ADMINISTRATIVE PROCEEDING
FILE NO. 3-15116

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

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 LLP; PricewaterhouseCoopers Zhong Tian CPAs Limited Respondents.	The Honorable Cameron Elliot, Administrative Law Judge

RESPONDENTS' MOTION FOR SUMMARY DISPOSITION AS TO CERTAIN THRESHOLD ISSUES AND MEMORANDUM IN SUPPORT

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Pursuant to the January 9, 2013 Order Following Prehearing Conference and U.S. Securities and Exchange Commission (the "SEC" or "Commission") Rule of Practice Rule 250, 17 C.F.R. § 201.250(a)-(b), Respondent Deloitte Touche Tohmatsu CPA Ltd. (now known as Deloitte Touche Tohmatsu CPA LLP) ("DTTC"), joined by Respondents BDO China Dahua CPA Co., Ltd. ("BDO China"), Ernst & Young Hua Ming LLP ("EYHM"), KPMG Huazhen (Special General Partnership) ("KPMG Huazhen"), and PricewaterhouseCoopers Zhong Tian CPAs Limited ("PwC Shanghai"), respectfully moves for summary disposition as to certain threshold issues and dismissal of the Order Instituting Administrative Proceedings Pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice ("OIP").

PRELIMINARY STATEMENT

Respondents move to dismiss the OIP because it (1) has not been properly served on any of the Respondents, and (2) seeks sanctions regarding document requests that never have been enforced in federal court, as required.[1] In both regards, the OIP flies in the face of the plain language of Section 106 of the Sarbanes-Oxley Act ("SOX"), attempts to leapfrog important procedural protections, and ignores principles of international comity reflected in the statute, as well as the SEC's own rules and established jurisprudence. As the Division of Enforcement (the "Division") has acknowledged, the document requests at issue may not be enforceable at all in federal court, because ordering compliance with them would potentially expose Respondents to "severe sanction in China."[2] Nonetheless, the Division contends that it can skip normal service

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[1] DTTC also joins PwC Shanghai's Motion for Summary Disposition as to Certain Threshold Issues, and adopts and incorporates by reference the arguments made in its supporting memorandum. DTTC did not "prepare[] or furnish[] an audit report" for Client G, and instead noisily resigned before doing so. *See* Answer ¶¶ 4, 14. The OIP therefore must be dismissed as it relates to Client G because the threshold requirements set forth in Section 106(a) are not satisfied.

[2] *In the Matter of Deloitte Touche Tohmatsu CPA Ltd*, A.F. 3-14872, Division of Enforcement's Memorandum of Law in Opposition to DTTC's Motion to Dismiss ("Opp."), at 8 n.1; *see also* Speech by PCAOB Member Lewis Ferguson, Investor Protection through Audit Oversight (Sept. 21, 2012),

procedures, avoid any effort to enforce the document requests, and proceed straight to sanctions. That is not the law, and the OIP should be dismissed.

Respondents are China-based audit firms that have received requests from the Division under Section 106 for documents that are located in China. The OIP seeks sanctions against Respondents for an alleged "willful refusal" to produce such documents, even though producing them would violate China law and the specific directive of Respondents' primary regulator in China (the China Securities Regulatory Commission, or "CSRC"). The charges here are thus both fundamentally unjust and unsupported by SOX, and a full record would show that Respondents' good faith conduct in the face of conflicting demands from two competing sovereigns precludes any finding of a "willful refusal" or the imposition of sanctions. But before even reaching those issues, this proceeding must be dismissed on threshold procedural grounds.

First, the Commission has not properly served copies of the OIP on any of the Respondents. Instead, the Commission has purported to serve Respondents' respective U.S. member firms as designated agents of Respondents. But in accordance with the plain language of Section 106, Respondents have designated them for service of process *only* with respect to (a) the Section 106 requests themselves and (b) actions to enforce them. There is no provision in the statute for designation of agents for service of the OIP, and no such designation has been made. Indeed, in the prior DTTC proceeding that is now part of this consolidated proceeding, the Division therefore conceded that the *only* possible basis for service on the U.S. member firms was the "reasonably calculated to give notice" provision of Rule 141(a)(2)(iv). Opp. at 19 (contending that "Section 106 says nothing about the proper manner of service in administrative proceedings" and asserting that the OIP was served under the "reasonably calculated to give

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available at http://pcaobus.org/News/Speech/Pages/ 09212012_FergusonCalState.aspx ("[u]nder Chinese law, it is illegal to remove audit workpapers from China.").

notice" provision). The problem for the Division is that the "reasonably calculated" provision (and the OIP itself) goes on to say that such service is authorized only so long as it is "not prohibited by the law of the foreign country." Rule 141(a)(2)(iv). In particular, the China Law of Civil Procedure establishes mandatory and exclusive service procedures under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ("Hague Service Convention"). These procedures prohibit the SEC's attempted service of Respondents' U.S. member firms, and therefore service on them is improper here. *Compare In re Alchemy Ventures, Inc.*, SEC Rel. No. 702 (S.E.C. Apr. 27, 2012) (directing service on respondent's U.S. counsel where, unlike here, the Division had made multiple efforts to serve the respondent, and the respondent had made efforts to evade service and had made "no effort to show" that directed service would violate foreign law).

Second, this action must be dismissed because the OIP attempts to jump directly to the issue of sanctions without the Division first enforcing the document requests in federal court. Indeed, the Division's position is that it can sanction Respondents even if the requests would not be enforceable in federal court at all. Opp. at 8 n.1 (a "district court could be convinced that ordering DTTC to comply with the Section 106 request ... would potentially expose DTTC to serve sanction in China, and thus decide not to enforce the Section 106 request..."). This is not what Congress intended in enacting Section 106. Section 106 requests are not self-enforcing, as the Division has virtually conceded[3], and their validity (when contested) must be determined by a federal district court. Section 106 is thus closely patterned on a number of other statutes governing the Commission's investigative subpoena authority, which require enforcement in federal court.

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[3] Opp. at 8 ("[t]o *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.") (emphasis original).

The Division's position is particularly curious given that it also acknowledges the Congressional intent to put foreign accounting firms on the same footing as domestic accounting firms, Opp. at 5 (quoting S. Rep. No. 107-205, at 11-12 (2002)), but has posited an interpretation of Section 106 that would do just the opposite. Notably, a domestic accounting firm is not subject to sanction, whether in court or in front of the Commission, for failing to produce documents *without a federal court first passing on the validity of the document request.* Under the Division's position here, though, a foreign accounting firm is somehow stripped of that opportunity. This construction of Section 106 is counter to several of its provisions—including alternate means of production through foreign counterparts, and confinement of sanctions to instances of "willful refusal" to comply—which reflect Congress' sensitivity to the acute international comity issues that are deeply rooted in federal law and protect foreign entities from being punished for being legally unable to produce foreign documents because of conflicts with foreign law. *See, e.g., Societe Internationale Pour Participations v. Rogers*, 357 U.S. 197, 200 (1958) (overturning sanctions for foreign party's non-compliance with discovery order that resulted from its good faith inability to produce the documents without violating Swiss penal laws); *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) (overturning contempt order and holding it "causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question").

The Division's only real attempt to justify this short-circuiting of established practice is to compare its powers under Section 106 to the Commission's powers with respect to routine examination and inspections of broker-dealers and other highly-regulated entities. This comparison is telling since (1) the language of the relevant examination provisions is very different and relates to inspections, not investigations; and (2) Section 106 specifically addresses

the sensitive issues surrounding foreign accounting firms and explicitly provides for judicial enforcement of such requests, whereas the examination provisions are expressly to the contrary. Indeed, these provisions demonstrate that when Congress wants to create an unqualified statutory obligation to produce documents, it knows how—but it did not do so in Section 106.

The Division cannot seek to sanction Respondents when it has neither properly served them nor complied with the judicial enforcement procedure set forth in Section 106. Accordingly, this proceeding should be dismissed.

