeding must be dismissed because it constitutes an impermissible circumvention of federal court review mandated by the plain language and structure of the U.S. securities laws and required under the Administrative Procedure Act ("APA").

By enacting Section 106 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "SOX") and its 2010 amendments,[1] Congress gave the Commission new authority to issue document requests to foreign public accounting firms like DTTC. But Congress also placed express limits on that power. Through the plain language of Section 106, Congress has required the SEC to enforce document requests made under that section in one—and only one—place: federal court. As Section 106 provides, a foreign public accounting firm is "subject to the jurisdiction of the *courts of the United States* for purposes of enforcement of any request for such documents." 15 U.S.C. §7216(b)(1)(B) (emphasis added). Only *after* a federal judge decides that a Section 106 request is enforceable may the SEC seek to sanction or otherwise discipline a foreign public accounting firm for "willfully refusing" to comply with that request. Thus, based on the plain language of Section 106, this administrative proceeding is premature and must be dismissed.

Congress's decision to require *judicial* enforcement of Section 106 requests was deliberate. For nearly a century, including in the Securities Act of 1933, the Securities Exchange

[1] 15 U.S.C. § 7216, as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), P.L. 111-203, Title IX, Subtitle B, § 929J, Subtitle I, § 982(g), 124 Stat. 1859, 1930 (July 21, 2010).

Act of 1934, and the APA, Congress has required the SEC and other federal agencies to go to federal court to determine the enforceability of administrative subpoenas and other investigative demands. Such judicial oversight maintains the separation of powers, protects the due process and other constitutional rights of subpoena recipients, and guards against agency demands that impose unreasonable burdens on their recipients. As the U.S. Department of Justice reported to Congress just two months before the enactment of Section 106, "Federal courts have generally held that due process *does preclude* federal agencies from enforcing [their own] subpoenas." U.S. Dep't of Justice, Office of Legal Policy, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities,* at 9 n.20 (2002) ("DOJ Report"), *available at* http://www.justice.gov/archive/olp/rpt_to_congress.pdf (emphasis added). The Supreme Court similarly has long recognized that a "subpoenaed party may obtain judicial review of the reasonableness of [a] demand prior to suffering penalties for refusing to comply." *See v. City of Seattle*, 387 U.S. 541, 545 (1967). In the context of demands on foreign public accounting firms, which implicate concerns of international comity, diplomatic relationships between sovereign nations, and often-conflicting legal requirements for the recipients of agency requests, Congress's considered judgment to reserve enforcement of Section 106 requests to the federal courts takes on even greater significance.

In filing this Rule 102(e) proceeding against DTTC, the Commission has skipped a critical step, bypassing the judicial review process mandated by Congress in Section 106. The Commission has not obtained a judicial determination that its Section 106 request to DTTC is valid and enforceable. Unless and until a federal court makes such a determination, there can be no violation of Section 106, willful or otherwise, by DTTC. As a result, this Rule 102(e) proceeding amounts to nothing more than an effort by the Commission to make an end-run around the U.S. courts, in defiance of Congress's express directive in Section 106.

What is more, the Commission's decision to institute a Rule 102(e) proceeding against DTTC before a federal court has determined whether the Commission's Section 106 request is enforceable is contrary to the position taken by the Commission in writing when it issued its Section 106 request—that the Commission may seek a "court order" to enforce the request. It also reflects an irrational, arbitrary and capricious departure from the Commission's own policy and practice for almost 80 years. Indeed, it is contrary to the position the SEC took when DTTC could not provide documents related to another of its clients, and the SEC, recognizing the need to have judicial review of the complex issued involved, went to court first. Simply put, the SEC has no authority to proceed here, and the OIP must be dismissed.

The Commission has skipped a second, independent step in contradiction to Section 106. The Commission has not properly served the OIP on DTTC. Under Section 106, foreign public accounting firms are required to designate an agent in the U.S. upon whom may be served two narrow categories of documents: (1) Section 106 requests by the SEC or PCAOB, and (2) any process, pleading, or other papers in (as explained below) any *judicial* action brought to enforce Section 106. *See infra* at 7-8. Section 106 does not authorize, and DTTC did not consent to, service of an OIP (or any other administrative, non-judicial process) via a designated agent in the U.S. Yet that is the way in which the Commission has attempted to effect service on DTTC here. The Commission has failed to serve properly the OIP on DTTC, and this proceeding should be dismissed for that independent, but related, reason.

