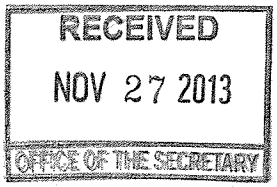
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

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| 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 ACOUNTANTS LTD., and PRICWATERHOUSECOOPERS ZHONG TIAN CPAs LIMITED | The Honorable Cameron Elliot, Hearing Officer |

**DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION TO SUPPLEMENT THE RECORD**

The Division of Enforcement ("Division") of the U.S. Securities and Exchange Commission ("SEC" or "Commission") respectfully submits this Opposition to Respondents' Motion To Supplement The Record. Respondents contend that the record should be re-opened so they can submit evidence of productions of audit workpapers recently made, or allegedly in progress, by the China Securities Regulatory Commission ("CSRC"). But the Court already considered the issue of whether additional, post-hearing evidentiary submissions by the parties should be required or allowed, and, noting that "the hearing record cannot be kept open indefinitely," decided to close the record. *See* Order Admitting Exhibits And Closing The Hearing Record, at 2 (Sept. 18, 2013) ("Order Closing the Record"). The record should stay closed.

The alleged evidence that Respondents now would proffer is irrelevant to their liability for willfully refusing to produce documents in response to the Division's requests under Section 106 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "the Act"). The Division sent these requests to Respondents 20 to 32 months ago. Through their willful refusals, Respondents seriously delayed or thwarted altogether ten Division investigations. Any late-breaking action by the CSRC – in the months approaching the already-extended deadline for the Court's initial decision – cannot undo this grave harm.

Furthermore, the relief sought by Respondents would simply re-create the same practical difficulty in achieving resolution of the Division's claims that the Court addressed through its Order Closing the Record. Permitting additional evidence of productions (or expected productions) by the CSRC would present a host of new factual questions about the status and completeness these productions. These questions are impossible to answer in the short term and ultimately, in all likelihood, would require new rounds of evidentiary submissions to fully inform the Court, on a schedule that extends beyond the Court's current initial decision deadline of January 20, 2013. The Court should deny Respondents' Motion.

## ARGUMENT

### A. Respondents Seek To Proffer Irrelevant Evidence

Respondents contend that they seek to re-open the record to allow the Court to evaluate "new critical evidence." But the alleged evidence is irrelevant to Respondents' liability under Sarbanes-Oxley. Respondents willfully refused to comply with the requests issued to them under Section 106 of the Act when they informed the Division that they would not produce the responsive documents. The CSRC's recent [redacted]. The CSRC's viability as an alternative channel for

obtaining these documents – either now or at the various times the firms said they would not produce – is irrelevant to whether the willful refusals occurred. *See* Division of Enforcement's Post-Hearing Brief at 2-5, 45-46, 95-96, 101-102 (Aug. 30, 2013) ("ENF Post-Hearing Brief"); Post-Hearing Reply Brief of the Division of Enforcement at 12-15 (Sept. 20, 2013) ("ENF Post-Hearing Reply").[1]

Furthermore, it is now almost a year since the second Order Instituting Proceedings ("OIP") (naming all five Respondents), over 18 months since the first OIP (naming only Deloitte Touche Tohmatsu CPA Ltd. ("DTTC") as a Respondent), and 20 to 32 months since the Section 106 requests were variously issued. All of Respondents' violations of Sarbanes-Oxley occurred when Respondents informed the Division that they would not produce the requested documents (*see* ENF Post-Hearing Brief at 45), and, in any event, no later than the dates of the respective OIPs seeking to remedy these willful refusals (*see id.* at 109-110). The Division's investigations related to the ten Section 106 requests already have been delayed or compromised as a result of Respondents' actions. *See id.* at 105-107, 116-118.