BACKGROUND

A. Section 106 of Sarbanes-Oxley

In 2002, in Section 106 of SOX, Congress established a process by which the SEC could seek, in a limited set of circumstances, the production of audit workpapers from "foreign public accounting firms." 15 U.S.C. § 7216(b)(1)(A). In 2010, as part of the Dodd-Frank amendments to SOX in 2010, Congress made certain modifications to this process. In both instances, Congress recognized that administrative demands for foreign workpapers implicated sensitive issues of international comity and had the potential for exposing foreign public accounting firms to competing demands between U.S. law and regulators, on the one hand, and the firms' home country laws and regulators on the other. To mitigate this potential for conflict, Congress established a number of procedural protections for foreign public accounting firms.

- Although the SEC Staff can itself issue a Section 106 request, it can only enforce those requests in "the courts of the United States." 15 U.S.C. § 7216(b)(1)(B).

- Congress required foreign public accounting firms to designate U.S. agents for service of Section 106 requests and "any process, pleadings, or other papers in any action brought to enforce" a request. *Id.* § 7216(d). But Congress did not require foreign public accounting firms to designate U.S. agents for any other purpose, including service of an OIP.

- To facilitate cooperation among the SEC and foreign regulators, Congress established a mechanism by which foreign public accounting firms could satisfy their obligations

to produce workpapers by making a production directly to a foreign counterpart of the SEC, such as their home country regulator. *Id.* § 7216(f).

- In the Dodd-Frank amendments, Congress made clear that noncompliance with a Section 106 request is not a *per se* violation of the federal securities laws. Instead, only a "willful refusal to comply" violates SOX. *Id.* § 7216(e).

B. Respondents Are China-Based Firms That Have Registered with the Public Company Accounting Oversight Board

Respondents—all "foreign public accounting firms"—are headquartered in China and provide audit and other professional services throughout mainland China. While they are all members of global networks of accounting firms, each member firm within these networks is a separate and independent legal entity, subject to the local laws of the particular country or countries in which it operates. *See United States v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39, 41 (D.D.C. 2009). As China-based audit firms, Respondents are supervised and regulated by the CSRC and China's Ministry of Finance.

Following the passage of SOX in 2002, all public accounting firms that audit "issuer" financial statements (including Respondents) were required to register and file annual reports with the Public Company Accounting Oversight Board ("PCAOB"). At that time, the PCAOB adopted rules that explicitly permit a foreign public accounting firm to register, notwithstanding that it would be required to withhold certain information under the laws of its home country. *See* PCAOB Rules 2105, 2207.6. Pursuant to its oversight responsibilities, the SEC itself approved these rules. *See* Order Approving Proposed Rules Relating to Registration System, SEC Release No. 34-48180, File No. PCAOB-2003-03, 68 Fed. Reg. 43,242 (July 16, 2003). In doing so, the SEC expressly "applaud[ed]" the PCAOB's "initiative to work with its foreign counterparts to find ways to accomplish the goals of the Act without subjecting foreign firms to unnecessary burdens or conflicting requirements." *Id.*

Each of the Respondents in this proceeding registered with the PCAOB in 2004. Without exception, each Respondent declined, as it was permitted to do under the registration rules, to sign Exhibit 8.1 to its PCAOB registration form, which called for consent to "cooperate in and comply with any request for ... production of documents." In compliance with PCAOB Rule 2105, Respondents each provided a legal opinion and explained that China law prevents them from providing "full cooperation" with overseas document requests, but that they would cooperate with those requests to the fullest extent permitted by applicable laws. *Id.* The SEC and PCAOB made the determination that despite these reservations, Respondents should be permitted to register, and companies audited by them would be permitted to sell securities in the United States.

C. The SEC Staff Requests that Respondents Produce Documents Located Entirely in China and Subject to China Law

This consolidated proceeding involves ten requests for audit workpapers under Section 106, issued by the SEC to Respondents between March 2011 and April 2012. In each instance, the SEC Staff sought to obtain workpapers related to services that Respondents performed exclusively in China. In at least one case, the Staff initially sought to obtain the documents through a direct request to the CSRC pursuant to multilateral cooperation agreements to which the U.S. and China are parties. However, the Staff ultimately requested in each case that Respondents produce the workpapers directly to the SEC, rather than through the CSRC.

Under China law, Respondents are prohibited from producing audit workpapers and related documents directly to the SEC without the authorization of their local regulators. The CSRC reiterated this prohibition to Respondents in the context of the requests at issue in this proceeding, including in October 2011, when following a meeting with each of the Respondents in China, the CSRC issued a written directive reiterating that China-based audit firms may not

produce workpapers and other documents to foreign regulators without authorization, and would face legal consequences for doing so. Respondents reminded the Staff about Respondents' legal obligations in China, and notified the Staff about the CSRC's October 11, 2011 directive. Nonetheless, between February 1, 2012 and April 26, 2012, the Staff served the remaining nine of the ten Section 106 requests at issue in this proceeding.

Respondents acted in good faith and went to great lengths to facilitate production of the requested documents to the SEC, including coordinating with the CSRC and preparing documents productions in the event they were authorized by the CSRC.[4] Ultimately, however, each of the Respondents was (and remains) unable to produce the requested documents directly to the SEC without exposing themselves to the risk of severe and potentially criminal sanctions.

D. The SEC Initiates Administrative Proceedings With The Purpose of Imposing Sanctions on Respondents

On May 9, 2012, the SEC instituted administrative proceedings against DTTC pursuant to Rule 102(e)(1)(iii) of the SEC's Rules of Practice, alleging that DTTC had "willfully refused" to comply with a Staff request under Section 106 and thus "willfully violated" the federal securities laws. In August 2012, the Staff filed an Unopposed Motion For a Stay of the Proceedings on the grounds that renewed negotiations between the SEC and CSRC may yield a viable means for the SEC to obtain the requested documents. On July 19, 2012, the SEC Chief Administrative Law Judge declined to grant the requested stay for lack of authority under the

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[4] DTTC engaged in extraordinary efforts to attempt to facilitate the production by the CSRC of its Client A workpapers to the SEC, at the expenditure of considerable time and resources. Although this resulted in an offer by the CSRC to the SEC for production of certain workpapers, the SEC unfortunately rejected this offer and ended negotiations with the CSRC late last year. *See* DTTC Answer, Affirmative Defenses ¶ 13 (AP No. 3-15116 Jan. 7, 2013). With respect to its Client G, DTTC noisily resigned before it ever issued an audit report, alerting the SEC and the investing public to potential irregularities at Client G. *See* Answer ¶¶ 4, 14.

SEC's Rules of Practice, but ordered a six-month postponement of the proceeding under SEC Rule 161(c)(1) and directed the Staff to file a status report by January 18, 2013.

In its status report, the Division reported that the SEC's negotiations with the CSRC to date have failed to yield a profession-wide resolution that is acceptable to the SEC. Thus, on December 3, 2012, the Commission filed an omnibus administrative proceeding against the five major audit firms in China: BDO China, EYHM, KPMG Huazhen, DTTC, and PwC China. The Division also moved to terminate the postponement of the pre-existing DTTC proceeding and to consolidate it with the newly filed omnibus proceeding. On December 20, 2012, the motion to consolidate was granted. The SEC now seeks to impose sanctions on each of these firms for their purported failure to comply with the document requests, notwithstanding the firms' good faith efforts to comply and the risk of severe and potentially criminal sanctions in China.

ARGUMENT

A. This Proceeding Must Be Dismissed Because The Division Has Failed To Serve Properly The OIP On Any Of The Respondents

The SEC has not served any of the five Respondents with the OIP, but instead has purported to serve their respective U.S. member firms.[5] This does not constitute valid service under either Section 106(d) or Rule 141 of the Commission's Rules of Practice, and this proceeding therefore must be dismissed.