BACKGROUND

I. OVERVIEW OF SECTION 106.

Through the enactment of Section 106 of Sarbanes-Oxley, Congress for the first time established a process by which the SEC could seek, in a limited set of circumstances, the production of audit workpapers by "foreign public accounting firms," such as DTTC. SOX

§ 106(b)(1)(A), (d); 15 U.S.C. § 7216(b)(1)(A), (d). As part of the Dodd-Frank amendments to SOX in 2010, Congress made certain modifications to the Section 106 process.[2]

Section 106(b)(1) authorizes the Commission to request audit work papers and other documents from certain "foreign public accounting firm[s]." *See* 15 U.S.C. § 7216(b)(1)(A). Within that same subparagraph, Congress provided an express mechanism for enforcing such requests: a covered foreign public accounting firm "shall ... be subject to the jurisdiction *of the courts of the United States* for purposes of enforcement of any request for such documents." *Id.* § 7216(b)(1)(B) (emphasis added). The statute provides no alternative enforcement mechanism.

In enacting Dodd-Frank, Congress left undisturbed its prior decision to vest in the federal courts the authority to determine the enforceability of Section 106 requests. Indeed, Congress reiterated that Section 106 requests may be enforced only through judicial action by enacting a complementary service provision that also contemplates enforcement in federal court. In Section 929J of Dodd-Frank, Congress added to Section 106 a requirement that covered foreign public accounting firms designate "an agent in the United States upon whom may be served any request by the Commission or the Board under this section or upon whom may be served any process, pleading, or other papers *in any action* brought to enforce this section." 15 U.S.C. § 7216(d)(2) (emphasis added). Thus, Congress did *not* require foreign public accounting firms to designate

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[2] The Dodd-Frank amendments reflect a concerted effort by Congress to address the difficult challenges presented by imposing document production requirements on foreign public accounting firms that are "organized and operate[] under the laws of a foreign government[.]" 15 U.S.C. § 7216(g). For example, Congress added a safe harbor provision to facilitate the production of documents through "alternate means," such as production through a foreign regulator. *See id.* §7216(f) (allowing "a foreign public accounting firm that is subject to [Section 106] to meet production obligations under this section through alternate means, such as through foreign counterparts of the Commission or the Board"). Congress also clarified that only a "*willful* refusal" to comply with a Section 106 request constitutes a violation of Sarbanes-Oxley. *Id.* § 7216(e) (emphasis added).

an agent for service or otherwise consent to jurisdiction in any SEC or other administrative proceedings, including a Rule 102(e) proceeding.

II. PROCEDURAL BACKGROUND.

In 2010, the SEC Division of Enforcement Staff ("Staff") began investigating "Client A," a DTTC audit client for whom DTTC performed audit services exclusively in the People's Republic of China ("PRC"). The Staff sought to obtain workpapers related to DTTC's audits of Client A through an alternative (and internationally cooperative) mechanism, a direct request to China's principal securities regulator, the China Securities Regulatory Commission ("CSRC"). The CSRC notified DTTC that it had received a request for Client A's workpapers from a foreign regulator and directed DTTC to produce to the CSRC the requested documents. Shortly thereafter, DTTC produced all of the requested documents to the CSRC with the expectation that they may be produced to the SEC.

Approximately eight months later, on March 11, 2011, the Staff issued to DTTC a request pursuant to Section 106 (the "Section 106 Request")—the document request at issue here. The Section 106 Request called for virtually the same documents DTTC previously had produced to the CSRC. *See* Section 106 Request, Exh. 2 to the Declaration of Elizabeth L. Howe ("Howe Decl."). As required by its home country's law, DTTC notified the CSRC of the SEC's Section 106 Request and sought the CSRC's direction on how to respond to this request from the SEC, a foreign regulator.