Respondents' present motion is premised on the notion that a foreign public accounting firm does not commit a "willful refusal to comply" under Section 106 if, notwithstanding the firm's failure to produce documents directly to the SEC upon request, the SEC has an "alternative means" of obtaining the documents at issue. Assuming this position is correct, which it is not, none of their alleged evidence has any bearing on whether the SEC could obtain the requested documents through the CSRC at the times the SEC issued the Section 106 requests.

[1] Sarbanes-Oxley Section 106(f) gives the SEC the *option* of allowing a foreign firm to satisfy its duties under Section 106 by producing audit workpapers to foreign regulators. The provision plainly did not require the SEC to allow such alternative production. *See* ENF Post-Hearing Brief at 101-102. In addition, although "alternative means" is one of the factors courts typically consider when applying a comity analysis under the Restatement of Foreign Relations Law, the Respondents willfully refused to comply with requests irrespective of the comity factors. *See id.* at 4-5, 95-96.

As the hearing record overwhelmingly demonstrates, the SEC had no such alternative means. *See id.* at 102-105; ENF Post-Hearing Reply at 38-43. Respondents' new evidence concerning the CSRC's recent cooperation is, accordingly, wholly irrelevant to their liability.

Finally, although Respondents would again (as in their prior briefing) seize on the prior statements of SEC staff within the agency's Office of International Affairs ("OIA"), to their CSRC counterparts about the future direction of these proceedings (Motion to Supplement at 6), these statements do not support reopening the record. The OIA staff did not, and could not, commit the Commission to discontinuing these proceedings in the event documents were produced. The decision whether to continue these proceedings resides with the Commission; the CSRC or Respondents cannot unilaterally control the status of these proceedings through their belated decisions to produce documents.[2]

### B. Respondents' Proffered Evidence Has Minimal, If Any, Standalone Probative Value

Even assuming recent CSRC productions are potentially relevant, as a practical matter they have little probative value at this late stage of the proceedings. In its Order Closing the Record, the Court concluded that it would be "impractical and unmanageable" to continue receiving additional communications between the SEC and the CSRC as evidence, because "[w]ithout the ability to hear testimony from sponsoring witnesses, the probative value of the additional evidence is unclear." *Id.* at 2. The Court was correct. Respondents' alleged evidence

[2] Moreover, Respondents mischaracterize the prior statements of OIA staff. [redacted]

presents, at best, only a partial snapshot of events that cannot be relied upon without further factual development.

Respondents' alleged evidence consists of one-sided descriptions of recent events set forth in declarations of Respondents' litigation counsel, supported by various correspondences between Respondents and the CSRC. *See* Motion to Supplement at 5-6; Declarations of David A. Gordon (counsel for DTTC), Richard A. Martin (for EYHM), Timothy B. Nagy (for KPMG Huazhen), Michael S. Flynn (for PwC Shanghai), and Deborah R. Meshulam (for Dahua). Contrary to Respondents' assertions, their alleged evidence is not "discrete" or self-explanatory. Motion to Supplement at 6. The supposed evidence contains the following gaps, or raises the following questions, among others:

- *The evidence does not even purport to show that the SEC has received all of the requested productions.* [redacted]. As Respondents acknowledge, the SEC to date has not received any documents [redacted]. It is speculative to predict when, if at all, the SEC will receive any of these documents, or to conclude that the CSRC's productions of these documents are "well underway." Motion to Supplement, at 4.
- *For the productions the SEC has received, the evidence does not show that the productions included all of the requested categories of documents.* The Section 106 requests issued by the SEC to Respondents sought not only audit workpapers but also "related" documents, as authorized under that provision. In a similar vein, the SEC's request for assistance to the CSRC as to DTTC's Client G sought

not only audit workpapers, but also "communications, including emails, relating to D&T Shanghai's audit of [Client G's] financial statements for 2010." **(ENF Ex. 211).** [redacted]. In their Motion to Supplement and supporting declarations, DTTC and EYHM claim that the *workpapers* of Client G and Client C, respectively, have been produced.[3] *See* Motion to Supplement, at 5; Gordon Declaration ¶¶ 3, 7; Martin Declaration ¶ 7. However, DTTC and EYHM do not expressly state that all of the other, critical categories of requested documents also have been produced. Thus, it is unclear whether DTTC or EYHM have even sought to provide [redacted].

