UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of BDO China Dahua CPA Co., Ltd.; Ernst & Young Hua Ming LLP; KPMG Huazhen (Special General Partnership); Deloitte Touche Tohmatsu Certified Public Accountants Ltd.; PricewaterhouseCoopers Zhong Tian CPAs Limited, Respondents.	The Honorable Cameron Elliot, Administrative Law Judge

RESPONDENTS' RESPONSE TO THE DIVISION OF ENFORCEMENT'S OBJECTIONS TO WITNESSES AND EXHIBITS AND MOTION *IN LIMINE* AS TO CERTAIN TESTIMONY TOPICS

Pursuant to the schedule and instructions provided by the Administrative Law Judge ("ALJ") during the July 1, 2013 final prehearing conference, Respondents Dahua CPA Co., Ltd., Ernst & Young Hua Ming LLP, KPMG Huazhen (Special General Partnership), Deloitte Touche Tohmatsu Certified Public Accountants Ltd., and PricewaterhouseCoopers Zhong Tian CPAs Limited Company (collectively, "Respondents") hereby submit this response to the Objections to Witnesses and Exhibits and Motion *in Limine* as to Certain Testimony Topics filed by the Division of Enforcement (the "Division") on June 26, 2013 ("Division's Objections").

During the final prehearing conference, the ALJ requested that Respondents address in writing the Division's motion *in limine* as it relates to certain aspects of Respondents' proposed expert testimony. Points I and II below respond to the Division's arguments in that regard. In addition, although the ALJ did not require Respondents to provide a written response to the other aspects of the Division's objections and motions *in limine*, to the extent the Court wishes to address any particular documentary or testimonial objection of the Division at the beginning of the hearing on July 8, 2013 or at some other time during the hearing, in points III through VI below, Respondents provide responses to the Division's other *in limine* objections. The proper framework for assessing the admissibility of the evidence to be adduced in this proceeding, which the ALJ referenced at the beginning of the final prehearing conference, makes plain, Respondents submit, that the Division's admissibility objections are entirely without merit. Consistent with the ALJ's directions, Respondents reserve the right to address any questions the ALJ may have with respect to any particular exhibits or proffered testimony at the commencement of the hearing on July 8, 2013 or at any other time as the ALJ wishes.[1]

[1] As explained during the final prehearing conference, Respondents intend to present all of their percipient witnesses live in the hearing room during the week of July 22, 2013. Certain witnesses have visa applications pending and, to the extent the U.S. government does not grant those applications, these witnesses would not be (....continued)

I. Chinese Law Experts

The Division attempts to exclude significant portions of the expert opinions of Professors Xin Tang and James Feinerman. (*See* Division's Objections at 8-13.) This attempt should be rejected. The Division's arguments are both incorrect as a matter of law and wholly inappropriate for a motion *in limine*—they amount to an attempt by the Division to raise issues appropriate, if at all, for cross-examination. The expert opinions of Professors Tang and Feinerman are appropriate for this hearing, critical to the issues presented here, and admissible under the Securities and Exchange Commission's (the "SEC" or "Commission") Rules of Practice—the applicable standard and one which the Division completely ignores. But even if the federal rules did apply, as the Division incorrectly implies, these opinions would be admissible, anyway. Under any standard, the Division's motion *in limine* fails.

What Chinese law requires is front and center in this proceeding. Respondents assert that Chinese law prohibits them from producing documents directly to the SEC without the approval of their domestic regulators, including China's Ministry of Finance (the "MoF") and the China Securities Regulatory Commission (the "CSRC"), and that Respondents understood that to be the case when declining to do so. The Division asserts otherwise—that there is no existing impediment to such a production and, if one exists, it is somehow of Respondents' own making. That this dispute even exists is, quite frankly, remarkable. In the spring of 2011, just as the Division was first seeking DTTC Client A documents from DTTC, SEC Chairman Schapiro told Congress that the Chinese government views the SEC's "direct[] access [to] witnesses and

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(continued....)