DTTC notified the Staff that it had contacted the CSRC and suggested that the Staff reach out to the CSRC. A few days later, the Staff confirmed that it was having its own discussions with the CSRC. On April 19, 2011, the CSRC notified DTTC that a direct production by DTTC of the Client A documents to the SEC was *not* permitted and that the CSRC itself would address any production of documents regarding Client A to the SEC. DTTC informed the Staff of the

CSRC's express instruction that DTTC could not to produce documents directly to the SEC. In October 2011, following a meeting with several audit firms in China, the CSRC issued a written directive reiterating that China law prohibits PRC audit firms from producing documents directly to the SEC without the authorization of PRC regulators.

On May 9, 2012, the Commission issued the OIP against DTTC. The Commission filed an amended OIP against DTTC shortly thereafter. The Commission's OIP expressly tracks the language of Section 106, alleging that DTTC has "willfully refused" to provide the Client A documents to the Commission, and "[a]s such, [DTTC] has willfully violated Sarbanes-Oxley and the Exchange Act." OIP ¶¶ 16-17.

Both the May 9 Order and the Second Corrected Order were sent via registered U.S. mail to the U.S. member firm of the DTTL network as DTTC's "designated agent." DTTC answered the OIP on June 4, 2012. Consistent with the schedule set at the June 4, 2012 pre-hearing conference, DTTC now moves to dismiss the OIP.

ARGUMENT

I. THE OIP MUST BE DISMISSED BECAUSE THE COMMISSION LACKS AUTHORITY TO INITIATE THIS PROCEEDING.

A. The Plain Language of Section 106 Requires The Commission To Enforce Section 106 Requests In Federal Court.

Congress's directive in Section 106(b)(1) is plain and unambiguous: only the "courts of the United States" have "jurisdiction ... for purposes of enforcement of any request" for the production of documents under Section 106. 15 U.S.C. § 7216(b)(1)(B) (covered foreign public accounting firms "shall ... be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for such documents"). Congress *did not* grant any similar authority to the Commission to enforce Section 106 requests through administrative or

any other proceedings. Nor did Congress deem foreign public accounting firms to have consented to Commission jurisdiction for enforcement of Section 106 requests.

It is axiomatic that the plain language of a statute must be followed. And here, Congress said what it meant and meant what it said: Section 106 requests are to be enforced in federal court. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" (alternation in original)). Thus, Section 106(b)(1) grants federal courts exclusive jurisdiction over the enforcement of Section 106 requests, and this administrative action must be dismissed.

In addition to the plain language of Section 106(b)(1), Section 106(d) further confirms that Section 106 requests are to be enforced only through judicial proceedings. Section 106(d), which is entitled, "Service of requests or process," establishes the relevant service procedures for Section 106 requests. As explained above, *see supra* at 4-5, Section 106(d) directs "foreign public accounting firms" to designate an "agent" in the U.S. to accept two—and only two—categories of documents: (1) "any request by the Commission or the Board under this section," and (2) "any process, pleadings, or other papers in any *action* brought to enforce this section." 15 U.S.C. § 7216(d) (emphasis added).

As the Supreme Court has recognized, "the term 'action,' standing alone, ordinarily refers to a *judicial* proceeding." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006) (emphasis added); *see also* Fed. R. Civ. P. 2 (stating that "[t]here is one form of action—*the civil action*" (emphasis added)). When Congress refers to "administrative proceedings," it either uses that precise term or uses "a modifier of some sort" along with the word "action," such as "'*administrative* action,' a '*civil administrative* action,' or '*administrative enforcement* action[].'" *Burton*, 549 U.S. at 93 (emphasis added); *id.* at 93 n.5 (collecting examples).

Consistent with its reference to federal court jurisdiction in Section 106(b)(1), Congress used the term "action" in Section 106(d), with no separate provision for administrative enforcement proceedings. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("'[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"). Thus, Congress contemplated a clear sequence of events here, all of which can and must be accomplished through Section 106: issue a request, file an action in federal court to enforce the request pursuant to Section 106(b)(1)(B), and serve process in that action pursuant to Section 106(d).

B. The Structure Of The Securities Laws Confirms That The Commission Must Enforce Section 106 Requests In Federal Court.

Congress's requirement that Section 106 requests be enforced through judicial action, not internal Commission disciplinary proceedings, is made all the more apparent when Section 106 is read in comparison with other federal securities laws enacted by Congress. "The construction of statutory language often turns on context," *FCC v. AT & T Inc.*, 131 S. Ct. 1177, 1182 (2011), and here the statutory context demonstrates that Section 106 requests must be enforced in the federal courts.

