UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-14872

In the Matter of

DELOITTE TOUCHE TOHMATSU
CERTIFIED PUBLIC ACCOUNTANTS LTD.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DELOITTE TOUCHE TOHMATSU CPA LTD'S MOTION TO DISMISS THE ORDER INSTITUTING PROCEEDINGS

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The Division of Enforcement (the "Division") of the U.S. Securities and Exchange Commission ("SEC" or "Commission") respectfully submits this brief in opposition to the Motion to Dismiss ("MTD") filed by respondent Deloitte Touche Tohmatsu CPA Ltd. ("DTTC" or "Respondent") on June 20, 2012.

PRELIMINARY STATEMENT

The Respondent argues that the Commission erred by initiating this administrative proceeding to address Respondent's willful refusal to comply with its statutory obligations as a registered public accounting firm. Respondent contends that, before taking this logical and permissible step, the Commission was required to file a civil lawsuit against DTTC in United States District Court. That is not the law. As this administrative proceeding will show, DTTC has willfully refused to comply with its statutory obligation, pursuant to Section 106 of the Sarbanes-Oxley Act of 2002 ("Section 106") [15 U.S.C. § 7216], to provide the Commission with a copy of its audit workpapers for Client A. This willful violation of the federal securities laws threatens not only the Commission's processes, but also investors who rely on the Commission's ability to conduct investigations. Accordingly, the Commission's decision to initiate proceedings was appropriate.

DTTC repeatedly seeks to analogize its obligations under Section 106 to that of a subpoena recipient, and argues that, like a subpoena recipient, it cannot be sanctioned until a federal court has ordered it to comply with the document request. But a Section 106 request is fundamentally different from an administrative subpoena; it is a statutory obligation that DTTC took on when it voluntarily chose to become a registered public accounting firm conducting audits for U.S. issuers. Moreover, the Division is not here seeking to "enforce" its Section 106 request by forcing DTTC to produce its audit workpapers, as it might in a district court action

akin to a subpoena enforcement action; rather, the Division is seeking to remedy the Respondent's willful violation of the Sarbanes-Oxley Act and protect U.S. investors who are left in the dark by DTTC's ongoing refusal to provide the SEC with any documentation in support of its audits. Accordingly, none of the principles DTTC seeks to invoke in its Motion to Dismiss warrant relief, and the motion should be denied.

DTTC's separate argument to delay the administrative proceeding until the OIP has been served directly on DTTC is similarly without merit. While DTTC is correct that its registered U.S. agent for service of Section 106 demands did not explicitly consent in advance to accepting service of orders instituting proceedings under Rule 102(e), that is of little consequence. Rule 141 of the Commission's Rules of Practice allows orders instituting proceedings to be served on foreign persons in any method "reasonably calculated to give notice" to such persons. 17 C.F.R. § 201.141(a)(2)(iv). Serving the OIP on DTTC's registered agent for service of Section 106 demands accomplished precisely that. Indeed, there can be no dispute that DTTC is on notice of the instant proceedings, having filed an answer and a motion to dismiss. Accordingly, there is no reason to delay the instant proceeding now.

BACKGROUND

The OIP alleges that DTTC is a public accounting firm, registered with the Public Company Accounting Oversight Board, and located in Shanghai, the People's Republic of China. (OIP ¶ 1). Beginning in April 2010, Commission staff has made extensive efforts to obtain audit workpapers connected to DTTC's independent audit work for an issuer-client ("Client A") of DTTC in connection with a fraud investigation it had initiated. (OIP ¶ 2). For example, Commission Staff has sought such workpapers from Deloitte LLP, the global firm of which DTTC is a member. (OIP ¶¶ 4-8). Moreover, beginning in June 2010, Commission staff

sought to obtain the relevant audit workpapers through international sharing mechanisms, which have to date been unsuccessful. (OIP ¶ 9).

On March 11, 2011, Commission Staff served DTTC with a formal request, pursuant to Section 106, for its audit workpapers for Client A. (OIP ¶ 10). However, on April 29, 2011, DTTC informed Commission staff that it would not produce the documents requested to the Commission because it interpreted the law of the Peoples Republic of China ("PRC" or "China") as prohibiting such production. (OIP ¶ 11).