permitted to travel to the United States for the hearing. In that circumstance, Respondents believe that such witnesses should be permitted to testify via video conference. The Division maintains an objection to video testimony, even in that circumstance. Pursuant to the agreement reached during the final prehearing conference, Respondents reserve the right to respond at a later date, if necessary, to the Division's objection.

information" from China "as a possible violation of sovereignty and/or national interest, which may be expressed informally (as is done by the CSRC) or embodied in law or agreement." Ltr. from SEC Chairman Mary L. Schapiro to Hon. Patrick T. McHenry, Chairman of the Subcomm. on TARP, Fin. Servs., & Bailouts of Pub. and Private Programs, Comm. on Oversight and Gov't Reform (Apr. 27, 2011) (RX[2] 241). And, last September, a Public Company Account Oversight Board ("PCAOB") Board Member straightforwardly observed that "[u]nder Chinese law, it is illegal to remove audit work papers from China." Lewis H. Ferguson, *Investor Protection through Audit Oversight* (Sept. 21, 2012) (RX 428). But the Division now disputes this—and to determine which side is right, the ALJ must obtain a full understanding of, and make determinations concerning, Chinese law.

Professor Tang is a law professor from China. Professor Feinerman is a law professor from the United States. Both are experts in Chinese law, with different perspectives to assist the ALJ. Although there are many ways in which the ALJ may gain the necessary understanding of foreign law, the most common way is to hear it from experts in that law, like Professor Tang and Professor Feinerman. This method falls fully within SEC Rule of Practice 320, which governs the admissibility of evidence at this hearing, and which the Division fails to cite. Under that Rule, as correctly stated by the ALJ at the final prehearing conference, evidence is excluded only if it is "irrelevant, immaterial or unduly repetitious." For the reasons stated above, this evidence is clearly relevant and material, and for reasons discussed below, is not unduly repetitious.

Moreover, even the more stringent federal rules plainly would permit the opinions offered here. In this respect, the Division simply cited to the wrong rule. Federal Rule of Civil Procedure 44.1, not Federal Rule of Evidence 702, would apply. Rule 44.1 states that "[i]n

[2] "RX" refers to Respondents' Consolidated Exhibit List, corrected version filed on June 21, 2013.

determining foreign law, the court may consider any relevant material or source, including testimony, whether or not . . . admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. Thus, Rule 44.1 specifically allows the testimony offered here, even if one were to indulge the Division's erroneous assertion that such testimony does not meet Federal Rule of Evidence 702.

Indeed, not only is such testimony permissible in district court proceedings, it is the "basic method" used. *Ganem v. Heckler*, 746 F.2d 844, 854 (D.C. Cir. 1984). And *both sides* of this dispute actually have employed this method here: the Division has submitted Professor Clarke as a China law expert, and Respondents have submitted Professors Tang and Feinerman. Thus, the Division's attempt to exclude substantial portions of expert testimony on foreign law is contrary to the SEC's Rules of Practice, to federal law, and to the evidence the Division itself has submitted, and it should be rejected completely. In any event, none of the Division's specific objections has any merit.[3]

First, the Division asserts that certain paragraphs of Professor Tang's opinion contain improper "factual recitations." But there is nothing improper about including in an expert opinion background facts that form the basis of the expert's opinion—this is standard practice, and is particularly appropriate in connection with an opinion on foreign law. *See Williams v. Illinois*, -- U.S. ----, 132 S. Ct. 2221, 2233 (2012) (plurality opinion) ("It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts."); *Millenium Inorganic Chems. Ltd. v. Nat'l Union Fire Ins. Co.*, No. ELH–09–1893, 2012 WL 273718, at *4

[3] Respondents understand that the Division has withdrawn its objection to the use of "Appellate Case on Disputes Regarding A Dissolving Penalty" as additional citation information has been provided to the Division. (*See* Division's Objections at 12-13.)