Respondents designated their U.S. member firms as agents only for the two limited purposes expressly recognized under Section 106: (1) service of Section 106 requests, and (2)

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[5] The OIP states that "[u]nder the authority conferred by Rule 141(a)(2) ..., this Order shall be served upon Respondents through the respective domestic registered public accounting firms or other United States agents that Respondents have designated for service under Section 106(d) of Sarbanes-Oxley, [], or by any other method reasonably calculated to give notice to a Respondent, provided that the other method of service is not prohibited by the law of the foreign country in which the Respondent is located." OIP at 6. The Division chose to mail the OIP to each of Respondents' Section 106 designated agents.

actions to enforce them. *See* 15 U.S.C. § 7216(d); *see also* DTTC Section 106 Consent ("[t]his consent is limited to the purposes set forth in Section 106 of the Act, and does not constitute consent to service of any request or process, or jurisdiction, for any other purpose."). The Division has conceded that this is not an action to "enforce" the requests (*see* Opp. at 19), and Section 106(d) restricts service to actions to "enforce" Section 106 requests.

The Division nonetheless has contended that it can serve the U.S. firms because such service constitutes a "method reasonably calculated to give notice" to Respondents of an OIP under Rule 141(a)(2)(iv). *Id.*; *see* OIP at 6. This position ignores, however, that Rule 141 does not authorize the SEC to use a method of service upon foreign parties that is "prohibited by the law of the foreign country." Rule 141(a)(2)(iv); *see also In re Tindall*, SEC Rel. 708 (June 20, 2012) (Elliott, A.L.J.) (Rule 141 prohibits service on a foreign entity in a manner that violates the law of its home country). In China, Articles 276 and 277 of the Civil Procedure Law establish the mandatory and exclusive procedures for serving entities located in China.[6] Exhibit A, Declaration of James V. Feinerman ("Feinerman Decl."), ¶¶ 8, 19-25. These provisions derive from China's entry (along with the United States) into the Hague Service Convention and, like many civil law jurisdictions, require foreign service to be transmitted through the central authorities and the courts. *Id.* ¶¶ 10-11, 19-21. Attempts to serve parties in China without following these procedures are prohibited. *Id.* ¶ 20-21, 23. Here, however, the SEC has attempted to circumvent the China Law of Civil Procedure and the Hague Service Convention by

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[6] These provisions were previously codified at Articles 260 and 261 of the Civil Procedure, but were recodified effective January 1, 2013. *See* Feinerman Decl., Exhibit C.

serving the U.S. member firms in the United States. This is prohibited by China law, and therefore does not comport with Rule 141.[7] *Id.* ¶¶ 22-25.

Pursuant to Articles 276 and 277, China routinely cooperates and accommodates requests to serve individuals and entities in China. *Id.* The SEC itself customarily serves foreign entities (including those located in China) under the Hague Service Convention. *See, e.g.*, *In re Carrier1, Intl.*, SEC Rel. No. 64118 (S.E.C. Mar. 24, 2011) (Office of International Affairs attempted service on China company through procedures established in Hague Service Convention); *In re China Technology Global Corp.*, SEC Rel. No. 62305 (June 17, 2010) (same for service in British Virgin Islands); *In re Sintec Co., Ltd.*, SEC Rel. No. 62198 (S.E.C. June 1, 2010) (OIP to be served in South Korea through Hague Service Convention); *In re Brokat Technologies*, SEC Rel. No. 62107 (S.E.C. May 13, 2010) (same for service in Germany). There is no reason to permit the SEC to disregard the clear limits on Commission authority that Congress established in Section 106, the Commission's own basic service requirements under Rule 141, and the treaty obligations of the United States. *See In re Alchemy Ventures, Inc.*, SEC Rel. No. 702; *see also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) ("compliance with the [Hague] Convention is mandatory in all cases to which it applies"). This proceeding therefore should be dismissed.

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[7] When China entered into the Hague Service Convention, it conditioned its assent on including a prohibition on service of process by mail. *See id.* ¶¶ 8, 18; *see also In re China Technology Global Corp.*, SEC Rel. No. 62305 (S.E.C. June 17, 2010) (citing a Division submission indicating that "China is a signatory to the Hague Convention..., but does not agree to allow service by mail."); *see also* U.S. Dep't of State, Country Specific U.S. State Department Circulars, Judicial Assistance – China ("Service by registered mail should not be used in China"). As such, the SEC's service of the OIP on the U.S. firms by registered mail also contravenes China law on service. Feinerman Decl., at ¶ 8.

B. This Proceeding Must Be Dismissed Because It Is Premised Entirely On Requests That Have Not Been Enforced In Federal Court.

The OIP must also be dismissed because it is premised entirely on Section 106 requests that have never been enforced in federal district court. The Division has acknowledged that an action to "enforce" a Section 106 request must be brought in federal district court. Opp. at 8 ("To *enforce* its Section 106 request and compel [Respondents] to produce workpapers directly to the SEC, the Commission may be required to initiate proceedings in federal district court.") (emphasis original). Nor could the Division credibly contend otherwise. Congress's directive in Section 106(b)(1) is plain and unambiguous: only the "courts of the United States" have "jurisdiction ... for purposes of enforcement of any request" for the production of documents under Section 106. 15 U.S.C. § 7216(b)(1)(B). As such, the SEC lacks any statutory authority to "enforce" Section 106 requests through this administrative proceeding.

The Division contends, however, that this jurisdictional requirement is irrelevant here. Instead, the Division asserts that it can discipline Respondents for willfully refusing to comply even if it never seeks to enforce the requests, or even if a court ruled that they were not enforceable. Opp. at 8 n.1. This remarkable position is entirely at odds with the plain language and structure of Section 106. It also raises a host of serious constitutional questions, and is inconsistent with the Commission's own longstanding practice. The OIP is thus fatally defective and must be dismissed.

1. Section 106 Requires Judicial Enforcement of Commission Requests

a. Like Investigative Subpoenas, Section 106 Requests Are Not Self-Enforcing.

As Section 106(b) makes clear (and the Division essentially concedes, Opp. at 8), Section 106 requests are plainly not self-enforcing or valid *ab initio*. Instead, Section 106 establishes a step-by-step process for serving and enforcing requests that includes important

safeguards for foreign public accounting firms. First, in certain circumstances, the SEC may request that a foreign firm produce its "audit work papers… and all other documents of the firm related to any such audit work…," and may serve such requests upon U.S. agents designated by the foreign firms for that specific purpose. Next, if the foreign firms fail to comply or otherwise challenge the validity of the request, the SEC may bring an action in federal district court to enforce its request. If the district court does not enforce the request, the firm has no obligation to produce the documents. On the other hand, if the request is enforced, and the firm "willful[ly] refus[es] to comply," then it has violated the federal securities laws. Alternatively, in recognition of the sensitive international comity concerns implicated by such requests, Section 106(f) provides for foreign public accounting firms to meet their production obligations through others means, such as by producing documents to a foreign counterpart of the SEC.