When the Commission was still unable to obtain the workpapers nearly a year later, the Commission filed the Second Corrected Order Instituting Proceedings (the "OIP"). The OIP was filed on May 9, 2012, and was served on DTTC, via its registered agent for service of Section 106 demands, on March 14, 2012. DTTC filed the instant Motion to Dismiss on June 20, 2012.

ARGUMENT

The Respondent's Motion to Dismiss should be denied. *First*, the Commission was acting well within its authority when it initiated this administrative proceeding to determine both whether DTTC has violated the Sarbanes-Oxley Act by willfully refusing to produce its audit workpapers and whether, in light of that violation, remedial steps are needed to protect investors. DTTC argues that the Commission lacked the authority to initiate this proceeding unless and until the Commission institutes a federal district court action to enforce its Section 106 document demand against DTTC; DTTC claims that this result is mandated primarily by principles underlying the enforcement of *subpoenas*. But as is explained at length below, a Section 106 demand is not a subpoena – it is a statutory obligation DTTC undertook when it voluntarily chose to become a registered public accounting firm engaged in the U.S. capital markets. Now that DTTC has willfully chosen to comply with what it believes Chinese law requires in lieu of

what U.S. law requires, it must accept the consequences. One of those consequences is that, pursuant to Rule 102(e), it may lose the privilege of practicing or appearing before the Commission. *Second*, the Secretary's Office properly served the OIP on DTTC by sending it to DTTC's registered agent for service of Section 106 demands – a method of service that was reasonably calculated to assure notice of the proceeding to DTTC. Thus, we respectfully submit that this Hearing Officer should proceed to the merits of this proceeding.

I. The Commission Has The Authority To Bring Administrative Proceedings Under Rule 102(e)(1)(iii) To Remedy Willful Violations Of Section 106 Of The Sarbanes-Oxley Act Of 2002.

A. Section 106 And Rule 102(e)(1)(iii) Provide Core Protections For The SEC's Processes.

Section 106 of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Act, makes clear that "[a]ny foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer . . . shall be subject to [the Act] and the rules of the . . . Commission issued under [the Act], in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States or any State." 15 U.S.C. § 7216. Of particular relevance here, Section 106 created an explicit obligation for foreign public accounting firms to produce their audit workpapers to the Commission or the Public Company Accounting Oversight Board ("PCAOB" or "Board") upon request. It states, in relevant part:

> (b) Production of documents
>
> If a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall--
>
> (A) produce the audit work papers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board; and

(B) be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for such documents.

. . . .

(e) Sanctions

A willful refusal to comply, in whole in or in part, with any request by the Commission or the Board under this section, shall be deemed a violation of this Act.

15 U.S.C. § 7216.

As the Senate Committee on Banking, Housing, and Urban Affairs explained at the time of Sarbanes-Oxley's passage, assuring the ability for the SEC and PCAOB to obtain audit workpapers of foreign public accounting firms was critical to maintaining the transparency that underlies the proper functioning of the securities laws:

> Companies that sell shares to U.S. investors, and are subject to the federal securities laws, can be organized and operate in any part of the world. Their financial statements are not necessarily audited by U.S. accounting firms, and the Committee believes that there should be no difference in treatment of a public company's auditors under the bill simply because of a particular auditor's place of operation. Otherwise, a significant loophole in the protection offered U.S. investors would be built into the statutory system. Thus, accounting firms organized under the laws of countries other than the United States that issue audit reports for public companies subject to the U.S. securities laws are covered by the bill in the same manner as domestic accounting firms, subject to the exemptive authority of both the Board and the SEC. . . .

S. Rep. No. 107-205, at 11-12 (2002).

Meanwhile, the Commission has long-established rules and procedures for policing the federal securities laws, including the provisions of Sarbanes-Oxley. Administrative proceedings are a core part of that function, and they are particularly important with respect to entities and individuals who are regulated by the Commission or practice before the Commission. Rule 102(e) of the Commission's Rules of Practice is the Commission's tool for policing the conduct of lawyers and accountants who practice before it. *See In the Matter of Gregory M. Dearlove,*

CPA, File No. 3-12064, 2006 WL 2080012, at *56 (Initial Decision, July 27, 2006) ("[T]he Commission views Rule 102(e) as a means to ensure that those professionals perform their tasks diligently and with a reasonable degree of competence"). The rule states, in relevant part:

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter:
> . . . .
>
> (iii) To have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

17 C.F.R. § 201.102(e). This rule was codified by Congress as part of the Sarbanes-Oxley Act, at the same time that it passed Section 106. 15 U.S.C. § 78d-3; *see In the Matter of Robert W. Armstrong, III*, File No. 3-9793, 2005 WL 1498425, at *12 n.61 (June 24, 2005) ("Congress embraced our application of Rule 102(e) by codifying the rule substantially verbatim in Section 4C of the Exchange Act as a result of the Sarbanes-Oxley Act of 2002").