Section 106 stands in stark contrast to other provisions of the securities laws, such as Section 17(a) of the Securities Exchange Act, 15 U.S.C. § 78q(a), and Section 204 of the Investment Advisers Act of 1940, *id.* § 80b-4, by which Congress provided the Commission with plenary supervisory authority over certain categories of professionals, such as broker-dealers and investment advisors. Statutes such as Sections 17(a) and 204 form the backbone of the Commission's inspection and examination programs applicable to broker-dealers, investment advisers, and others and mandate that they, as a matter of course, furnish certain information to the Commission. Unlike Section 106 and other administrative subpoena statutes, Sections 17(a)

and 204 contain no requirement that the Commission seek enforcement of the disclosure obligations in federal court. Rather, if a broker-dealer or investment adviser fails to comply with these mandatory disclosure requirements, the Commission is authorized to take prompt remedial action by initiating internal administrative proceedings. Thus, Congress had a choice when it enacted Section 106 whether to pattern it after administrative subpoena statutes that require judicial enforcement, or whether to model it after statutes such as Sections 17(a) and 204 that allow the Commission to enforce the production requirements through its own internal administrative processes.

Section 106's insistence upon judicial enforcement of Commission requests to foreign public accounting firms continues Congress's consistent approach, throughout the SEC's almost 80-year history, of requiring judicial review of Commission investigative requests prior to their enforcement. Since the Commission's creation in 1934, Congress has enacted several statutes that empower the Commission to investigate violations of the securities laws and to subpoena information relevant to those investigations. In each of those statutes, Congress required the Commission to seek enforcement of its subpoenas through judicial actions. *See, e.g.*, 15 U.S.C. §§ 77s(c) (Securities Act of 1933), 78u(b) (Securities Exchange Act of 1934); 15 U.S.C. § 79r(d) (Public Utility Holding Company Act of 1935); 15 U.S.C. § 80a-41(c) (Investment Company Act of 1940); 15 U.S.C. § 80b-9(c) (Investment Advisers Act of 1940). Thus, these statutes establish that "[s]ubpoenas issued by the Commission are not self-enforcing." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741 (1984). Rather, "[e]nforcement of administrative subpoenas has long been committed, not to administrative tribunals themselves, but instead to the courts. Power to enforce subpoenas of the Securities and Exchange Commission is cast in this traditional mold." *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1032-33 (D.C. Cir. 1978). This longstanding requirement of judicial enforcement is hardly limited to the SEC. To the contrary, "Congress has

consistently required that agencies and departments seek enforcement of administrative subpoenas through a federal district court." DOJ Report, at 9. This requirement of judicial enforcement is all the more important in the context of Section 106 requests to foreign public accounting firms, which, as here, raise serious issues of international comity and sovereignty.

Thus, the plain language of Section 106 comports with almost 80 years of congressional practice. Any attempt to read Congress's mandate of judicial enforcement out of Section 106 would defy logic *and* experience. As explained above, Congress's choice in Section 106 is clear: Commission requests may be enforced only in federal court. Because the Hearing Officer lacks jurisdiction to enforce the Section 106 Request, the instant proceeding must be dismissed.

C. The Administrative Procedure Act Further Requires Judicial Enforcement Of Any Section 106 Request.

In addition to the plain language of Sarbanes-Oxley, the Administrative Procedure Act ("APA") independently provides that only federal courts have the authority to determine the enforceability of Section 106 requests made by the Commission. Indeed, it can be "strongly presumed" that Congress crafted Section 106 to conform to the APA's requirements, which had been in force for more than half a century when Congress enacted Section 106. *United States v. Fausto*, 484 U.S. 439, 453 (1988) "[It] can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.").

The APA sets forth procedures that apply to *any* administrative "subp[o]ena or similar process or demand," including Commission requests pursuant to Section 106. 5 U.S.C. § 555(d). The APA, like Section 106, expressly provides that the enforceability of administrative subpoenas and other demands is a judgment reserved for the federal courts:

> Agency subp[o]enas authorized by law shall be issued to a party on request . . . . On contest, *the court* shall sustain the subp[o]ena or similar process or demand *to the extent that it is found to be in accordance with law*. In a proceeding for enforcement, *the court* shall issue an order requiring the appearance of the witness

> or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

Id. (emphasis added).