In this way, Congress unmistakably modeled Section 106 upon the statutory provisions governing the Commission's investigative subpoena authority. Like Section 106 requests, "[s]ubpoenas issued by the Commission are not self-enforcing." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741 (1984); *see also SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1032-33 (D.C. Cir. 1978) ("[e]nforcement of administrative subpoenas has long been committed, not to administrative tribunals themselves, but instead to the courts."). Instead, if a subpoena recipient "refus[es] to obey" the subpoena, the Commission is authorized to invoke the assistance of a U.S. court, which may order the recipient to comply. *See, e.g.*, 15 U.S.C. § 78u(c) ("[i]n case of contumacy by, or refusal to obey a subpoena …, *the Commission may invoke the aid of any court of the United States…* [a]nd such court may *issue an order*" requiring compliance) (emphasis added). Only then is the recipient subject to punishment if they continue not to comply in the face of the court order. *See, e.g., id.* ("any failure to obey such order of the court

may be punished by such court as a contempt thereof."). This exact process applies to subpoenas issued pursuant to the Securities Act, 15 U.S.C. § 77v, the Exchange Act, *id.* § 78u, the Investment Advisors Act, *id.* § 80b-9(c), and the Investment Company Act, *id.* § 80a-41(c). This step-by-step process is critical for ensuring that agency subpoenas as well as other "*similar process or demand*" (such as Section 106 requests) do not fun afoul of Administrative Procedures Act ("APA"). 5 U.S.C. § 555(d) (emphasis added) (requiring that a court shall first determine whether an agency "subpoena or similar process or demand" is "in accordance with law" before any sanctions may issue for "contempt in a case of contumacious failure to comply."); *see also* S. Rep. No. 79-752 (1945), *reprinted in Administrative Procedure Act: Legislative History, 79th Congress*, at 206 (Pat McCarran, ed. 1946) (APA "expressly recognized the right of parties subject to administrative subp[o]enas to contest their validity *in the courts prior to the subjection of any form of penalty for non-compliance*." (emphasis added).

Legislative history and context affirms that Congress intended to include such procedural protections in Section 106. Congress enacted this provision against the backdrop of a well-developed body of law protecting foreign entities from being punished for their inability to produce documents without violating the laws of their home country. *See Societe Internationale Pour Participations v. Rogers*, 357 U.S. 197 (1958) (overturning sanctions for refusing disclosure of bank records that would violate Swiss law); *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) (overturning contempt order and holding it "causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question"); Restatement (Third) of Foreign Relations § 442(2)(c) (in circumstances where disclosure is prohibited by local law, a "court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to

comply with [an] order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort" to comply). The U.S. Supreme Court has directed that, under the principle of "prescriptive comity," courts must assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. *See F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004); *see also, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) ("prescriptive comity" is "the respect sovereign nations afford each other by limiting the reach of their laws," which is "exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted."). Here, before Dodd Frank's enactment, Congress was advised on multiple occasions by representatives of the Commission about the sensitive issues of international comity that can arise in this context, including the obstacles faced by foreign accounting firms in producing documents directly to the SEC as well as the SEC's own efforts to coordinate with foreign regulators on these issues.[8] Dodd Frank's amendments to Sarbanes-Oxley were primarily intended to support the SEC's and PCAOB's efforts to foster cooperative arrangements with foreign regulators while paying due respect to the challenges facing foreign accounting firms. *See, e.g.*, § 7216(f) (establishing "alternate means" for foreign accounting firm to satisfy obligations through production to foreign counterpart of SEC); *id.* § 7215(b)(5)(C) (authorizing

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[8] For example, the SEC Chief Accountant specifically testified that "[a]ccess to non-U.S. firms and their audit work papers, particularly in the European Union, Switzerland, and *China*, has been hindered due to the PCAOB's lack of explicit legal authority to share information with its foreign counterparts and other issues related to the coordination of inspections with local authorities and the resolution of potential conflicts of law." U.S. House Committee on Financial Services, Testimony Concerning Accounting and Auditing Standards: Pending Proposals and Emerging Issues, James L. Kroeker, Chief Accountant, SEC (May 21, 2010) (emphasis added); *see also* U.S. Senate Banking Subcommittee on Security and International Trade and Finance, Testimony Concerning Continuing Oversight on International Cooperation to Modernize Financial Regulation, Commissioner Kathleen L. Casey, SEC (Jul. 20, 2010) ("[c]ertain provisions of the Dodd-Frank bill will facilitate supervisory cooperation between U.S. authorities and our foreign counterparts...").

PCAOB to share inspection information with foreign regulators); *id.* § 7216(e) (violation of Section 106 limited to instances of a "willful refusal to comply" with request). In this context, it is implausible that Congress intended, with essentially no explanation, to require foreign accounting firms to (i) produce their audit workpapers to the SEC even if would violate the laws of their home country, (ii) with *none* of the safeguards that have traditionally protected parties who have good faith reasons to believe that their noncompliance with an SEC investigative request is legally protected.

b. There is No Merit to the Division's Contention that Section 106 Creates an Unqualified Statutory Obligation to Furnish Records.

Contrary to the Division's contentions, *see* Opp. at 8-10, it is very clear that Congress did not intend to create an unqualified "statutory obligation" for foreign public accounting firms to furnish documents to the SEC. *See* Opp. at 3. Congress obviously knows how to draft such provisions, and has done just that in circumstances where the SEC has been granted plenary authority to conduct routine examination or inspections of the books and records of a limited set of highly regulated entities, such as national securities exchanges and certain broker dealers or investment advisors (but, notably, not public accounting firms). *See* 15 U.S.C. § 78q(a); *id.* § 80b-4.

But the statutory provisions applicable in those circumstances are very distinct from those governing Section 106 requests and investigative subpoenas. The inspection-related provisions are designed primarily to facilitate certain types of examinations of a specific set of highly-regulated entities, as opposed to the broader inquiries or investigations conducted by the Division of Enforcement. Regulated entities subject to these routine examinations must "make and keep" certain records, which are then "subject, *at any time*... to reasonable, periodic, special, or other examinations." *See, e.g.*, *id.* § 78q(a) (emphasis added). The applicable provisions state

simply that these regulated entities "*shall... furnish* such copies thereof ... as the Commission, by rules, prescribes as necessary or appropriate." *Id.* (emphasis added). Unlike Section 106 and the provisions governing agency subpoenas, there is no reference to the courts of the United States, and no direction that the SEC seek judicial enforcement of its requests for such records prior to imposing punishment for non-compliance. *See, e.g., In re Dominick & Dominick, Inc.*, SEC Rel. No. 29243 (S.E.C. May 29, 1991) (where broker-dealer had unqualified statutory obligation under Section 17(a)(1) of the Exchange Act to furnish records to the Staff, its failure to do so constituted a violation of the federal securities laws notwithstanding the lack of any judicial enforcement of the request). Congress has thus demonstrated its ability to establish an unqualified "statutory obligation" to furnish records to the SEC, but these provisions make clear that it did not do so in Section 106.

At bottom, the Division's proffered construction of Section 106 amounts to a radical reshaping of its obligations and authority in conducting enforcement investigations—but only with respect to *foreign* accounting firms.[9] The SEC does not contend—nor could it—that *domestic* accounting firms are subject to sanctions, whether in court or in front of the Commission, for failing to produce documents without a federal court first passing on the validity of the document request. But under the Division's position here, foreign firms are somehow denied these procedural safeguards. That position is flatly inconsistent with Section

[9] The Division's construction of Section 106 would not only disregard international comity, it would yield a series of results that Congress could not have intended. For example, under the Division's theory, without a court ever passing on the validity of the request, the SEC could initiate Rule 102(e) proceedings against foreign accounting firms (but *not* their domestic counterparts) for declining to produce any of the following if they were contained in "audit workpapers" or "*all other documents*" related to an audit: (i) materials protected by the attorney-client privilege or attorney work product doctrine; (ii) sensitive and embarrassing personal information that has no relevance to the Staff's inquiry, and requested for purely prurient or harassing motives; (iii) U.S. state secrets or classified information (or other information it could not disclose under U.S. law); or (iv) diplomatic documents entitled to immunity under the Vienna Convention on Diplomatic Relations.

106, which provides that foreign firms are subject to SOX only "in the *same* manner and to the *same* extent" as domestic public accounting firms. 15 U.S.C. § 7216(a)(1) (emphasis added).

c. Until Section 106 Requests are Enforced in Court, the Division Cannot Prove a "Willful Refusal to Comply."