As the Second Circuit observed over 30 years ago in describing a prior version of Rule 102(e), it "represents an attempt by the SEC essentially to protect the integrity of its own processes. If incompetent or unethical accountants should be permitted to certify financial statements, the reliability of the disclosure process would be impaired." *Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979). Thus, "[i]t provides the Commission with the means to ensure that those professionals, upon whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence." *Id.* at 582; *see Checkosky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994) (discussing importance of predecessor rule to 102(e) and noting that "[t]he Commission had promulgated [the predecessor to Rule 102(e)] not to augment its enforcement arsenal but to protect its administrative processes"). Because an action under Rule 102(e) is a remedial measure meant to protect

Commission processes, the Commission may initiate proceedings to seek remedial relief before filing a civil lawsuit to enforce any underlying violations of law. *Id.*; *In the Matter of Robert W. Armstrong, III*, 2005 WL 1498425, at *11-12 (discussing remedial nature of Rule 102(e) proceedings); *In the Matter of Gregory M. Dearlove, CPA*, 2006 WL 2080012, at *56 ("The Commission has insisted that it does not use Rule 102(e) as an additional weapon in its enforcement arsenal. The bright-line distinction between disciplinary proceedings and enforcement proceedings is also memorialized in Rules 101(a)(3)-(4) of the Commission's Rules of Practice."). Simply put, if the Commission concludes that certain accountants are unethical, are engaged in improper conduct, or are otherwise willfully violating any provision of the federal securities laws, the Commission has the power – and, indeed, the responsibility – to consider whether some limitation on their practice before the Commission is needed to protect U.S. investors.

That is precisely what the Commission seeks to do here. By issuing the OIP, the Commission has not alleged that DTTC is unethical or lacking in qualifications; rather, it has initiated proceedings to determine whether DTTC has willfully violated Section 106 by willfully refusing to provide the Commission with a copy of its audit workpapers for Client A. Because of the centrality of Section 106 compliance to an auditing firm's ability to comply with the Commission's processes, the Commission has directed this Hearing Officer to consider whether DTTC "should be censured or denied the privilege of appearance and practice before the Commission." (OIP ¶ 18). Taking such a remedial step may ultimately remedy the core problem presented by DTTC's willful refusal to provide the Commission with its workpapers – namely, the fact that, as long as the SEC is unable to access DTTC's workpapers, investors are left potentially unprotected by the non-transparent audits that DTTC is performing on U.S. issuers.

See generally United States v. Arthur Young & Co., 465 U.S. 805, 818 (1984) (discussing need for disclosure and review of audit workpapers and stating: "To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.").

B. Because A Rule 102(e) Proceeding Is Designed To Protect The Commission's Processes, And Not To Enforce A Section 106 Request, No District Court Action Need Be Brought.

DTTC argues that, prior to bringing an administrative proceeding pursuant to Rule 102(e)(1)(iii), the Commission must first seek to enforce its Section 106 request in U.S. District Court. DTTC is wrong. To *enforce* its Section 106 request and compel DTTC to produce its workpapers directly to the SEC, the Commission may be required to initiate proceedings in federal district court. But that is not the relief the Commission has ordered to be considered in this proceeding, and it is not the relief the Division is seeking. Indeed, it is ultimately irrelevant to this proceeding whether the Commission could successfully enforce its Section 106 request through a district court action and compel production of DTTC's audit workpapers. That is because deciding whether a Section 106 request should be enforced and deciding whether a willful violation of Section 106 should be remedied under Rule 102(e)(1)(iii) involve very different considerations in light of the different remedies at stake.[1]

[1] For example, if the SEC were to initiate a district court proceeding to enforce its Section 106 request, the district court could be convinced that ordering DTTC to comply with the Section 106 request by producing the requested workpapers would potentially expose DTTC to severe sanction in China, and thus decide not to enforce the Section 106 request even though the request itself was valid and DTTC is willfully refusing to comply with it. By contrast, in this Rule 102(e) proceeding, because the Division is not seeking production of the workpapers, DTTC will not face the same hardship in China from the remedies sought. Indeed, to the extent principles of international comity apply in this proceeding, they will apply very differently than they would in any effort to enforce the Section 106 request.