(D. Md. Jan. 27, 2012) (allowing expert report to set forth "background facts of a kind that experts generally may consider"). The Division specifically suggests that Professor Tang's opinion is a "bare recitation" of facts and likens it to cases where experts were not permitted to opine on matters "within the common knowledge of jurors." (Division's Objections at 9.) But this suggestion is wrong at every level. Professor Tang is no summary witness; he is a real expert offering real expert opinions. Professor Tang has included certain facts in his opinion for context and to enhance understanding of his opinion, and not in an attempt to *establish* those facts, which of course will be the subject of exhibits and testimony. And a typical juror simply would not have "common knowledge" of intricate facts about cross-border regulatory requests, many of which are not even public. *See SEC v. Johnson*, 525 F. Supp. 2d 70, 77 (D.D.C. 2007) (allowing expert to testify about "general information relating to financial reporting requirements and other background subjects, such as the role of the independent auditor, the importance of an accounting cutoff, prerequisites for revenue recognition, the use of third-party confirmations, and the concept of materiality" because "in securities cases, expert testimony commonly is admitted to assist the trier of fact in understanding . . . securities industry practice, securities industry regulations, and complicated terms and concepts"). The Division's cases thus are inapposite.

Second, the Division argues that Professors Tang and Feinerman do not meet Federal Rule of Evidence 702 because they have no "recognizable expert methodology." But as noted above, this is the wrong standard twice over. The correct standard is SEC Rule 320—a relevancy standard that Professors Tang and Feinerman easily meet. Even if the Federal Rules of Evidence applied in an administrative proceeding (which they do not), they do not apply in the context of foreign law experts—that is governed by Rule 44.1. Rule 702 is simply inapplicable. *See, e.g., Grupo Televisa, S.A. v. Telemundo Commc'ns Grp., Inc.*, 04-20073-CIV, 2005 WL

5955701, at *7 (S.D. Fla. Aug. 17, 2005) ("*Daubert* . . . does not govern the admissibility of expert testimony introduced to assist a court in making decisions regarding foreign law."); *see also HFGL Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc.*, 264 F.R.D. 146, 148 (D.N.J. 2009) ("Under Rule 44.1, the Court may consider a foreign law expert report to aid its determination of foreign law, whether or not the report is admissible under the Federal Rules of Evidence."); *Canales Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 723-24 (E.D. La. 2002) (denying motion to strike testimony of foreign law expert, which opposing party alleged did not satisfy reliability standards of Rule 702 and *Daubert*). Tellingly, because Rule 702 does not apply to foreign law experts, not a *single* one of the Division's cases involves an expert in foreign law.

Professors Tang and Feinerman are not engaging in the analysis of data or conducting scientific experiments that can or cannot be replicated, the typical subjects of a *Daubert* challenge. They are offering testimony about "an issue about a foreign country's law," as contemplated by Rule 44.1 of the Federal Rules of Civil Procedure. That is entirely permissible, and helpful here. As *all* of the experts have recognized, at least at some point in their careers, the law of China is not only about what is in the written, public law, but also about how such laws are applied in fact. (*See* Expert Report of Xin Tang ¶ 43; Expert Decl. of James V. Feinerman ¶ 42); Donald C. Clarke, *The Chinese Legal System*, *available at* http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html (July 4, 2005) ("Any account of the legal system of the People's Republic of China must be prefaced by a warning of the need to distinguish between the formal system and what actually happens."). Opinions as to how Chinese law *actually* works thus will be quite helpful, and in all events admissible.