Finally, even if the Division could somehow, as a procedural matter, skip over judicial enforcement and initiate administrative proceedings against Respondents, it would be unable to prove its substantive case as a matter of law, and the OIP should be dismissed in any event. Only a "willful refusal to comply" is deemed a violation of the federal securities laws and, as such, a potential predicate for a proceeding under Rule 102(e)(1)(iii). Until a court has enforced the Section 106 requests, Respondents have not failed to comply—much less "willfully refused to comply"—with the requests. Because Section 106 requests are not self-enforcing, their validity and enforceability are open to dispute until a "court[] of the United States" rules. In the absence of such a definitive determination of enforceability, the dynamic is just two parties contesting in good faith their respective rights and obligations—not a "willful refusal to comply."

2. Permitting the Division to Bypass Judicial Enforcement Would Raise Serious Constitutional Considerations

Constitutional considerations also compel the conclusion that Section 106 requests must be enforced in federal court. As in Section 106, Congress has required judicial enforcement of investigative requests in order to preserve the separation of powers and in recognition that the enforcing agency is necessarily an interested party concerning the validity of its requests. *United States v. Bell*, 564 F.2d 953, 959 (Temp. Emer. Ct. App. 1977) ("Bifurcation of power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them" is required to eliminate any potential "abuse of subpoena power" that could result if an agency was authorized to enforce its own subpoenas). Judicial enforcement also guarantees

due process for the recipient of an investigative request. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (a person served with an "administrative subpoena" must be afforded the "protection" to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court."); *see also* 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 ("Federal courts have generally held that due process does preclude federal agencies from enforcing [their own] subpoenas.").

Thus, even if Section 106 were ambiguous about the need for judicial enforcement (which it is not), the doctrine of constitutional avoidance requires an interpretation of Section 106 that directs the Division to obtain judicial enforcement of its Section 106 requests. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail...").

3. The Division's Attempt to Bypass Judicial Enforcement Constitutes Arbitrary and Capricious Agency Action

The SEC's decision to bypass judicial enforcement in this proceeding cannot be reconciled with its existing rules, policies, and practices—including the Commission Staff's prior conduct in this case. The Division has offered no reasoned explanation for this change. Bypassing judicial enforcement of the Section 106 requests is therefore impermissibly arbitrary and capricious and in violation of the APA. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (explaining that an agency's "unexplained inconsistency" can be "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]"); *Morall v. DEA*, 412 F.3d 165, 181 (D.C. Cir.

2005) (agency acts arbitrarily and capriciously when imposing sanction without "'explain[ing] why it had not taken the same position ... in similar circumstances in the past."). The OIP must be dismissed on this ground as well.

As demonstrated *supra*, Section 106 was patterned on the provisions governing the SEC's investigative subpoenas and they are effectively equivalent in every relevant respect. The SEC long has taken the position that investigative requests must be enforced in federal courts. *See, e.g.*, SEC Division of Enforcement Manual at 31 ("If a person or entity refuses to comply with a subpoena ..., the Commission may file a subpoena enforcement action in federal district court."). As such, in the Section 106 context, the SEC cannot bypass the procedural safeguards that the SEC has long provided to subpoena recipients without reasoned explanation; otherwise its conduct is impermissibly arbitrary and capricious.

Tellingly, the SEC specifically represented to each of the Respondents in this proceeding that sanctions for non-compliance with the Section 106 requests at issue in this proceeding would not be imposed unless and until a federal court enforced the requests. Each of the Section 106 requests at issue in this proceeding was accompanied by the SEC's Form 1662, "Supplemental Information Pursuant to a Commission Subpoena." In the section entitled "Effect of Not Supplying Information," Form 1662 states:

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

Id. at 6 (emphasis added). The SEC's representations at that time were consistent with the step-by-step enforcement process established by Section 106 and required by the APA. And in reliance upon these statements, Respondents believed that they would be able to present to a

federal court their challenges to the enforceability of the Section 106 requests, before suffering any sanctions.

The SEC now suggests that it apparently erred by incorporating the Form 1662 into the Section 106 requests. Opp. at 18 (contending that Form 1662 is "on its face, inapplicable" to a Section 106 request). But that litigation posture is belied by the Division's consistent pattern of including Forms 1662 in each of the ten Section 106 requests at issue here. Until it initiated the administrative proceeding against DTTC in May 2012, the SEC's position was unmistakable: judicial enforcement of these requests was a prerequisite for sanctions.[10] This unexplained departure is arbitrary and capricious, and the OIP must be dismissed on those grounds.

CONCLUSION

Based on the foregoing, this proceeding must be dismissed.

Dated: February 1, 2013

Respectfully submitted,

Miles Ruthberg / SEK

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[10] The SEC could have accompanied these Section 106 requests with Form 1661, which applies to entities statutorily required to furnish records for examination. Form 1661 is clear that a failure to furnish "Mandatory Information" may result in immediate sanctions without judicial process. *Id.* at 1-2 (section entitled "Effect of Not Supplying Information"). Given that the SEC now analogizes its authority under Section 106 to this type of plenary examination power, it would have been natural for the SEC to include Form 1661 with the Section 106 requests. That it did not is telling, and makes clear that the SEC has changed its clear and settled position in the context of this litigation and without a reasoned explanation.

CERTIFICATE OF COMPLIANCE

I certify that Respondents' Motion for Summary Disposition as to Certain Threshold Issues and Memorandum in Support (the "Motion") complies with the length limitations of SEC Rule of Practice 154(c) because it contains 6,963 words (as determined by the Microsoft Word 2010 word-processing system used to prepare the Motion), excluding attachments and other parts of the Motion exempted by Rule 154(c).

Dated: February 1, 2013

Brian E. Kowalski
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Suite 1000
Washington, D.C. 20004

Counsel for Deloitte Touche Tohmatsu CPA LLP

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 CPA Ltd.;	)
PricewaterhouseCoopers Zhong Tian CPAs Limited	)
Respondents.	)

DECLARATION OF JAMES V. FEINERMAN
JAMES M. MORITA PROFESSOR OF ASIAN LEGAL STUDIES
GEORGETOWN UNIVERSITY LAW CENTER

I, James V. Feinerman, declare as follows:

1. I am the James M. Morita Professor of Asian Legal Studies at Georgetown University Law Center and have been admitted as an attorney to practice before the courts of New York. I have been retained by counsel for Deloitte Touche Tohmatsu CPA Ltd. (now known as Deloitte Touche Tohmatsu CPA, LLP) ("DTTC") in the above-captioned action. I submit this declaration in support of Respondents' Motion for Summary Disposition As to Certain Threshold Issues and Memorandum in Support.

2. For purposes of this opinion, I accept as true the following factual background and U.S. legal context, as explained to me by counsel for DTTC and based on documents I reviewed:

    a. On December 3, 2012, the U.S. Securities and Exchange Commission ("SEC") issued an Order Instituting Proceedings ("OIP") against five China-based accounting firms.

    b. I have reviewed the OIP and assume for purposes of this opinion that the SEC purports to use the method of service described in the OIP, namely:

        Under the authority conferred by Rule 141(a)(2) of the Commission's Rules of Practice, 17 C.F.R. § 201.141(a)(2), this Order shall be served

upon Respondents through the respective domestic registered public accounting firms or other United States agents that Respondents have designated for service under Section 106(d) of Sarbanes-Oxley, 15 U.S.C. § 7216(d), or by any other method reasonably calculated to give notice to a Respondent, provided that the other method of service used is not prohibited by the law of the foreign country in which the Respondent is located.

c. I understand that the OIPs were sent by U.S. mail to U.S.-based firms designated by the China-based firms pursuant to Section 106(d) Sarbanes-Oxley as agents to accept "requests" and "process, pleadings, or other papers in any action to enforce" a Section 106 request.[1]

d. I also understand that prior to mailing the OIPs to the U.S.-based firms, the SEC made no effort to serve the China-based accounting firms using the channels established by the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, (the "Hague Service Convention").

e. SEC Rule of Practice 141(a)(2)(iv) provides that service may be made on persons in a foreign country "by any other method reasonably calculated to give notice to a Respondent, provided that the other method of service is not prohibited by the law of the foreign country."