This is precisely the same rationale that supported the Commission action, over 20 years ago, in *In re the Matter of Dominick & Dominick, Inc.*, Rel. No. 34-29243 (May 29, 1991). In that case, Dominick, a broker-dealer registered with the Commission but based in Switzerland, refused to furnish promptly a copy of its books and records to Commission staff as required by Rule; instead, it argued that Swiss secrecy laws prevented its compliance with the Commission's request. The Commission brought an administrative proceeding, finding that Dominick had willfully violated Exchange Act Rule 17a-4(j) and emphasizing that "foreign law does not invalidate a registered broker-dealer's pre-existing statutory obligation to furnish promptly its required books and records to the Commission upon demand." *Id.* at *18 n.15. In deciding the case, the Commission wrote:

> The Commission emphasizes that the purpose of this action is not to compel the production of documents from Switzerland. At the time it opened its office in Basel, Dominick was subject to a U.S. regulatory obligation which required it to make sure that it was in a position to furnish promptly required books and records demanded by the Commission staff. The primary purpose of these proceedings is to impose remedial relief on the basis of Dominick's failure to satisfy this obligation.

Id. at *19 n.16. So too here. The purpose of this action is not to compel DTTC to produce its audit workpapers for Client A. Rather, the purpose of these proceedings it to protect the integrity of the Commission's processes by imposing remedial relief in response to DTTC's failure to satisfy its statutory obligation under Section 106.

Similarly instructive is the Commodity Futures Trading Commission ("CFTC") case of *In the Matter of Alan J. Ridge and Co., Ltd.*, No. 80-16, Comm. Fut. L. Rep. (CCH) P 21,819 (March 22, 1989). That case arose after the CFTC ordered Alan J. Ridge & Company ("Ridge"), a British company, to provide the CFTC with information and records relating to certain futures and cash transactions Ridge had directed on an exchange located in New York. Ridge was

required to maintain such records and disclose them to the CFTC under U.S. law, but Ridge refused to provide the information, arguing, among other things, that complying with the request would violate British law. The CFTC ultimately brought an administrative proceeding alleging that Ridge had violated the Commodity Exchange Act [7 U.S.C. § 6i] by, among other things, failing to provide the CFTC with the requested information regarding futures contracts in which Ridge had participated. The ALJ held that, even if providing the requested information would violate British law, that would not provide a defense in the CFTC's administrative proceeding because:

> [The enforcement action] does not seek to compel conduct by a foreign trader which would violate the laws of his home country. The intended purpose of this action for the short term is to impose sanctions for a past violation of Commission regulations and its order. The long-term objective is, of course, to demonstrate to all traders whether foreign or local, that they will be compelled to produce such information relevant to their futures trading as may be necessary to comply with this Commission's lawful orders, or otherwise to forego the privilege of trading on contract markets in the United States. This clearly does not contemplate any conflict with foreign laws.

In the Matter of Alan J. Ridge and Co., Ltd., No. 80-16, Comm. Fut. L. Rep. (CCH) P 21,819 (footnote omitted). Viewed with this understanding of the purposes and consequences of this proceeding, DTTC's arguments are all easily rejected.

1. The Text And Structure Of Section 106 Do Not Support DTTC's Claim That The SEC's Only Recourse To DTTC's Willful Violation Of Section 106 Is To File A District Court Action

Contrary to DTTC's arguments, the Commission's authority to bring this OIP is *supported* by the text and structure of the Sarbanes-Oxley Act. DTTC makes much of the fact that Section 106 states that 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 audit workpapers and related documents issued under Section 106. 15 U.S.C. § 7216(b)(1)(A); *see* DTTC MTD at