This text of the APA makes clear that administrative subpoenas and other demands are not self-enforcing and valid ab initio. Rather, a court must determine whether the agency request is enforceable—*i.e.*, whether it is "in accordance with law." *Id.* This is by no means a ministerial inquiry. Instead, the court must assess whether the request is "'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (quoting *City of Seattle*, 387 U.S. at 544); *see also infra* at 12-14 (discussing constitutional concerns raised by the Commission's Section 106 demand). If the court determines that the request is enforceable, only then will it issue an "order requiring . . . production . . . under penalty of punishment for contempt." 5 U.S.C. § 555(d). If the recipient fails adequately to comply within the time allotted by the judicial order, the agency seeking production may proceed to the second step—a separate judicial proceeding to determine whether, under the facts and circumstances, the recipient should be held in contempt of the judicial order requiring production.

This two-step process enables the recipient of an agency demand the opportunity to challenge its legal validity and enforceability at a meaningful time—*i.e.*, before sanctions for non-compliance are imposed. Indeed, Congress and the courts have long emphasized the principle that a "subpoenaed party may obtain *judicial* review of the reasonableness of the demand *prior to suffering penalties for refusing to comply.*" *See*, 387 U.S. at 544-45 (emphasis added); *Administrative Procedure Act: Legislative History, 79th Congress* 206 (Pat McCarran, ed. 1946) (S. Rep. No. 79-752 (1945)) (APA "expressly recognized the right of parties subject to administrative subp[o]enas to contest their validity *in the courts prior to the subjection of any*

form of penalty for non-compliance") (emphasis added); *id.* (APA imposes "a statutory limitation on the enforcement of subp[o]enas in excess of agency authority or jurisdiction"); *see also NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 499 (4th Cir. 2011) (holding that, "before a court commands a party to comply with a subpoena, it must first determine that the subpoena 'is within the authority of the agency,'" and "guarantee[] [that party] an opportunity to contest the subpoena's validity *through any appropriate defense*") (emphasis added). Thus, any attempt to bypass the federal courts through the initiation of this Rule 102(e) proceeding violates Congress's clear commands in both Section 106 and the APA.

D. The Requirement of Judicial Enforcement of Agency Demands Serves Important Constitutional Purposes.

Congress's decision to require enforcement of administrative subpoenas in federal court is by no means an accident or an artifact of history. Rather, by requiring judicial enforcement of agencies' investigative requests in the APA and other statutory provisions like Section 106, Congress avoids serious constitutional issues that would result from allowing a single branch of government to determine the enforceability of its own requests.

First, Congress has required judicial enforcement of investigative requests to preserve the separation of powers. The questions to be determined in a proceeding to enforce such a request—*i.e.*, (1) whether the request is enforceable, and (2) whether the respondent has adequately complied or has a legally valid justification for non-compliance—are questions on which the enforcing agency is necessarily an interested party. Congress thus has demanded "[b]ifurcation of power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them" to eliminate any potential "abuse of subpoena power" that could result if a single branch of government issued and enforced its own subpoenas. *United States v. Bell*, 564 F.2d 953, 959 (Temp. Emerg. Ct. App. 1977).

In addition, the judicial enforcement requirement ensures adequate Fourth Amendment protections against unreasonable searches and seizures. Those protections have caused the Supreme Court to embrace the principle that a person served with an "administrative subpoena" must be afforded the "protection" to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections *in an action in district court*." *Lone Steer*, 464 U.S. at 415 (emphasis added); *See*, 387 U.S. at 544-45.

Congress's demand for judicial enforcement also guarantees due process for the recipient of an investigative request. As the Supreme Court has recognized, "'under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.'" *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001). The enforcement of an investigative request presents precisely such a circumstance. *See* DOJ Report, at 9 n.20 ("Federal courts have generally held that due process does preclude federal agencies from enforcing [their own] subpoenas.") (citing *Shasta Minerals & Chem. Co. v. SEC*, 328 F.2d 285, 286 (10th Cir. 1964)); *see also Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485 (1894) ("[T]he power . . . to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises.").