Finally, the Division asks the ALJ to exclude that portion of Professor Feinerman's report that agrees with Professor Tang's report. (*See* Division's Objections at 13.) But this argument does not hold water under the SEC Rules of Practice or in the context of foreign law experts. SEC Rule 320 allows any evidence that is relevant and is not immaterial or unduly repetitious. Here, Respondents submit that it has "persuasive force" that there is agreement as to the key issues between Professor Tang, a Chinese national who teaches law in China, and Professor Feinerman, a U.S. professor who can put that Chinese law in the context of U.S. expectations.[4] For this reason, among others, this testimony is highly relevant, material, and is not repetitious—it provides a view different from that of Professor Tang (i.e., from a U.S. professor)—and would be permissible under both Rule 44.1 and the Federal Rules of Evidence if they applied. Indeed, in other cases, Professor Clarke himself has offered opinions with which a second expert—a Chinese national—has concurred. *See* Mem. in Support of Mot. to Dismiss, *Chen v. Ho*, No. 03-cv-2312 (D.N.J. June 9, 2004), at 16-17. That the Division has failed to offer such an expert opinion from a Chinese national in this case may be telling, but it provides no reason to limit Professor Feinerman's testimony.[5]

At bottom, the Division's objections to Professors Tang and Feinerman boil down to this: Respondents' experts are "wrong" and the Division's expert is "right." For example, the Division asserts that Professor Tang "mischaracterizes" the facts concerning CSRC

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[4] Although it is true that the Federal Rules of Evidence preclude experts from testifying about the credibility of fact witnesses, *see, e.g.*, *Halcomb v. Washington Metro. Area Transit Auth.*, 526 F. Supp. 2d 24, 29 (D.D.C. 2007), when it comes to questions of foreign law, "it is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed," *Iter-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998).

[5] Moreover, to the extent that the Division suggests that experts can only offer their disagreements with other expert opinions, it is notable that Professor Clarke himself agrees with Professor Tang on several issues in his report. (*See, e.g.*, Expert Report of Donald Clarke ¶ 54 ("The Tang Declaration states that the CSRC has the authority to impose such a duty [to notify the CSRC of requests for production of documents], and I agree.").)

correspondence and the success of the international negotiations. (Division's Objections at 9-10, 12.) But the Division's contrary view of the facts is no reason to exclude opinion testimony; it is instead the stuff of cross-examination. *See McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 30, 42 (D.D.C. 2004) ("When the factual underpinnings of an expert's opinion are in dispute, it is not the role of the court to determine the correctness of the facts underlying the expert's testimony."); Fed. R. Evid. 702 advisory committee's note ("When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."). In any event, there is good reason to doubt the Division's claims here. For example, the Division calls it an "egregious instance of cherry-picking" that Professor Tang does not mention a 2002 agreement to which the United States and China agreed. (Division's Objections at 12.) But the Division itself fails to note that Professor Tang *does* mention a *May 2013* agreement that directly permits documents to be produced from the CSRC to the PCAOB and, ultimately, to the Division. The Division apparently would like the ALJ to decide summarily that the SEC's negotiations with China are "fruitless" on the basis of the Division's own say-so and without regard to the most recent developments. (Division's Objections at 12.) But such decisions properly are the subject of trials, where both sides get to provide evidence.

II. Sanctions Expert

The Division's attempt to preclude Paul S. Atkins from testifying on certain topics in this matter (*see* Division's Objections at 13-14) also should be rejected. The Division's objections to Mr. Atkins's testimony are grossly premature. Indeed, the Division moved to exclude significant portions of Mr. Atkins's "potential testimony" before his expert report was even filed on the

apparent assumption that not a single word of what Mr. Atkins might say would be of assistance to the ALJ.

The Division's objections are also unfounded on the merits. As noted, SEC Rule 320 allows any evidence that is relevant and is not immaterial or unduly repetitious. Even under the federal rules, however, the standard for expert testimony is liberal. An expert witness may provide testimony on *any subject* if he or she "[has] such knowledge or experience in [his] field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth." *United States v. Bourgeois,* 950 F.2d 980, 987 (5th Cir. 1992) (internal quotation marks omitted). This includes opinions regarding ultimate issues. Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."). Moreover, federal courts have held that "Rule 702 contemplates a *broad* conception of expert qualifications." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015 (9th Cir. 2004) (emphasis in original).