3. With this understanding of the factual background, I have been asked to provide my opinion as to the following issue:

- Whether the method of service the SEC has purported to use is prohibited by Chinese law, including the Hague Service Convention, as adopted and implemented by China, and/or other Chinese domestic law.

Qualifications

4. I briefly summarize below my education, training and relevant experience. Following my receiving a B.A. in Chinese Studies at Yale College, I spent two years teaching and studying in Hong Kong at the Chinese University of Hong Kong, 1971-73. In the ensuing years, I earned a Ph.D. in East Asian Languages and Literature at Yale University and a J.D. from the Harvard Law School, where I specialized in East Asian Legal Studies. During 1979-80, I

[1] I understand that the SEC had previously served another OIP on DTTC on May 9, 2012, using the same method. Because the method of attempted service was the same and that separate action has since been consolidated into the omnibus Rule 102(e) action, I assume that my analysis also applies with equal force to the service of the May 9, 2012 OIP.

was a participant in the national student exchange program sponsored by the Committee on Scholarly Communication with the People's Republic of China ("CSCPRC", renamed "Committee on Scholarly Communication with China" – "CSCC"). For one year, I studied at Peking University and received a post-graduate certificate; in the fall of 1980, I spent an additional four months as a Visiting Scholar at the Institute of Law of the Chinese Academy of Social Sciences. I speak Mandarin and Cantonese dialects of Chinese and can also read Chinese.

5. I have taught at Georgetown University Law Center, and also as a visiting professor at Harvard and Yale Law Schools, for over twenty-five years. Among other courses, I teach a course in Chinese Law at Georgetown, along with a seminar in Asian Law and Policy Studies. At Harvard, I have taught courses in Chinese Law and Pacific Community Legal Relations; at Yale, I taught both Chinese Law and Asian Legal Studies courses.

6. In addition to my work as a professor of law, I served as Editor-in-Chief of the China Law Reporter, a publication of the American Bar Association's Section of International Law and Practice, from 1986-1998; as Chair of the Committee on Legal Education Exchange with China, from 1993-1997; as Chair of the Asia Law Forum of the Association for Asian Studies, from 1991-1996; and have been a Trustee of the Yale-China Association and the Lingnan Foundation.

7. From 1993-1995, I served as Director of the Committee on Scholarly Communication with China, Washington, D.C., the national organization sponsoring official academic exchange between the United States and China, sponsored by the National Academy of Sciences, the American Council of Learned Societies, and the Social Science Research Council. In 1982-83, I taught as a Fulbright Lecturer on Law at the Peking University Law Department, Peking, People' s Republic of China. From 1983-1985, I served as Administrative Director and Fellow of the East Asian Legal Studies Program at Harvard Law School, Cambridge, Massachusetts. In 2006, I taught as Fulbright Distinguished Senior Lecturer on Law at the Law School of Tsinghua University, Beijing, People's Republic of China. I have attached my curriculum vitae as Exhibit A to this declaration.

Summary of Opinions

8. I summarize my opinions as follows:

   - Traditionally, civil law states, like China, have prohibited any attempt by foreign litigants to effect service on its nationals within its sovereign territory.

   - Today the exclusive method for serving Chinese nationals (whether natural persons or legal entities organized in China) with judicial or extra-judicial documents, including

documents that commence quasi-judicial administrative proceedings like the OIPs in this case, is to make a formal request to the Chinese Central Authority pursuant to the Hague Service Convention.

- Furthermore, China specifically objected to the provision in the Hague Service Convention that contemplates service of judicial and extra-judicial documents by mail. Thus, service by mail is prohibited by Chinese law.

- The SEC's purported attempt to serve the China-based accounting firms by mailing the OIPs to the U.S.-based member firms that have no authority to accept service of an OIP on the China-based accounting firms' behalf, is prohibited by Chinese law. Chinese law requires direct, formal service on its citizens within its borders through the appropriate Chinese government authorities.

- The SEC's purported attempt to serve the China-based accounting firms by mailing the OIPs to their U.S.-based member firms, with the understanding that the U.S.-based firms would forward these documents to the member firms in China, is prohibited by Chinese law. This is true regardless of whether the attempted service by postal channels is done directly by the party attempting to effect service or via an intermediary.

9. My opinions are based on my experience with and study of Chinese law and the PRC government, my examination of relevant statutes, and cases and interactions with Chinese and foreign experts in Chinese law. These include the Constitution of the People's Republic of China, national laws issued by the National People's Congress, and administrative regulations issued by the State Council.

China as a Civil Law State

10. China is a civil law country and its approach to the service of process is consistent with that of almost all other foreign nations who share the civil law tradition. In civil law jurisdictions, such as China, the service of process is regarded as an extension of the state's sovereign power that may only be performed by judicial officers and not by parties to a proceeding.

11. Many foreign states, particularly those with civil law systems, object to the service of process from foreign courts within their national territory upon local nationals, except where local officials effect the service. That is true in most of the European countries where the modern civil law originated, such as Switzerland, France, and Germany. It has been carried over into other civil law jurisdictions around the world where the civil law has spread, such as China.

China's Accession to the Hague Service Convention

12. The Hague Service Convention was designed to facilitate the cross-border service of litigation documents by providing a channel for litigants in contracting states to submit formal requests to the Central Authority of another state to effect service on the litigant's behalf.

13. As of the date of this declaration, there are 67 contracting states to the Hague Service Convention, including both the United States and China.

14. Prior to the adoption of the Hague Service Convention, litigants seeking to serve process in foreign countries had to effect service using a letter rogatory, which is a formal request from the court where the proceeding is pending to a court in the foreign country where the defendant or respondent resided. These letters rogatory had to be transmitted via the traditional consular and diplomatic channels, which were slow and burdensome.

15. The Hague Service Convention significantly liberalized the cross-border service of judicial and extra-judicial documents. It established a systematic process through which litigants from one contracting state could directly request the designated "Central Authority" in another contracting state to execute service on nationals in that foreign state's territory.

16. In addition to formal requests to the designated Central Authority of a contracting state, Article 10 of the Hague Service Convention sets forth several "alternate" methods of service, including by postal channels or by direct transmission between legal process servers in the two contracting states.

17. Recognizing, however, that these less formal methods may be viewed as too intrusive by some states, and particularly in civil law countries, the Convention explicitly allows for contracting states to object to the use of such alternate methods to effect service within their territory. A significant number of the contracting states registered their full or qualified opposition to Article 10's alternate service provisions. (Ex. B)[2]

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[2] Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and 16(3) of the Hague Service Convention, Hague Conference on Private International Law (Sept. 2012), available at http://www.hcch.net/upload/applicability14e.pdf.

18. The People's Republic of China acceded to the Hague Service Convention in 1991, and the Convention entered into force for China on January 1, 1992.[3] China was one of twenty-two contracting states that expressly objected to Section 10(a) of the Convention regarding the service of foreign litigation documents by "postal channels." The U.S. Department of State website confirms that U.S. courts honor these formal objections to service by mail as binding treaty obligations, "and litigants should refrain from using such a method of service."[4] China also objected to the other alternative methods of service set forth in Article 10(b) and (c).

China's Domestic Laws Implementing the Hague Service Convention

19. China has adopted domestic laws to implement its obligations under the Hague Service Convention. These laws establish the sole means for foreign litigants to obtain international judicial assistance in China. Article 276 of China's Civil Procedure Law provides that, "[a]ccording to the international treaties concluded or acceded to by the People's Republic of China or the principle of reciprocity, the people's courts of China and foreign courts may request each other's assistance in the service of legal documents, the investigation and collection of evidence, or other litigation actions . . . ." Article 277 states that any request for judicial assistance "shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China" or through diplomatic channels. (Exhibit C)

20. Moreover, Article 277 states, "Except for the circumstances pr[e]scribed in the preceding paragraph [which are not relevant here],[5] no foreign organ or individual may, without obtaining an approval from the relevant authorities of the People's Republic of China, serve documents or conduct any investigation and collection of evidence within the territory of the People's Republic of China." (*Id.*)

21. Therefore, service on a Chinese national must fully comply with the Hague Service Convention and the laws China enacted to implement that Convention. To comply, requests

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[3] *See* Status Table: Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Hague Conference on Private International Law (Hague Service Convention), available at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=41 (last visited Jan. 23, 2013).