- *The Division must review the claimed productions of audit workpapers for completeness.* As to the workpapers that Respondents contend have been delivered to the SEC to date (*i.e.*, the workpapers of DTTC Clients A and G, and EYHM Client C[4]), the Division still must review the documents and obtain

[3] EYHM further claims that it produced to the CSRC unspecified "other materials," Martin Declaration ¶ 3, but the document that describes those materials does not state, in either precise or general terms, that those materials comprise all of the responsive materials requested by the Commission, *see id;* RX 649A.

[4] [redacted]

confirmation that complete sets of documents have been delivered. Neither Respondents nor the CSRC have provided any representations as to (1) whether all [redacted] workpapers have been produced; or (2) what information, if any, has been withheld from the workpapers on the purported grounds of state secrets or any other provision of Chinese law, or privilege under U.S. law. The Division also must review the other requested productions if and when they arrive.

Notably, verifying the completeness of each of the CSRC's productions is likely to be a significant undertaking for the Division. This is especially true if the workpapers are not produced in their native electronic format (as is the custom in the United States) and are unaccompanied by any privilege or withholding log. In this regard, the SEC's experience in the *Longtop* investigation is illustrative. The SEC received the Longtop production on or about July 15, 2013. However, because the CSRC did not produce the workpapers in their native format, the SEC had to scan the documents for loading into the SEC's electronic database, a step that took approximately two months to complete for the entire production. *See SEC v. DTTC*, 11 Misc. 512 GK (D.D.C.), Joint Status Report [Dkt. No. 69] **(Attachment A hereto)**. That production also presented a number of other issues that the SEC is continuing to discuss with both the DTTC and the CSRC, four months after receiving the production. *See id.* Given this experience and the fact that the CSRC's productions of documents for DTTC Clients A and G, and for EYHM Client C have all arrived at the SEC after October 2013[5] – and the fact that the productions for the other Clients (Dahua Client A, EYHM Client B, and PwC Shanghai Client I)

[redacted]

[5] Upon a preliminary assessment, the volume of the hard copy Client A production appears to be comparable to the hard copy component of the Longtop production. Scanning has been completed for the Client G production and may not be needed for the Client C production in light of the manner in which [redacted]

have not yet arrived at all – it could take a number of months for the Division to assess all of the productions and make a meaningful report to this Court as to their completeness.

Given the time constraints and processes and procedures which the Respondents have indicated must be undertaken in the PRC, it is very unlikely that all documents [redacted], involving audit workpapers regarding the six relevant Clients, will be produced and verified before the current initial decision deadline of January 20, 2014. Furthermore, the CSRC's productions would come against the backdrop of possible sanctions against Respondents in these proceedings. Such sanctions and other unforeseen developments in the overall relationship between Chinese and United States authorities could convert the record of cooperation into a short one. If, at this eleventh hour, circumstances in China have changed, at least temporarily, such that full and complete productions of Respondents' documents are forthcoming via the CSRC (again, a scenario that has yet to be determined), circumstances could just as easily change back to one of noncooperation. Accordingly, an exercise of judgment by SEC staff regarding the reliability of the CSRC as an alternative gateway still would be required.[6]

In short, Respondents' contention that the Court should consider recent developments involving the CSRC is too little too late. Respondents do not claim that the CSRC has produced all documents responsive to the SEC's requests, and their claims about what the CSRC has produced thus far – or what the CSRC might yet produce in the coming weeks – cannot be taken at face value. Even assuming its relevance, the alleged evidence is of low probative value and impractical to consider, and should not be allowed at this juncture.