Mr. Atkins's actual testimony—which is set forth in his expert report filed on July 1, 2013—more than satisfies these standards. If Respondents' conduct is deemed to have violated Section 106, the ALJ will need to consider the issue of sanctions. This will require the ALJ to determine, among other things, whether sanctioning Respondents in these circumstances would (1) arbitrarily and capriciously conflict with longstanding policies or practices; (2) be in the public interest; and (3) have any remedial effect. (*See* KPMG Huazhen's Pre-Hearing Br. at 17-31.) Such determinations will require the ALJ to have information on (1) the Commission's policies and practices regarding registration of foreign companies and foreign accounting; (2) the Commission's policies and practices regarding cooperation with foreign regulators; (3) the likely impact of sanctions on third parties; and (4) the likely impact of sanctions on the Commission's

ability to obtain documents from China in the future. Although some of these issues involve topics that are "legal" in nature, the testimony set forth in Mr. Atkins's expert report on these issues does not consist of bare legal conclusions or legal analysis. Instead, it provides critical factual information and historical context to aid the ALJ in deciding whether sanctions would be in the public interest and consistent with the Administrative Procedure Act. Even under the more restrictive standard of Federal Rule of Evidence 702, this testimony is completely permissible because "an expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied" when he does "not testify as to whether the legal standard has been satisfied." *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997). For example, Mr. Atkins's expert report discusses the adoption of PCAOB Rule 2105 and policies underlying the rule, but that discussion is based upon his own personal experience, as one of the Commissioners who approved the rule, and involves no "opining" on the rule's legal meaning. Similarly, Mr. Atkins provides an expert opinion on the likely impact that sanctions would have on the issuers, investors, and securities markets—a matter that must be considered before sanctions are imposed—but does not provide any legal analysis of those issues. In short, Mr. Atkins's actual testimony—in contrast to the Division's speculation about what he might say—bears no resemblance to the "legal opinions" excluded by federal courts under Rule 702 where experts provided "solely legal conclusions." *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003).

Finally, the Division argues that Mr. Atkins is unqualified to serve as an expert witness because be "boasts no credentials whatsoever as a historian." (Division's Objections at 14.) Mr. Atkins is uniquely qualified to provide expert testimony in this case. He served as a Commissioner of the SEC from 2002 to 2008 and served before that on the staffs of two

Chairmen of the SEC. Given his knowledge and experience, he is unquestionably an expert in the matters about which he will testify. Indeed, he witnessed much of the history discussed in his report firsthand. One need not be a professional "historian" to have expert knowledge of historical events. Indeed, even under Rule 702, an expert's lack of a particular "title" is not grounds for precluding his testimony if he is otherwise qualified by "knowledge, skill, experience, training or education." *See United States v. Majors,* 196 F.3d 1206, 1215 (11th Cir. 1999).[6]

In short, Mr. Atkins's expert report is highly relevant to the issues to be decided, material, and not unduly repetitious. It is, therefore, admissible under SEC Rule 320. Even if the more stringent standards of the Federal Rules of Evidence applied, Mr. Atkins's testimony covers matters that are properly the subject of expert opinions, which he is fully qualified to give. The Division's motion to exclude portions of Mr. Atkins's "potential testimony" should be denied.

III. Authenticity

As mentioned above, the rules for admission of documents in this proceeding are liberal and limited only by SEC Rule 320's bar on "evidence that is irrelevant, immaterial or unduly repetitious." The Federal Rules of Evidence, including the rules on authentication, do not apply. *See generally In re City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *2 & n.7 (Nov. 16, 1999) ("[L]aw judges should be inclusive in making evidentiary determinations . . . if in doubt, let it in." (internal quotations omitted)); *In re Lawrence*, Exchange Act Release No. 821343, 1967 WL 86382, at *4 (Dec. 19, 1967) ("[A]ll evidence which can conceivably

[6] Even if Mr. Atkins is deemed not specialized in this field, that fact would go to the *weight*, not the *admissibility*, of the evidence he presents. *Baerman v. Reisinger,* 363 F.2d 309, 310 (D.C. Cir. 1966).

throw any light upon the controversy should normally be admitted."). These general principles fully apply to authentication issues; the Division does not suggest otherwise or provide any support for a contrary position. Thus, the Division's apparent request to exclude at the threshold, without allowing Respondents even the opportunity to make a proffer as to authenticity, is improper.