The proceeding the SEC seeks to conduct here would raise all those constitutional issues. Thus, even if Section 106 and the APA were ambiguous about the need for judicial enforcement in Section 106—which they are not—the doctrine of constitutional avoidance requires an interpretation of Section 106 that requires judicial enforcement of Section 106 requests in the first instance. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail . . . .").

E. The SEC's Initiation of a Rule 102(e) Proceeding Rather Than An Action In Federal Court is Arbitrary and Capricious.

This proceeding is not only contrary to the plain language of SOX and the APA, it also cannot be reconciled with the Commission's existing rules, policies, and practices—including the Commission Staff's prior conduct in this case. Accordingly, this proceeding constitutes an arbitrary and capricious abuse of the Commission's discretion and should be dismissed. *See Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) ("Under the APA, we will set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (quoting 5 U.S.C. § 706(2)(A)).

Consistent with SEC rules and policy, when the Commission Staff issued its Section 106 Request to DTTC in March 2011 (*i.e.*, prior to this litigation), the Staff included with the request the SEC's Form 1662, "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena." Howe Decl. Exh. 2, at 4. In the section entitled "Effect of Not Supplying Information," Form 1662 states:

> If you fail to comply with the subpoena, the Commission may seek a *court order* requiring you to do so. *If such an order is obtained and you thereafter fail to supply the information*, you may be subject to civil and/or criminal sanctions for contempt of court.

Id. at 6 (emphasis added). Thus, consistent with the two-step enforcement procedure required by the APA and contemplated by Section 106, the SEC took the position when it issued its Section 106 Request (and so notified DTTC) that sanctions for non-compliance with the Request would not be imposed unless and until a federal court deemed the Request valid and enforceable.

The Staff's inclusion of Form 1662 with its Section 106 Request to DTTC is all the more significant when Form 1662 is compared to another SEC form the Staff did *not* to send to DTTC, Form 1661. Form 1661 is entitled "Supplemental Information for Entities Subject to Inspection

by the Commission and Directed to Supply Information Other Than Pursuant to a Commission Subpoena," and applies to entities statutorily required to furnish records for examination by the SEC under Section 17(a) of the Securities Exchange Act of 1934, Section 204 of the Investment Advisers Act of 1940, and related statutes. Howe Decl. Exh. 3. Unlike Form 1662, the section of Form 1661 that addresses the "Effect of Not Supplying Information" indicates that failure to furnish "Mandatory Information" may result in immediate sanctions, without prior judicial process:

> Failure to produce the records and documents described in paragraph B.1 for inspection . . . may have the following consequences: (i) regulated persons may be censured or their registration and/or exchange or association status may be suspended, revoked, or subject to various other sanctions . . . .

Id. at 1-2 (section entitled "Effect of Not Supplying Information").

The Commission's promulgation of these separate forms demonstrates the Commission's acknowledgement, in a pre-litigation context, that its investigative requests and its collection of "mandatory information" from regulated entities are subject to different rules and different processes for enforcement. And when the Staff incorporated Form 1662 into the Section 106 Request here, it unequivocally confirmed that the Section 106 Request is investigative and, therefore, must be enforced in a federal court.

Moreover, the Commission's own Enforcement Manual makes clear that enforcement of subpoenas and other similar demands must occur in federal court, and not through internal Commission proceedings: "If a person or entity refuses to comply with a subpoena . . ., the Commission may file a subpoena enforcement action in *federal district court*." SEC Division of Enforcement Manual at 31, *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf (emphasis added). As the D.C. Circuit has recognized, "Manuals or procedures may be binding on an agency when they affect individuals' rights." *Chiron Corp. v.*

Nat'l Transp. Safety Bd., 198 F.3d 935, 943-44 (D.C. Cir. 1999). DTTC's right to obtain judicial review of the Commission's Section 106 Request before that demand is enforced and sanctions imposed for non-compliance clearly has been affected by the Commission's failure to follow its own procedural manual and seek enforcement of its Section 106 Request in federal court.

The SEC's adoption of its Enforcement Manual, its use of Forms 1661 and 1662, and its and issuance of Form 1662 to DTTC require the SEC to enforce its request in a judicial action. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (holding that it is "arbitrary and capricious" for an agency to change policy without a "reasoned explanation" for the change); *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 83 (D.C. Cir. 2011) (holding that "'procedural rules benefitting the party otherwise left unprotected by agency rules'" "can be enforced against the agency" (quoting *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003))). This is true regardless of whether the distinction drawn in the forms and the Enforcement Manual are mandated by Congress or adopted by the SEC voluntarily. *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985) ("It has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated").