6-8. But Section 106(e) of the Sarbanes-Oxley Act states that "[a] willful refusal to comply, in whole or in part, with any request by the Commission . . . under [Section 106], shall be deemed a violation of [the Sarbanes-Oxley Act]," 15 U.S.C. § 7216(d), and Section 3(b)(1) of the Sarbanes-Oxley Act makes plain that "[a] violation by any person of [the Sarbanes-Oxley Act] . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 . . . and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that act." 15 U.S.C. § 7202(b)(1). Thus, the fact that foreign public accounting firms are subject to district court jurisdiction for actions brought to *enforce* Section 106 demands (*i.e.*, to compel production of the documents) says nothing about whether they are *also* subject to the Commission's longstanding jurisdiction for Rule 102(e) proceedings to protect the integrity of the Commission's processes and remedy willful violations of the federal securities laws. On that score, "[t]here can be little doubt that the Commission, like any other institution in which [accountants] or other professionals participate, has authority to police the behavior of practitioners before it." *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985). Indeed, it is a power codified by statute. 15 U.S.C. § 78d-3.

Again, the Division does not dispute that Congress provided that actions to enforce compliance with Section 106 requests could be brought in federal district court; however, it does not follow that Congress *sub silentio* elected simultaneously to sweep away or otherwise limit the Commission's power to protect its own processes. But that is precisely what DTTC maintains; it is effectively urging this Hearing Officer to read the word "first" into Section 106(b)(1)(B) by claiming that the Commission cannot protect its own processes until it first pursues and wins a district court action to enforce its Section 106 request. The better reading of Section 106(b)(1)(B) is to interpret it not as limiting the Commission's existing jurisdiction to

protect its own processes through disciplining professionals who practice before it; but rather as expanding the Commission's ability to obtain foreign audit workpapers by expressly providing for federal court jurisdiction for such actions.

This reading of Section 106(b)(1)(B) is also consistent with the structure of the rest of the Sarbanes-Oxley Act, which explicitly made foreign public accounting firms subject to the newly created disciplinary proceedings of the PCAOB. Pursuant to Section 105 of the Sarbanes Oxley Act, the PCAOB can bring disciplinary proceedings against registered public accounting firms, including foreign firms, of a very similar nature to this Rule 102(e)(1)(iii) proceeding, for failing to comply with the Sarbanes-Oxley Act, including a refusal to produce requested documents. *See* 15 U.S.C §§ 7216(a) (stating that foreign public accounting firms "shall be subject to [the Sarbanes-Oxley Act] and the rules of the Board and the Commission issued under [the Act]"); 7215(b)(2)(B) ("[T]he rules of the Board may . . . require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof, *wherever domiciled*, that the Board considers relevant or material to the investigation, and may inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied" (emphasis added)); 7215(c) (directing Board to devise non-public disciplinary proceedings to address violations of the Sarbanes-Oxley Act by registered public accounting firms); 7215(b)(3) (describing remedial measures PCAOB can take against registered accounting firms that refuse to produce documents); 7211(c)(6) (noting that one of the duties of the Board is to "enforce compliance" with the Sarbanes-Oxley Act). Put differently, Congress created a new disciplinary authority for the PCAOB in Section 105 of the Sarbanes-Oxley Act, and explicitly authorized the PCAOB to proceed directly to an administrative proceeding against accounting firms, wherever domiciled,

that refuse to produce documents. Given that Congress intended to grant this authority to the PCAOB, there is no reason to assume that Congress simultaneously intended to eliminate – through silence – such an authority from the SEC.

The fact that the Commission has parallel jurisdiction to bring a Rule 102(e) proceeding is further supported by the structure of other provisions of the securities laws involving broker-dealers and investment advisors. DTTC claims that because those statutes did not explicitly confer jurisdiction on federal district court for enforcement actions, the fact that Congress *did* explicitly confer federal court jurisdiction for enforcement of Section 106 requests takes on heightened meaning. *See* DTC MTD 8-9 (citing 15 U.S.C. § 80b-4). But the more telling fact is that neither Section 204 of the Investment Advisers Act nor Section 17(a) of the Exchange Act identified a specific enforcement mechanism, let alone an exclusive one; in the absence of an explicit directive for how violations of the statutes were to be addressed, the SEC has all available options to it, including administrative proceedings. *See e.g.*, *In the Matter of vFinance Investments, Inc., and Richard Campanella*, No. 3-12918, 2010 SEC Lexis 2216 (July 2, 2010) (finding, in an administrative proceeding without prior judicial action, that broker dealer and its chief compliance officer had willfully violated recordkeeping and production provisions of federal securities laws and imposing sanctions including by barring officer from associating with a broker-dealer in any supervisory or principal capacity).

