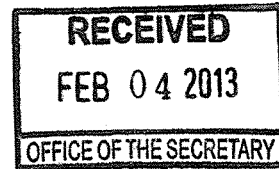


UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
FILE NO. 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

**MOTION FOR SUMMARY DISPOSITION AS TO CERTAIN THRESHOLD ISSUES  
ON BEHALF OF RESPONDENT KPMG HUAZHEN (SPECIAL GENERAL  
PARTNERSHIP) AND MEMORANDUM IN SUPPORT**

Respondent KPMG Huazhen (Special General Partnership) (“KPMG Huazhen” or the “Firm”) respectfully moves for summary disposition and dismissal of the U.S. Securities and Exchange Commission’s (“SEC” or “Commission”) Order Instituting Administrative Proceedings Pursuant to Rule 102(e)(1)(iii) of the Commission’s Rules of Practice (“OIP”).

### **PRELIMINARY STATEMENT**

This Rule 102(e) proceeding must be dismissed in whole on threshold procedural grounds for either of two independent reasons, each ground itself sufficient for dismissal, and in part for a third additional reason:

- *First*, KPMG Huazhen has not been properly served.
- *Second*, this action constitutes an impermissible circumvention of federal court review mandated by statute.
- *Third*, this action lacks the necessary predicate as it relates to Client E because the Firm did not produce an audit report.

Consistent with the parties’ discussion at the pre-hearing conference on January 9, 2013, to consolidate to the fullest extent practicable the legal arguments of the Respondents and to avoid duplicative submissions, KPMG Hauzhen adopts and incorporates by reference the arguments set forth in the dispositive motions submitted this date by the other Respondents in this matter. Specifically, as to the *first* and *second* arguments above, KPMG Hauzhen hereby adopts and incorporates by reference the arguments set forth in the dispositive motions submitted by Respondent Deloitte Touche Tohmatsu Certified Public Accountants Ltd. (“Deloitte”) and the other Respondents. As to the *third* argument, KPMG Huazhen hereby adopts and incorporates by reference the arguments set forth in the dispositive motion of Pricewaterhouse Coopers Zhong Tian CPAs Limited Company (“PWC Shanghai”) and the other Respondents. KPMG Hauzhen hereinafter sets out for the benefit of the tribunal its statement of the case and facts relevant specifically to KPMG Hauzhen.

## STATEMENT OF THE CASE

The Commission purported to effectuate service on KPMG Hauzhen via the U.S. mail, directing the OIP to the Firm's agent designated to receive service of requests made under Section 106(d) of the Sarbanes-Oxley Act of 2002 as amended in 2010 ("Sarbanes-Oxley" or "SOX"). 15 U.S.C. § 7216 (2012).<sup>1</sup> Section 106 by its express terms requires the designation of an agent for receipt of service solely for a Section 106 request or for the purpose of enforcing such a request. Section 106 does not purport to require designation of an agent on which the Commission may serve an OIP, and the Firm has not designated the agent for that purpose or otherwise agreed to accept service in that manner. No other effort has been made to serve the Firm, and the Commission Staff does not allege that such efforts have been pursued. For this reason alone, this action should be dismissed.

Even were the Commission to have effected proper service here, which it has not, this action must be dismissed as it constitutes an impermissible circumvention of federal court review mandated by the plain language of Section 106 and consistent with the decades-long policies and practices for enforcing such demands for documents under the U.S. securities laws and the Administrative Procedure Act. Through Section 106, Congress granted the Commission and the Public Company Accounting Oversight Board ("PCAOB") authority to issue document requests to foreign public accounting firms. Section 106, by its plain terms, requires the Commission to seek enforcement of such document requests in federal court prior to seeking sanctions for non-compliance. Section 106 states in relevant part only that a foreign public accounting firm is "subject to the jurisdiction of *the courts of the United States* for purposes of enforcement of any request for such documents." 15 U.S.C. § 7216(b)(1)(B) (emphasis added). If, upon petition by

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<sup>1</sup> Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") amended Section 106 of Sarbanes-Oxley. P.L. 111-203, § 929J, 124 Stat. 1859, 1930 (2010)).

the Commission, a federal judge decides that a Section 106 request is enforceable and a foreign public accounting firm nonetheless refuses to comply, only then may the Commission seek to sanction or otherwise discipline the firm for “willfully refusing” to comply with that request.<sup>2</sup> See § 7216(e).