On March 2, 1991, at the Seventh National People's Congress Standing Committee meeting, the People's Republic of China decided to approve China's accession to the Hague Service Convention. 20 U.S.T. 361, T.I.A.S. 6638; 28 U.S.C.A. (Appendix following Rule 4 Fed. R. Civ. P.); 16 I.L.M. 1339 (1977).

[4] *See* U.S. Department of State Website, Service of Legal Documents Abroad, available at http://travel.state.gov/law/judicial/judicial_680.html#treatyobligation.

[5] The preceding paragraph of Article 277 provides that embassies or consulates of foreign countries in the People's Republic of China may "serve documents on, investigate, and take evidence from" their own citizens (when those citizens are within the jurisdiction of the People's Republic of China) provided that "the law of the People's Republic of China is not violated and that no compulsory measures are violated."

for service on Chinese nationals in China must be submitted to the designated Central Authority, which is the Bureau of International Judicial Assistance, Ministry of Justice of the People's Republic of China. The Central Authority then forwards the requests to the Chinese courts, which execute them on behalf of the foreign judicial or quasi-judicial authority.

SEC's Method of Attempted Service Violates Chinese Law

22. What the SEC purports to seek here—to effect service on China-based accounting firms in China by mailing OIPs to U.S.-based firms —violates the Hague Service Convention, as adopted and implemented by China.

23. Such purported service also violates Chinese law. Article 277 of China's Civil Procedure Law explicitly prohibits any attempt to serve documents on the China-based accounting firms without first obtaining the approval of the appropriate Chinese authorities. As I understand it, the SEC did not obtain approval from the Chinese authorities for the purported service at issue here.

24. Articles 276 and 277 make clear that any attempt at service must be made "through channels stipulated in the international treaties concluded or acceded to by [China]" or diplomatic channels. These channels are the *exclusive* means for serving process on Chinese nationals located in China. The SEC did not use these available channels.

25. Thus, in my opinion, the SEC's purported method of attempted service violates both the Hague Service Convention, as adopted by China, and the China domestic laws and regulations that have been enacted to implement its obligations under the Convention.

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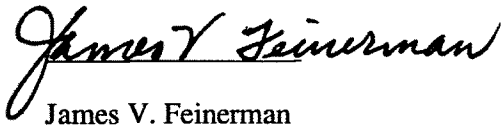
I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 1, 2013 in Washington, D.C.



James V. Feinerman

FEINERMAN DECLARATION
EXHIBIT A

Name: James Vincent Feinerman **Born:** [redacted]

[redacted]

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Education:

Preparatory: Loyola Academy, Wilmette, Illinois
Graduated 1968

College: Yale, B.A., 1971
Course: Chinese Studies
Honors: B.A. with honors
Three NDFL/Ford Foundation Summer Fellowships
(for Chinese Language Study: 1968, 1969 and 1970)
Yale-in-China Fellowship, Hong Kong, 1971-1973

Graduate: Yale University, 1973-1975; 1976-1977
Department: East Asian Languages and Literatures
Degrees: M.A., 1974; M. Phil., 1975; Ph.D., 1979
Dissertation Title: *The Poetry of Wang Wei*

Legal: Harvard Law School, J.D., 1979
Honors and Activities: Board of Student Advisers
Editor, Harvard International Law Journal
Teaching Fellow, Prof. Fried (First Year Contracts)
Robert A. Taft Scholarship
CSCPRC Fellowship for Study in the
People's Republic of China

Employment Experience:

1971-1973	Tutor, Department of English The Chinese University of Hong Kong
1973-1975 1976-1977	Assistant to the Committee, Yale College Undergraduate Admissions Office
1976	Summer Associate, Mayer, Brown & Platt Chicago, Illinois

Employment Experience (continued):

1976-1977 Research Assistant, Prof. Jerome A. Cohen
Harvard Law School

1977 Summer Associate, Orrick, Herrington, Rowley & Sutcliffe
San Francisco, California

1978 Summer Associate, Davis Polk & Wardwell
New York, New York

1978-1979 Teaching Fellow, Contracts I, Prof. Charles Fried
Harvard Law School

1979-1983 Associate, Davis Polk & Wardwell
New York, New York
(on leave while studying in China)

1982-1983 Lecturer on Law, Peking University Law Department
Peking, People's Republic of China

1983-1985 Administrative Director and Fellow
East Asian Legal Studies Program
Harvard Law School, Cambridge, Massachusetts

1985-1986 Visiting Professor, Georgetown University Law Center

1986 Fulbright Visiting Researcher, Faculty of Law
Kyoto University, Kyoto, Japan
(Fulbright Research Award, Japan-U.S. Educational Commission)

1986-1992 Associate Professor, Georgetown University Law Center

1992-1997 Professor of Law, Georgetown University Law Center
[on leave of absence, July 1, 1993 - June 30, 1995]

1993-1995 Director, Committee on Scholarly Communication with China
Washington, DC

1997-present James M. Morita Professor of Asian Legal Studies

2001-2005 Associate Dean, International and Graduate Programs

Honors, Awards and Activities:

1979-1980 CSCPRC Postgraduate Fellowships, Peking University and Institute of Law, Chinese Academy of Social Sciences Peking, People's Republic of China

1982-1983 Fulbright Lecturer on Law, Peking University Law Department

1986 Fulbright Visiting Researcher, Faculty of Law Kyoto University, Kyoto, Japan (Fulbright Research Award, Japan-U.S. Educational Commission)

1986-1998 Editor-in-Chief, *China Law Reporter* [publication of the ABA's Section of International Law and Practice]

1987-1998 Member, Committee on Legal Educational Exchange with China Chair, 1993-1998

1987-1990 Member, Northeast Asia Advisory Committee, Council on International Exchange of Scholars (Fulbright Program)

1989 Recipient, John D. and Catherine T. MacArthur Foundation Award for Research and Writing in Peace and International Cooperation Project: "Post-Mao China and International Law"

1991-1995 Chair, Asian Law Forum, Association for Asian Studies

1991-1996; 1997-present Trustee, Yale-China Association, New Haven, Connecticut

1991-present Board of Governors, Washington Foreign Law Society Chair, Jackson Award Committee [for Best Student

1992-1993 Fellow, Woodrow Wilson International Center for Scholars

1994-present Trustee, Lingnan Foundation, New York, New York

1997-present James M. Morita Professor of Asian Legal Studies (First incumbent of newly established chair)

2005-2006 Fulbright Distinguished Senior Lecturer on Law, Tsinghua University Law School
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FEINERMAN PUBLICATIONS LIST June 2009

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2. Book Review, Ralph Clough's *Island China*, 20 *Harvard International Law Journal* 221 (1979).