In sum, DTTC's textual argument should be rejected; if anything, the text of the federal securities laws, read as a whole, fully support the Commission action here.

2. The APA and Constitutional Protections Do Not Preclude the Commission From Taking Remedial Steps To Protect its Processes

DTTC's arguments regarding due process and the Administrative Procedure Act (*see* DTTC MTD at 10-14) fare no better, as all of these arguments are based on the flawed premise

that this Rule 102(e)(1)(iii) proceeding is no different than an attempt to enforce an administrative subpoena.

Again, a Section 106 demand is materially different from an administrative subpoena. An administrative subpoena may be issued to third parties based on extremely broad authority. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("The provisions vesting the SEC with the power to issue and seek enforcement of subpoenas are expansive."). Thus, it is unsurprising that an agency must generally obtain judicial review of that subpoena prior to seeking sanctions – a court must determine that the subpoena's request is reasonable as an independent check on agency power. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (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, the demand is not too indefinite and the information sought is reasonably relevant."). By contrast, Section 106 reflects Congress's considered decision to obligate any foreign public accounting firm that elects to register with the PCAOB and participate in the U.S. capital markets to produce a copy of its audit workpapers to the SEC upon request. Put differently, Congress has already deemed this Section 106 request to be reasonable.

Even if a Section 106 request is deemed analogous to a subpoena, however, DTTC's due process and APA arguments rest entirely on the flawed premise that this is a proceeding to *enforce* the Section 106 request. As discussed above, that is not the purpose of this proceeding; the purpose of this proceeding is to protect the Commission's processes. To be sure, in this proceeding the Hearing Officer will be called upon to determine the legal question of whether DTTC has willfully violated the securities laws and whether certain remedial sanctions are appropriate as a result. But neither of those steps runs afoul of due process or the APA.

The flaw in DTTC's analysis is perhaps best exposed by one of the cases DTTC itself cites, *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 499 (4th Cir. 2011). That case involved an administrative proceeding before the National Labor Relations Board ("NLRB"), in connection with which the NLRB issued an administrative subpoena. After the subpoena recipient refused to comply, asserting privilege over the subpoenaed documents, the ALJ ordered the recipient to produce the documents *in camera* to permit the ALJ to consider the issue. The Fourth Circuit held that, while the issuance of the order was permissible, the ALJ lacked the authority to *enforce* the order. Specifically, the Court wrote:

> [I]n this case, ALJ Clark had the authority, on the basis of the privilege log and the Board's response to it, to sustain the claim of privilege or to order the production of documents for *in camera* review. But when Interbake refused to comply with that order, the ALJ lacked the power to enforce it. To obtain enforcement, the Board had to apply to the district court for a judicial order of enforcement, in accordance with the established division of powers between agencies and courts.
>
> We do not say that an ALJ does not have the authority to rule on a claim of privilege. He can make a ruling just as he could rule on any issue of evidence presented to him during the course of a hearing. But the ALJ has no power *to require the production* of documents for *in camera* review or for admission into evidence when a person or a party refuses to produce them. That would require Article III power, which the ALJ does not have.

Id. at 499 (emphasis in original). The very same analysis applies here. Just as the ALJ in *Interbake Foods* had the power to consider the claim of privilege, this Hearing Officer has the authority to consider DTTC's claims that it has not willfully violated Section 106. And just like the ALJ in *Interbake Foods*, this Hearing Officer will have limited powers if it finds that DTTC has, in fact, willfully violated Section 106 – it will be able to consider and impose the sanctions available under Rule 102(e), but it will not be able to order DTTC to produce the requested documents under Section 106.