United States securities laws have long required federal agencies to pursue enforcement of administrative subpoenas and other investigative demands through the judiciary. Similarly, the Administrative Procedure Act contemplates judicial enforcement of administrative subpoenas or “similar process.” Administrative Procedure Act, 5 U.S.C. § 555(d) (2012). It is well established that administrative demands for documents are not self-executing and can be enforced only in federal court. Moreover, the SEC’s conduct, representing a radical departure from nearly 80 years of established process under the federal securities laws, is an arbitrary and capricious abuse of the Commission’s discretion. The Commission’s attempt to proceed directly to a disciplinary action is invalid and contradictory to the plain terms of Section 106 and this long-established structure for enforcement of administrative demands for information, and therefore must be dismissed.

Finally, the action against the Firm must be dismissed as it relates to Client E, for whom neither the Firm nor its affiliate produced any audit report. Section 106 states:

“Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, shall be subject to this Act and the rules of the Board and the Commission issued under this 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(a)(1).

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<sup>2</sup> The OIP alleges that the Firm “willfully refused” to provide the documents requested by the Division of Enforcement in its Section 106 requests and therefore violated the Exchange Act of 1934. The Firm emphasizes that it has consistently and diligently sought to produce materials to the extent permissible under the law of the People’s Republic of China. The Firm’s interactions with both the Commission and the China regulators throughout this investigation demonstrate that the Firm’s conduct has been wholly inconsistent with a “willful violation” of the securities laws. The Firm reserves its argument on this point until such time as the tribunal may consider the merits of the OIP.

Because the Firm never “prepare[d] or furnish[ed] an audit report with respect to” Client E at any time, it is not properly subject to a demand under Section 106 and this action must be dismissed as it relates to that client.

### **FACTS RELEVANT TO KPMG HUAZHEN**

#### **A. KPMG Huazhen**

KPMG Huazhen is an accounting firm located in the People’s Republic of China (“China” or “PRC”). The Firm is registered locally with the Chinese Institute of Certified Public Accountants, the Ministry of Finance (“MOF”), and the China Securities Regulatory Commission (“CSRC”). KPMG Huazhen is a member of the KPMG international network of independent accounting firms.<sup>3</sup>

KPMG Huazhen is a foreign public accounting firm, as defined by Section 106. On April 26, 2004, KPMG Huazhen filed an application for registration with the PCAOB. KPMG Huazhen’s application for registration was approved July 14, 2004 despite the Firm’s inability to supply a “Consent to Cooperate with the Board” (Item 8.1 of Form 1). As explained in the Firm’s application for registration, certain legal impediments outlined in an accompanying legal opinion prevented the Firm from disclosing certain information to the PCAOB, including providing the necessary waivers and consents to allow for that promise of cooperation.

#### **B. The Lack of An Audit Report for Client E**

KPMG Huazhen did not serve as the principal auditor for any of the PRC-based clients identified in the OIP. Clients D, E, and F retained an affiliate of KPMG Huazhen to serve as the principal auditor, but the affiliate did not provide an audit report to Client E at any time.

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<sup>3</sup> Each member firm of the international network is a separate legal entity, typically formed under the laws of its home country. A website disclaimer concerning the international network advises that “[n]o member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties . . .” KPMG.com/Global, About, <http://www.kpmg.com/global/en/about/Pages/default.aspx> (last visited January 31, 2013).

KPMG Huazhen's affiliate was engaged on January 17, 2011 to audit Client E's financial statements for the fiscal year ended December 31, 2010. Client E disclosed in a filing that its auditors thereafter raised issues, primarily related to unexplained issues regarding cash transactions and recorded sales, in connection with the consolidated financial statements as of December 31, 2010 and for the fiscal year then ended. Client E also disclosed that its auditors reported that there was a possibility that the company would be required to make adjustments to certain previously issued financial statements and that such previously issued financial statements may not be relied upon. On May 20, 2011, the affiliate resigned as principal auditors of Client E.

**C. The Commission's Requests for Documents Related to Clients D, E, and F**

The Commission's Division of Enforcement (the "Division," or the "Staff") first sought audit work papers and other documents voluntarily in 2011 related to the Firm's audits and reviews of Clients D, E and F. The Firm responded that it was willing but unable legally under PRC law to provide the Division with the materials it sought. These laws prohibit the Firm from producing audit work papers and other documents to foreign regulators absent express authorization from PRC government authorities and require that such information only be provided through mechanisms of cooperation established between the PRC and the U.S. government.