[6] For similar reasons, the SEC's receipt of DTTC's audit workpapers in the *Longtop* investigation in July 2013, while a hopeful sign, is of limited use in predicting future cooperation by DTTC and the CSRC. These documents arrived fortuitously just as the hearing in these proceedings was starting, 11 months after the SEC sent a request for assistance to the SEC seeking them. Moreover, the CSRC made its production only when the SEC's subpoena-enforcement action involving Longtop became ripe for decision. *See* ENF Posthearing Reply at 36.

## CONCLUSION

For the reasons set forth above, Respondents' Motion to Supplement should be denied.

Dated: November 27, 2013

Respectfully submitted,

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ATTACHMENT A

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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|---|---|---|
| **U.S. Securities and Exchange Commission,** | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| -v.- | ) | 11 Misc. 512 GK |
| | ) | |
| **Deloitte Touche Tohmatsu CPA Ltd.,** | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

**JOINT STATUS REPORT**

Petitioner Securities and Exchange Commission ("SEC") and Respondent Deloitte Touche Tohmatsu CPA Ltd. ("DTTC") hereby submit a Joint Status Report pursuant to the Court's Order of October 4, 2013.

**A. SEC's Receipt and Review of the Longtop Production**

On August 6, 2012, SEC staff sent a request for assistance to the China Securities Regulatory Commission ("CSRC") with respect to DTTC's audit workpapers and certain other DTTC documents related to Longtop Financial Technologies Limited ("Longtop"). This request sought the CSRC's assistance in obtaining documents also requested in the May 27, 2011 subpoena that is at issue in this action. Under cover of letter dated March 4, 2013, the SEC re-sent its August 6, 2012 request for assistance to the CSRC. The CSRC subsequently requested that DTTC produce to it DTTC's Longtop audit workpapers and certain other DTTC documents regarding Longtop. After undertaking a review for state secret information at the direction of the CSRC, DTTC produced to the CSRC 20 boxes of documents, including its Longtop audit workpapers and other Longtop documents, and a flash drive containing

additional information in electronic form. In early July 2013, the CSRC provided notice that it intended to produce documents responsive to the August 6, 2012 request for assistance to the SEC. The SEC informed the Court of this development through the SEC's July 10, 2013 Notice to the Court [Dkt. No. 67]

On or about July 15, 2013, the SEC received from the CSRC a UPS shipment consisting of 20 boxes of documents and a flash drive containing additional information in electronic form. Altogether, the materials represented a production of at least 200,000 pages of audit workpapers and other documents of DTTC related to Longtop ("Production").

The SEC's review of the Production is ongoing and is complicated by a number of factors. Among other issues, the Production is not sequentially numbered (i.e., "bates labeled"); and, because the CSRC had requested that DTTC produce workpapers in hard copy, DTTC's electronic workpapers (the "AS/2 materials") were not produced in their native format. Thus, before reviewing the documents, the SEC had to scan them for loading into the SEC's electronic database, a step that was not completed for the entire Production (given its volume) until September 2013.

Based upon the SEC's review to date, the Production consists of a significant number of documents responsive to the SEC's request for assistance to the CSRC, including, among other documents, DTTC audit workpapers for Longtop. These same documents are also responsive to the SEC's May 27, 2011 subpoena directed to DTTC that is the subject of this action.

**B. Discussions Among The SEC, DTTC, and CSRC**

As the SEC's review of the Production has progressed, the SEC has raised a number of issues relating to the Production with DTTC's undersigned U.S. counsel. Those discussions

are ongoing. In addition, the SEC has raised certain issues relating to the Production with the CSRC. The SEC is waiting to hear back from the CSRC as to how the CSRC may address those issues.

In light of these ongoing discussions, the SEC believes it is premature to advise the Court of the Production's impact on the subpoena enforcement action. The SEC and DTTC state that they intend to provide an additional Joint Status Report on or before December 16, 2013.

Dated: Washington, D.C.
November 4, 2013

Respectfully submitted,

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Enforcement Division



ATTACHMENT A