For all of these reasons, DTTC's reliance on the Department of Justice's 2002 report regarding the use of *subpoenas* by administrative agencies is particularly unwarranted. *See* DTTC MTD at 2, 10, 13 (citing 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")). DTTC suggests that, by issuing that report, the Department of Justice has implied that administrative agencies can take no steps to remedy refusals to comply with document requests. In fact, the report's import is far more limited. Indeed, in that very report, the Department of Justice recognized that the requirement of administrative agencies to go to court to enforce subpoenas does *not* limit agencies' ability to bring disciplinary proceedings or other collateral actions to encourage compliance with subpoenas. Specifically, the Department of Justice wrote:

> As federal agencies are not currently authorized under statute to enforce administrative subpoena compliance directly, certain agencies have recognized that they are capable of taking action separate and apart from a U.S. district court's enforcement action in an indirect effort to encourage compliance. The Federal Maritime Commission, for instance, states that, in addition to requesting the Attorney General's assistance in seeking judicial enforcement, the Commission may: (1) suspend a common carrier's tariff or use of a tariff for failure to supply information, 46 App. U.S.C. §1712(b)(2), (2) impose a penalty of up to $50,000 per shipment for carriers subsequently operating under a suspended tariff, 46 App. U.S.C. §1712(b)(3), and (3) request that the Secretary of the Treasury refuse clearance to carriers in noncompliance with a subpoena request, 46 App. U.S.C. §1712(b)(4). Shipping Act of 1984, 46 U.S.C. §13(b)(2)-(4).

DOJ Report, at 14; *see* 46 U.S.C. § 41108 (formerly 46 U.S.C. § 1712); *see Key Bridge Express Inc. and Key Bridge Express (U.S.A.) Inc.*, No. 98-08 (April 8, 1999) (Federal Maritime Commission opinion suspending Kin Bridge's tariff for failure to comply with discovery request

prior to having sought judicial enforcement of such requests). What the Commission seeks to do here is no different.

Ultimately, because of the remedies to be considered, a Rule 102(e) proceeding based on a willful violation of Section 106 is far more akin to a delicensing proceeding than it is to a subpoena enforcement action. Just like a licensee, what is at stake in this proceeding is DTTC's privilege of practicing or appearing before the Commission. The due process protections afforded in such circumstances are far less than DTTC would have this Hearing Officer believe, particularly given the critical nature of the Commission's ability to protect its own processes. *See generally Barry v. Barchi*, 443 U.S. 55, 64-66 (1979) (holding that, prior to suspending the license of a horse trainer, New York state was not required to provide a hearing, let alone judicial review, to determine the validity of the allegations). DTTC's due process rights are surely adequately protected by this proceeding.

Accordingly, this Hearing Officer should reject DTTC's arguments that due process or the APA preclude what the Commission has ordered in this case.

3. This Proceeding Is Not Arbitrary or Capricious

Finally, the Commission's decision to institute administrative proceedings in this action is neither arbitrary nor capricious. DTTC contends that the institution of Rule 102(e) proceedings here was inconsistent with the manner in which the SEC has previously enforced *subpoenas*, including in a pending subpoena enforcement action against DTTC. (DTTC MTD at 14-17). But that only highlights the point that a Section 106 demand is a different (and new) tool, and thus it is unsurprising that the consequences of DTTC's willful violation of Section 106 are different from that of a non-compliant subpoena recipient. Indeed, DTTC cannot point to a

single prior instance of the SEC taking a different form of action in response to an accounting firm's willful violation of Section 106.

Nor is the Commission limited by the fact that, in sending DTTC the Section 106 demand in this case, the Enforcement Division staff included a copy of Form 1662. *See* DTTC MTD at 15-16. That form, on its face, is inapplicable to a Section 106 demand, as Form 1662 provides "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information." (Howe Decl. Exh. 2, at 4). Thus, the provision of that form was, in fact, not "[c]onsistent with SEC rules and policy," as DTTC claims. (DTTC MTD at 14). More to the point, Form 1662 said nothing whatsoever about what consequences DTTC could face for willfully refusing to comply with the Commission's Section 106 demand; it only speaks of consequences for not complying with a *subpoena* or a *voluntary request*, and this was neither. While DTTC suggests that it is telling that the staff chose to provide it with a Form 1662 in lieu of a Form 1661, that is not true for the simple reason that Form 1661 is likewise inapplicable, on its face, to Section 106 demands. Form 1661 is a form to be provided 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 194, and related statutes. Howe Decl. Exh. 3. It is not, as currently drafted, applicable to foreign public accounting firms required to produce documents in response to a Section 106 demand. In any event, because the SEC told DTTC nothing about the consequences of not complying with its Section 106 demand by providing a copy of Form 1662 to DTTC, it is inaccurate for DTTC to now claim that "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." (DTTC MTD at 15).[2]