Just last year, the SEC itself, under very similar circumstances, recognized that a Rule 102(e) proceeding is, at best, premature unless and until a federal court has deemed a document demand valid and enforceable. In September 2011, the Staff initiated a subpoena enforcement action—in federal court in Washington, D.C.—against DTTC related to a separate demand for workpapers and other documents located in China. The federal court has not yet issued a decision in that action. Indeed, two weeks after the Staff filed the OIP, the Staff itself sought to delay the federal court action because of developments in negotiations between the U.S. and Chinese governments regarding access to foreign accounting firm workpapers. The SEC's

decision to push forward with this administrative disciplinary proceeding and attempt to sanction DTTC for failing to produce documents, without any judicial consideration of such issues as international comity and whether the Commission's Request imposes an unreasonable burden on DTTC, is wholly inconsistent with its pursuit of judicial enforcement with respect to a separate demand for documents located in China.

Indeed, apart from the instant proceeding, the SEC routinely and consistently has enforced investigative requests through judicial actions. By taking the unprecedented step of seeking to enforce this Section 106 Request in an internal adjudication, the Commission has singled out DTTC for differential treatment for which it has proffered no rational basis. Not only is such action arbitrary and capricious, it also imperils DTTC's right to equal protection as well. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564-66 (2000) (authorizing equal protection claims brought by a "class of one" where the plaintiff has intentionally been treated differently from others similarly situated without a rational basis); *Gupta v. SEC*, 796 F. Supp. 2d 503 513-14 (S.D.N.Y. 2011) (refusing to dismiss equal protection claim asserting that SEC had singled out respondent for prosecution through an administrative hearing while overwhelmingly pursuing like claims against other SEC enforcement targets in federal court). The only way to avoid this constitutional problem is to interpret Section 106 to require judicial enforcement and to dismiss this proceeding.

II. THE SECTION 106 REQUEST CANNOT BE ENFORCED UNTIL THE OIP IS PROPERLY SERVED.

In addition to disregarding the plain language of Section 106 in filing an OIP against DTTC, the Commission also has ignored the express terms of Section 106 by failing to serve the OIP on DTTC. For this separate reason, the proceeding must be dismissed.

The Staff sent the OIP via registered mail to Deloitte's U.S. member firm, which the Commission identified as DTTC's "designated agent." DTTC, however, has *not* designated the Deloitte U.S. member firm—or anyone else for that matter—as its agent in the United States for purposes of service of a Commission OIP. Nor has the Staff served the OIP on DTTC in China. Thus, the Staff has not effectuated service of the OIP on DTTC.

Section 106 requires foreign public accounting firms to consent to service in the U.S. of only two particular types of documents—investigative requests pursuant to Section 106 and "process, pleadings, or other papers" in *judicial* "actions" brought to enforce such a request. *See supra* at 7-8 (explaining that the term "action" in Section 106 refers exclusively "judicial action"). DTTC confirmed that its designation of a U.S. agent was so limited: "This consent is limited to the purposes set forth in Section 106 of the Act, and does not constitute consent to service of any request or process, or jurisdiction, for any other purpose." Howe Decl. Exh. 1. The OIP here is neither an investigative request, nor is it process, a pleading, or other paper in an "action." The Commission cannot disregard the clear limits on Commission authority that Congress established in Section 106 and that apply more generally when the Commission seeks to serve process on a foreign entity. Thus, unless and until the OIP is properly served on DTTC in a manner in accordance with the law, this proceeding cannot go forward.

CONCLUSION

Based on the foregoing, this Hearing Officer should dismiss the OIP.

Dated: June 20, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that Respondent DTTC's Motion To Dismiss The Commission's Order Instituting Administrative Proceedings And Memorandum In Support (the "Motion") complies with the type-volume limitations of SEC Rule of Practice 154(c) because it contains 5,885 words (as determined by the Microsoft Word 2007 word-processing system used to prepare the Motion), excluding those parts of the Motion exempted by Rule 154(c).

Dated: June 20, 2012

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