3. Ph.D. Dissertation, Yale University, *The Poetry of Wang Wei*, May 1979.

4. Co-translator, "Lectures on the Criminal Law," in *Chinese Law and Government*, Vol. XIII, No. 2, Summer 1980.

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FEINERMAN DECLARATION
EXHIBIT B

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	(b)	(c)	Art. 15(2)	Art. 16(3)
Albania	No opposition	No opposition	No opposition	No opposition	No declaration of applicability	No declaration
Antigua and Barbuda	No opposition	No opposition	Additional information	Additional information	Declaration of applicability	No declaration
Argentina	No opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration of applicability
Australia	No opposition	Qualified opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment, except where it is determined otherwise by the Court seized by the matter
Bahamas	No opposition	No opposition	No opposition	No opposition	No declaration of applicability	No declaration
Barbados	No opposition	No opposition	No opposition	No opposition	No declaration of applicability	No declaration
Belarus	No opposition	No opposition	No opposition	No opposition	No declaration of applicability	No declaration
Belgium	Opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Belize	No opposition	No opposition	No opposition	No opposition	No opposition	No opposition

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	Art. 10 (b)	Art. 10 (c)	Art. 15(2)	Art. 16(3)
Bosnia and Herzegovina	No opposition	No opposition	No opposition	No opposition	No opposition	No opposition
Botswana	No opposition	No opposition	Opposition	Opposition	Declaration of applicability	No declaration
Bulgaria	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Canada	No opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of judgment, except in exceptional cases determined by the rules of the Court seized of the matter
China, People's Republic of	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
China (Hong Kong)	Opposition	No opposition	Additional information	Additional information	No declaration of applicability	No declaration
China (Macao)	Opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	(b)	(c)	Art. 15(2)	Art. 16(3)
Croatia	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Cyprus	No opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Czech Republic	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	No declaration
Denmark	No opposition	No opposition - Additional information, see practical information chart	No opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment (additional information, see declarations)
Egypt	Opposition	Opposition	Opposition	Opposition	No declaration of applicability	No declaration
Estonia	No opposition	No opposition	No opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of three years following the date of the judgment
Finland	No opposition	No opposition	Additional information	Additional information	No declaration of applicability	No declaration
France	Opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of twelve months following the date of the judgment

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	Art. 10 (b)	Art. 10 (c)	Art. 15(2)	Art. 16(3)
Germany	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the termination of the time limit which has not been observed
Greece	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	No declaration
Hungary	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Iceland	No opposition	No opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
India	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Ireland	No opposition	No opposition	Additional information	Additional information	Declaration of applicability	No declaration

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	(b)	(c)	Art. 15(2)	Art. 16(3)
Israel	No opposition	No opposition	Additional information	Additional information	No declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Italy	No opposition	No opposition	No opposition	No opposition	No declaration of applicability	No declaration
Japan	No opposition	No opposition Additional information – See practical information chart	Opposition	Opposition	Declaration of applicability	No declaration
Korea, Republic of	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	No declaration
Kuwait	Opposition	Opposition	Opposition	Opposition	Declaration of non-applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of the time fixed by the law of the trial judge or one year following the date of judgment, whichever is longer
Latvia	Opposition	Qualified opposition	Opposition	Opposition	Declaration of applicability	No declaration
Lithuania	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	(b)	(c)	Art. 15(2)	Art. 16(3)
Luxembourg	Opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after expiration of one year following the date of the judgment
Malawi	No opposition	No opposition	No opposition	No opposition	No declaration of applicability	No declaration
Malta	Opposition	Opposition	Opposition	Opposition	No declaration of applicability	No declaration
Mexico	Opposition	Opposition	Opposition	Opposition	Declaration of non-applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of judgment, or a longer period which the judge may deem reasonable (additional information, see declarations)
Monaco	Opposition	Opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after expiration of twelve months following the date of the judgment
Montenegro	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after expiration of one year following the date of the judgment
Morocco	No opposition	No opposition	No opposition	No opposition	No declaration of applicability	No declaration

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	(b)	(c)	Art. 15(2)	Art. 16(3)
Netherlands	No opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Norway	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed if delivered to the competent Norwegian authorities after the expiration of three years following the date of the judgment
Pakistan	Opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief from ex parte decisions will not be entertained if it is filed after the expiration of the period of limitation prescribed by the law of Pakistan
Poland	Opposition	Opposition	Opposition	Opposition	No declaration of applicability	No declaration
Portugal	Opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Romania	Opposition	No opposition	No opposition	No opposition	No declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Russian Federation	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	No declaration

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	Art. 10 (b)	Art. 10 (c)	Art. 15(2)	Art. 16(3)
Saint Vincent and the Grenadines	No opposition	No opposition	Opposition	Opposition	Declaration of applicability	No declaration
San Marino	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	No declaration
Serbia	Opposition	Opposition	No opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Seychelles	Opposition	No opposition	Additional information	Additional information	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Slovakia	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	No declaration
Slovenia	No opposition	No opposition	No opposition	No opposition	No declaration of applicability	No declaration
Spain	No opposition	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of sixteen months following the date of the judgment
Sri Lanka	Opposition	Opposition	No opposition	Opposition	Declaration of applicability	No declaration
Sweden	No opposition	No opposition	Additional information	Additional information	No declaration of applicability	No declaration

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	(b)	(c)	Art. 15(2)	Art. 16(3)
Switzerland	Opposition	Opposition	Opposition	Opposition	No declaration of applicability	No declaration
The Former Yugoslav Republic of Macedonia	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Turkey	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the expiration of one year following the date of the judgment
Ukraine	Opposition	Opposition	Opposition	Opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after the after expiration of one year following the date of the judgment
United Kingdom	No opposition	No opposition	Additional information – See declarations and practical information chart	Additional information - See declarations and practical information chart	Declaration of applicability	In relation to *Scotland only*, applications for setting aside judgments on the grounds that the defendant did not have knowledge of the proceedings in sufficient time to defend the action will not be entertained if filed more than one year after the date of judgment.

TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION

States Parties	Art. 8(2)	Art. 10 (a)	Art. 10 (b)	Art. 10 (c)	Art. 15(2)	Art. 16(3)
United States of America	No opposition – See Practical information chart	No opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after: a) after the expiration of the period within which the same may be filed under the procedural regulations of the court in which the judgment has been entered, or b) after the expiration of one year following the date of judgment, whichever is later.
Venezuela	Opposition	Opposition	No opposition	No opposition	Declaration of applicability	Declaration that application for relief will not be entertained if it is filed after expiration of the period specified in Venezuelan law

FEINERMAN DECLARATION
EXHIBIT C

Excerpts from the Civil Procedure Law of the People's Republic of China

Unofficial English Translation

(As revised and adopted on August 31, 2012 by the Standing Committee of the National People's Congress and effective as of January 1, 2013)

Article 276 According to the international treaties concluded or acceded to by the People's Republic of China or the principle of reciprocity, the people's courts of China and foreign courts may request each other's assistance in the service of legal documents, the investigation and collection of evidence, or other litigation actions.
If any matter requested by a foreign court for assistance would impair the sovereignty, security, or social and public interests of the People's Republic of China, the people's court shall refuse the request.

Article 277 A request for providing of judicial assistance shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China; if there is no treaty regarding judicial assistance between China and the foreign country, such a request may be made through diplomatic channels.
A foreign embassy or consulate to the People's Republic of China may serve legal documents to its citizens or conduct the investigation and collection of evidence on its citizens with the conditions of no laws of the People's Republic of China to be violated and no compulsory measures to be taken.

Except for the circumstances proscribed in the preceding paragraph, no foreign organ or individual may, without obtaining an approval from the relevant authorities of the People's Republic of China, serve documents or conduct any investigation and collection of evidence within the territory of the People's Republic of China.

第二百七十六条 根据中华人民共和国缔结或者参加 的国际条约，或者按照互惠原则，人民法院和外国法院可以相互请求，代为送达文书、调查取证以及 进行其他诉讼行为。

外国法院请求协助的事项有损于中华人民共和国的 主权、安全或者社会公共利益的，人民法院不予执 行。

第二百七十七条 请求和提供司法协助，应当依照中 华人民共和国缔结或者参加的国际条约所规定的途径进行；没有条约关系的，通过外交途径进行。

外国驻中华人民共和国的使领馆可以向该国公民送 达文书和调查取证，但不得违反中华人民共和国的法律，并不得采取强制措施。

除前款规定的情况外，未经中华人民共和国主管机 关准许，任何外国机关或者个人不得在中华人民共和国领域内送达文书、调查取证。