The Division's suggestion that Respondents may establish authenticity only through a testifying witness is unfounded. (*See* Division's Objections at 4 ("[I]t is not sufficiently clear whether any of the witnesses on Respondents' witness list would even be able to authenticate the exhibits").) Even the more stringent admissibility provisions of the federal rules permit a party to authenticate documents through means other than live testimony—for example, via a declaration of a person with knowledge. Fed. R. Evid. 902(11)-(12) (allowing sworn declarations to establish authenticity of both domestic and foreign records); *see also Moncada v. Peters*, 579 F. Supp. 2d 46, 51 (D.D.C. 2008) (to satisfy Fed. R. Evid. 901 and 902, "[t]he proponent need only offer proof sufficient for a reasonable fact finder to conclude that the evidence in question is what the proponent says it is"); *Pearson v. District of Columbia*, 644 F. Supp. 2d 23, 35 n.11 (D.D.C. 2009) (sworn declaration was "sufficient to authenticate defendants' exhibits"); *Global Minerals & Metals Corp.*, CFTC No. 99-11, 2003 WL 23105208, at *3 (CFTC Dec. 30, 2003) (sworn declaration was sufficient; "the submission of an affidavit or 28 U.S.C. §1746 declaration that makes the requisite showing will generally be sufficient to overcome an authenticity objection despite the lack of cross-examination").

In any event, in most, if not all, instances, Respondents will be able to establish the documents' authenticity through live witnesses. To the extent live witnesses cannot authenticate particular documents, there nevertheless will be no issue as to authenticity because (1) the

documents can and will be authenticated through other means, such as a sworn declaration, or (2) the documents satisfy the admissibility requirements of SEC Rule 320 and there is no tenable basis for challenging their accuracy and authenticity. *See In re Pierce*, Exchange Act Release No. 425, 2011 WL 3159088, at *7 & n.3 (July 27, 2011) (Elliot, ALJ) (admitting foreign documents because they "appear to qualify as foreign business records under Fed. R. Evid. 803(6) and 902(3), and are admissible under the Commission's Rules of Practice in any event. 17 C.F.R. § 201.320. . . . [Respondent] has otherwise not made a sufficient showing to call into question either document's accuracy or authenticity.").

The Division has also asserted objections to the reliability of translations included in Respondents' exhibits and has improperly cast them as objections to authenticity. (*See* Division's Objections at 3-4.) Those objections fail for the same reason as do the Division's other authenticity objections. As with the other documents to which the Division asserts authenticity objections, these documents will be sufficiently authenticated for SEC Rule 320 purposes through live witness testimony or through other permissible means. In any event, the Division's objection speaks to weight rather than admissibility.

IV. Hearsay

The Division objects on hearsay grounds to "proposed testimony from multiple witnesses regarding their prior, out-of-court communications with Chinese regulators." (Division's Objections at 7.) According to the Division, "[s]uch testimony risks significant lack of probative value and reliability because of witness bias, and the fact that the testimony may concern oral and unsworn statements of others." (*Id.*) The Division's objection is wholly without merit.

As a threshold matter, and as the ALJ noted during the final prehearing conference, hearsay is not a proper objection in SEC administrative proceedings. *See In re Alacan*, Exchange Act Release No. 8346, 2004 WL 1496843, at *6 (July 6, 2004) ("As we repeatedly

have held, hearsay evidence is admissible in our administrative proceedings and, in an appropriate case, may even form the sole basis for findings of fact." (internal quotation marks omitted)); *In re Calais Resources Inc.*, Exchange Act Release No. 67312, 2012 WL 2499349, at *4 n.19 (June 29, 2012) ("Hearsay is admissible in administrative proceedings, and we evaluate such evidence based on its probative value, its reliability and the fairness of its use." (internal quotation marks omitted)). Accordingly, as with its authenticity objection, the Division's hearsay "objection" is merely a premature argument about the weight that the Court should afford the proposed testimony.[7]