II. The OIP Has Been Properly Served.

DTTC's separate argument, regarding service of the OIP, is also without merit. DTTC contends that "the Commission . . . has ignored the express terms of Section 106 by failing to serve the OIP on DTTC." DTTC MTD at 17. Specifically, DTTC contends that when it designated an agent for service of Section 106 demands, which consented to accept service of "process, pleadings, or other papers in any *action* by the SEC or the PCAOB to enforce Section 106 of the Act," it only intended to accept service of such papers in connection with *judicial* actions – rather than administrative actions. Section 106 says nothing about the proper manner of service in administrative proceedings such as this; because this Rule 102(e) proceeding is not an effort to *enforce* the SEC's Section 106 demand, DTTC's registered agent has not consented to accept service of the OIP. Nevertheless, even without that prior consent having been obtained, service has been effectively made under the Commission's Rules of Practice.

Rule 141 of the Commission's Rules of Practice allows for significant flexibility in the service of orders instituting proceedings. Specifically, that rule provides that orders instituting proceeding may be served on foreign persons in any method "reasonably calculated to give notice" to such persons, so long as it is not prohibited by international agreement. 17 C.F.R. § 201.141(a)(2)(iv). The service that was made here fits squarely within Rule 141.

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[2] We also note that DTTC cannot plausibly claim prejudice for having received the wrong Form in connection with the Section 106 request, as it would not have responded any differently had it been more explicitly warned that it could face a Rule 102(e) proceeding as a consequence of non-compliance. Indeed, when it received a Wells notice to that effect, DTTC continued to refuse to produce its workpapers to the SEC.

As an initial matter, serving the OIP on DTTC's registered agent for service of Section 106 demands was not prohibited by the Hague Convention or any other international agreement. *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents art. 1, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T. S. 163 (noting that it applies to cases "where there is occasion to transmit a judicial or extrajudicial document for service abroad," which was not contemplated or conducted here). Nor did anything in the Commission's Rules of Practice require the Commission to attempt service through any different method before resorting to Rule 141(a)(2)(iv). *Cf.* Fed. R. Civ. P. 4(f)(3); *Rio Properties v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002) (holding that a party need not exhaust available methods of service identified in Federal Rules before pursuing alterative means of service reasonably calculated to provide notice to defendant); *In re LDK Solar Securities Litigation*, No. C 07–05182 WHA, 2008 WL 2415186 (N.D. Cal. June 12, 2008) (permitting alternative service of process on defendants in China before plaintiffs had attempted service through the Hague Convention). Indeed, for similar reasons in a pending subpoena enforcement action brought by the SEC against DTTC, the presiding Magistrate Judge has authorized the SEC to serve papers on DTTC's U.S. counsel prior to resorting to the Hague Convention or other methods to attempt service. *SEC v. Deloitte Touche Tohmatsu CPA Ltd.*, Misc. No. 11-0512 GK/DAR (D.D.C. Feb. 1, 2012) (Minute Order).

Moreover, there can be no meaningful dispute that the method of service employed by the Commission here effectively placed DTTC on notice of the instant proceedings. DTTC was on notice of the potential for this proceeding for months in advance, having been issued a Wells notice; and since the OIP was served on May 14, 2012, DTTC has filed an answer and a motion to dismiss. This is sufficient to accomplish "the core function of service," which "is to supply

notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." *Henderson v. United States*, 517 U.S. 654, 672 (1996); *see also Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 176 (2d Cir. 1979) ("The Supreme Court has long recognized that no one form of substitute service is favored over any other so long as the method chosen is reasonably calculated, under the circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit and an opportunity to present his defense."). Accordingly, there is no reason to delay the instant proceeding now.

CONCLUSION

For the reasons set forth above, the Division of Enforcement respectfully submits that this Hearing Officer should deny DTTC's Motion to Dismiss the OIP.

Dated: July 5, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify the Division of Enforcement's Memorandum of Law in Opposition to Deloitte Touche Tohmatsu CPA Ltd.'s Motion to Dismiss the Order Instituting Proceedings complies with the word limitations of SEC Rule of Practice 154(c) because it contains 6,850 words, as determined by the Microsoft Word processing system used to prepare the Memorandum.

Dated: July 5, 2012

Mark Lanpher