In July 2011, the Firm sought guidance from the CSRC and the MOF with regard to Accounting Board Demands issued by the PCAOB in connection with investigations relating to the audits of Client D and Client F. The Firm continued its discussions with officials from the CSRC and the MOF in October 2011. The Chinese regulatory authorities have expressly affirmed the applicability of the PRC laws to audit work papers and other documents. They also

have affirmed that the Firm is prohibited from providing such materials to foreign regulatory authorities, including the Commission, absent prior PRC governmental approval.

In February 2012, after no further contact with the Firm by the Division for an extended period of time, and despite knowledge that the Firm was legally prohibited from producing such documents, the Commission sent demands pursuant to Section 106 of Sarbanes-Oxley as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) relating to each of the three issuers, seeking “all audit work papers and all other documents” related to audit reports issued, audit work performed, or interim reviews conducted in each of the matters (the “Section 106 Demands”). Each of the Division’s Section 106 Demands was accompanied by an SEC Form 1662.

KPMG Huazhen and representatives of other Chinese accounting firms met with each of the PRC regulators, CSRC and MOF, in February of 2012, to inform them of the Section 106 Demands and to seek their directions. During those meetings, both PRC regulators reiterated that any such requests for documents shall be directed to the CSRC and handled through inter-government agreement on cooperation as to such matters, and that the accounting firms did not have the government’s authorization to produce any documents to the SEC directly in response to the Section 106 Demands.

The Firm submitted a single response to the Section 106 Demands on March 27, 2012 (the “March 27, 2012 Response”), reiterating that it was willing but unable lawfully to produce the audit work papers and other documents under various PRC laws and the specific directions of the PRC regulatory authorities. The March 27, 2012 Response included as attachments the opinion of local PRC counsel and supporting documents. The Firm reaffirmed that it wished to

cooperate with the Commission and expressed its strong desire that the issues between the PRC and U.S. governments be resolved in a mutually satisfactory manner.

On May 2, 2012, the Division informed the Firm of its intent to recommend that the Commission institute an administrative proceeding against the Firm for the Firm's failure to comply with the Section 106 Demands. On May 30, 2012, the Firm submitted a Wells Submission to the Commission reiterating the PRC legal impediments preventing compliance with the Section 106 requests and detailing the legal arguments supporting its position that disciplinary action by the Commission would be unprecedented and unwarranted.

**D. The Order Instituting Administrative Proceedings**

After another extended period without contact from the Division, the Commission issued the OIP on December 3, 2012, instituting disciplinary proceedings against the Firm pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice. The OIP was sent via U.S. certified mail to the U.S. member firm of the KPMG network of independent accounting firms, which is KPMG Huazhen's "designated agent" for the limited purposes of Section 106(d). Pursuant to Section 106(d), KPMG Huazhen designated the U.S. member firm as its agent authorized only to accept: (1) any request for documents under Section 106; and (2) other process, pleadings, or other papers in any action brought to enforce a Section 106 request. KPMG Huazhen has not designated the U.S. member firm, or anyone else, as its agent in the United States for purposes of a Commission OIP.

KPMG Huazhen filed an Answer to the OIP on January 7, 2013, reserving all rights to contest service and to assert any and all applicable defenses. Consistent with the January 9, 2013 pre-hearing conference, KPMG Huazhen now moves to dismiss the OIP.



**SUMMARY ARGUMENT**

As set out more fully in the dispositive motions of Respondents Deloitte, PWC Shanghai, and the other Respondents, all of which are fully adopted and incorporated herein by reference, KPMG Huazhen respectfully submits that:

*First*, the Section 106 requests cannot be enforced until the OIP is properly served. *See* Respondents' Motion for Summary Disposition as to Certain Threshold Issues and Memorandum in Support.

*Second*, the OIP must be dismissed because it is premised on Section 106 requests that have not been enforced in federal court. *See* Respondents' Motion for Summary Disposition as to Certain Threshold Issues and Memorandum in Support.

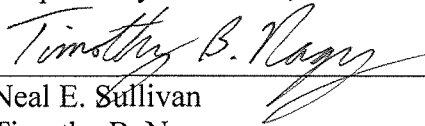
*Third*, the OIP must be dismissed as to Client E because Section 106 does not apply since neither KPMG Huazhen nor its affiliate prepared or furnished an audit report. *See* Respondent PWC Shanghai's Motion for Summary Disposition as to Certain Threshold Issues and Memorandum in Support.

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

\* \* \* \* \*

Dated: February 1, 2013

Respectfully submitted,

  
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