Even if the Federal Rules of Evidence's treatment of hearsay were applicable in this proceeding (which, again, it is not), Respondents' proposed testimony regarding CSRC directives would not be subject to exclusion. An out-of-court statement may be excluded as hearsay only if it is offered to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). Accordingly, a statement that is offered to demonstrate what was said and/or its effect on the hearer is not excludable as hearsay under the Federal Rules of Evidence. *See* Charles A. Wright et al., 30B Federal Practice & Procedure: Evidence § 7005 (2d ed. 2006). Here, to the extent Respondents elicit testimony regarding directives made by Chinese regulators at various meetings or through correspondence received by Respondents, the testimony is being offered to demonstrate that the directives were heard or received by Respondents. This is a permissible, non-hearsay purpose for the admission of those statements. *See, e.g.*, *United States v. Baird*, 29 F.3d 647 (D.C. Cir. 1994) (finding that an out-of-court instruction about a legal obligation should have been admitted to show lack of scienter).

[7] The Division will, of course, have the opportunity to cross-examine Respondents' witnesses and can argue later about the weight accorded the testimony of various witnesses.

Finally, oral instructions provided by Chinese regulators would not be inadmissible hearsay under the federal rules because they constitute "verbal acts" having independent evidentiary significance. *See* Fed. R. Evid. 801(c) advisory committee's note (explaining that the definition of hearsay does not include a "statement that itself affects the legal rights of [a party]" because the fact that the statement was made has independent evidentiary value); Charles A. Wright et al., 30B Federal Practice & Procedure: Evidence § 7005 n.2 (2d ed. 2006) (noting that "[c]ommands, instructions and directives are often verbal acts having independent legal significance" and thus are not hearsay (internal quotation marks omitted)).

V. Duplicativeness

The Division seeks to exclude as unduly repetitious those of Respondents' witnesses who "intend to offer testimony that is duplicative of testimony offered by other witnesses" and to limit Respondents to a single witness for "any specific topic." (Division's Objections at 7-8.) This objection is premature and is best addressed, on a witness-by-witness basis, during the course of the hearing. Respondents certainly do not intend to burden the ALJ unnecessarily with duplicative testimony and will endeavor to keep to a minimum any overlap between witnesses. In addition, it is noteworthy that the Division appears to complain about overlapping or duplicative testimony when it was the Division's decision both to pursue claims against five different firms, each of which nonetheless faces the potential of a severe individual sanction, in one proceeding, and to call numerous percipient witnesses (principally SEC Enforcement staff members) who themselves appear to be offering cumulative evidence. While Respondents have gone to great lengths to coordinate the defense and to avoid duplication and inefficiency, a certain degree of overlap is a natural consequence of the Division's litigation strategy, which has forced five firms to defend themselves in one proceeding. In any event, to prospectively bar any

witness before hearing any testimony and seeing whether the testimony is duplicative, or to limit the topics that may be explored on the basis of short summaries of the expected areas of testimony would be prejudicial and unfair to Respondents. Given the stakes at issue here, Respondents are entitled to defend themselves, and that defense should not be curtailed unless and until the ALJ believes the proceedings are being unreasonably bogged down by unnecessarily cumulative testimony.

VI. Relevance

Finally, the Division objects on relevance grounds to various categories of evidence: (1) recent SEC registration and listing materials of Chinese issuers audited by certain of Respondents; (2) PCAOB registration materials for firms which, like Respondents, registered without providing form cooperation consents; and (3) exhibits related to SEC and PCAOB rulemaking.

Nothing in the Division's motion demonstrates these exhibits do not meet the liberal standard of SEC Rule 320. As to the first category, that the SEC continues to permit Chinese issuers audited by Respondents to register and list securities in the United States undercuts the Division's argument that Respondents' ongoing work on behalf of these issuers is a sign of bad faith. Materials concerning Chinese issuers (including issuers audited by Respondents DTTC and PwC Shanghai) who recently have registered and conducted initial public offerings—with the SEC's blessing— also tend to show that this action is arbitrary and capricious. The second category is relevant to Respondents' efforts to rebut the Division's assertion that Respondents are outliers operating in bad faith because they continue to perform services knowing they cannot produce materials directly to the SEC without the authorization of their domestic regulators. PCAOB registration materials concerning auditors from *other* countries that have impediments

to the direct production of documents demonstrate, for example, that the situation in China is in no way unique.[8] Finally, materials concerning SEC and PCAOB rulemakings tend to show (among other things) that the SEC long has encouraged foreign issuers (audited by foreign accounting firms) to register in the United States, and that Respondents acted in good faith in relying on representations by the PCAOB and the SEC that they would show sensitivity to the kind of conflicts of law that are at issue here. It has long been the practice of the SEC and the PCAOB to encourage the registration of foreign issuers notwithstanding the potential for the conflict of laws issues at the heart of this proceeding. In June 2003, for example, then-Acting Director of the SEC Office of International Affairs Ethiopis Tafara stated that the SEC was charged with fulfilling its congressional mandate "while also respecting foreign laws and regulatory schemes" and that through the rulemaking process the SEC and PCAOB accordingly had made certain accommodations for foreign issuers that were "intended to avoid unnecessary burdens and conflicts of law." Ethiopis Tafara, *Speech by SEC Staff: Addressing International Concerns under the Sarbanes-Oxley Act* (June 10, 2003) (RX 419).

In any event, whether for purposes of cross-examination, rebuttal, or their affirmative cases, these materials form part of Respondents' defense. It is not surprising that the Division is not persuaded that they help Respondents' position, but it would not be much of a hearing if the test for admissibility were whether the evidence persuaded the Division that their claims lack merit or that the sanctions sought are not supportable. The Division can, and presumably will,

[8] Although not mentioned in the body of its motion, the Division has also objected on relevance grounds to communications between the PCAOB and some (but not all) of the Respondents, including document requests issued by the PCAOB (Accounting Board Demands) and responses thereto. These documents, among other things, provide the background for some of Respondents' communications with the CSRC, tend to show Respondents' good faith in attempting to obtain permission from the CSRC and MoF to produce documents directly to U.S. regulators, and bear on the SEC's ability to obtain the requested documents from the PCAOB pursuant to its Memorandum of Understanding with the CSRC and MoF.

argue that these materials should have no impact on liability or sanctions, but Respondents should not be precluded before the hearing even begins from attempting to demonstrate otherwise. Doing so would be inconsistent with the evidentiary rules governing this proceeding.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Division's motion *in limine* be denied and its objections be overruled.

Dated: July 3, 2013

Respectfully submitted,

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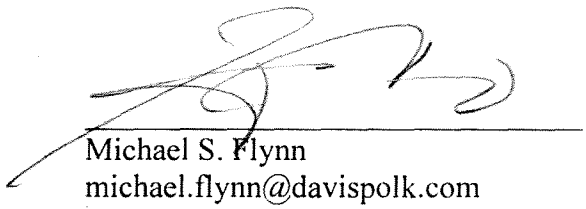

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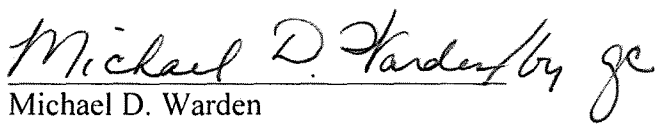

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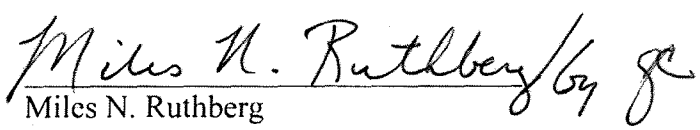

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