UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

In the Matter of	
BDO CHINA DAHUA CPA CO., LTD., ERNST & YOUNG HUA MING LLP, KPMG HUAZHEN (SPECIAL GENERAL PARTNERSHIP), DELOITTE TOUCHE TOHMATSU CERTIFIED PUBLIC ACOUNTANTS LTD., and PRICWATERHOUSECOOPERS ZHONG TIAN CPAs LIMITED	The Honorable Cameron Elliot, Administrative Law Judge

DIVISION OF ENFORCEMENT'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTIONS FOR SUMMARY DISPOSITION AS TO CERTAIN THRESHOLD ISSUES

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MISCELLANEOUS

Pursuant to the January 9, 2013 Order Following Prehearing Conference and the Hearing Officer's instructions during the prehearing conference, the Division of Enforcement (the "Division") of the U.S. Securities and Exchange Commission ("SEC" or "Commission") respectfully submits this consolidated brief in opposition to the Motions for Summary Disposition As To Certain Threshold Issues filed on February 1, 2013, by Respondents Deloitte Touche Tohmatsu CPA Ltd. (now known as Deloitte Touche Tohmatsu CPA LLP) ("DTTC"), PricewaterhouseCoopers Zhong Tian CPAs Limited ("PwC Shanghai"), BDO China Dahua CPA Co., Ltd. ("BDO China"), Ernst & Young Hua Ming LLP ("EYHM"), and KPMG Huazhen (Special General Partnership) ("KPMG Huazhen") (collectively "Respondents").

PRELIMINARY STATEMENT

Respondents are public accounting firms based in the People's Republic of China ("China"). They voluntarily have chosen to participate in U.S. capital markets by registering with the Public Company Accounting Oversight Board ("PCAOB" or "Board") and performing audit work for clients that issue securities traded in the U.S. Despite this, Respondents have failed to comply with U.S. statutory requirements that expressly apply to them by virtue of their conduct. Specifically, each Respondent has declined to produce audit workpapers and related documents for certain U.S. issuer-clients in response to Commission requests under Section 106 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "the Act"), as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") ("Section 106"). ~~The documents, if produced~~, Respondents contend that producing the requested documents would subject them to possible penalties under China law, a circumstance they acknowledge they have known about at least since they first registered with the Board between 2004 and 2006. Ostensibly to avoid these alleged penalties, Respondents have chosen to deny the Commission access to documents to which it is statutorily entitled, and which the

Commission needs to conduct ongoing investigations and to supervise accounting professionals who are registered with the Board and whose work is incorporated into Commission filings and relied upon by U.S. investors.

Respondents contend that the above-described status quo, under which, in the firms' view, they may freely avail themselves of the financial and reputational benefits of participating in U.S. markets while relying on the supposed restrictions of foreign law to exempt themselves from U.S. rules, cannot be remedied by the Commission through these proceedings. The Division disagrees. Through Sarbanes-Oxley, the Dodd-Frank amendments, and other securities law statutes, Congress provided the Commission with sufficient regulatory tools to protect its own processes through these proceedings and, appropriately, to avoid this untenable result.

Under Rule 102(e)(iii) of its Rules of Practice, which Sarbanes-Oxley codified, "[t]he Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . [t]o have willfully violated . . . any provision of the Federal securities laws or the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(iii); *see also* 15 U.S.C. § 78d-3(a)(3). Sarbanes-Oxley Section 106(e) provides that "[a] willful refusal to comply" with a Section 106 demand "shall be deemed a violation of this Act." *Id.* § 7216(e). Accordingly, the Commission instituted these proceedings to determine whether Respondents willfully violated the securities laws by willfully refusing to comply with the Commission's document demands, and, if so, what remedy should result. Because Respondents' knowing failures to produce the requested documents constituted willful refusals to comply, the Commission could seek to rectify the improper status quo by suspending Respondents' privilege of appearing or practicing before it. These proceedings are not punitive in nature, but rather have been brought to protect the Commission's processes – which include

investigating auditors and their gatekeeper functions as well as potential fraud at their issuer clients.

Through their present motions for summary disposition, Respondents raise three "threshold" arguments for why these proceedings should be dismissed as to some or all of the charges against them. As a procedural matter, these arguments do not now require the Hearing Officer to determine whether Respondents' conduct amounted to a willful refusal to comply with the Section 106 demands. But the Division notes that, if and when this question is addressed, it will require only the narrow determination of whether Respondents were in fact cognizant of their refusal to produce the requested documents. This narrow inquiry is compelled by the fact that "willful" means "knowing," as courts and the Commission repeatedly have defined the term under the securities laws. *See, e.g.*, *Mathis v. SEC*, 671 F.3d 210, 217 (2d Cir. 2012) (concluding "willfully" as used in Exchange Act "means intentionally committing the act which constitutes the violation" (internal quotation omitted)); *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (same). Contrary to Respondents' comments in their briefs (*e.g.*, PwC Shanghai Br. at 1-2), the straightforward willfulness inquiry will *not* require evaluation of either (1) the asserted constraints imposed by China law on the audit firms, or (2) whether the audit firms acted in good faith despite their failure to produce documents to the Commission.

As for the three arguments that Respondents raise for resolution in their motions, each of these is without merit.

First, the Division properly served the Orders Instituting Proceedings ("OIPs") on Respondents by mailing them to Respondents' affiliates located in the U.S. The Commission expressly directed this method of service when it authorized the filing of the Omnibus OIP (File No. 3-15116). And because this method indisputably was reasonably calculated to provide

notice to Respondents, it is authorized under Rule 141 of the Commission's Rules of Practice. Respondents contend that the method of service was prohibited by China law. However, this assertion is irrelevant under Rule 141, because the operative sub-section, Rule 141(a)(2)(iv), was *not* intended to render service that occurs solely *within the U.S.* subject to the dictates of foreign law. Furthermore, even assuming *arguendo* that foreign-law restrictions could apply in this context, Respondents cannot carry their burden of demonstrating that China law actually imposed the alleged prohibition. The China law provisions cited by Respondents, by their own terms, apply only to service that occurs *within Chinese territory*, and, therefore, cannot apply to the Division's service of the OIPs within the U.S.

Second, Section 106 required Respondents to produce the requested documents in response to all of the Commission's demands at issue in the OIPs – regardless of whether the documents related to a completed audit report. Accordingly, all of the OIPs' charges as to each Respondent should be heard. Even though Respondents have been registered with the Board for at least six years, have prepared or furnished or played substantial roles in the preparation or furnishing of audit reports for U.S. issuer-clients, and have performed audit work for U.S. issuer-clients involved in ongoing Commission investigations, Respondents contend that they were not obligated to produce documents related to any audit that did not result in a completed audit report. This argument defies the language and structure of Section 106, which plainly requires *any* foreign public accounting firm to produce documents relating to *any audit work* the firm performs for U.S. issuers to the Commission upon request. Respondents' argument also ignores Respondents' obligations as Board registrants, and disregards the fact that they are all subject to Sarbanes-Oxley and the rules of the Board and the Commission issued under the Act.

Third, the Hearing Officer and the Commission are authorized to consider the OIPs' charges against Respondents and to impose appropriate remedial relief, *without* a federal court's first issuing an order directing compliance with the Section 106 demands. The Commission's exercise of authority here is consistent with its long-standing authority to bring disciplinary proceedings against accountants and their firms under Rule of Practice 102(e); with the language and structure of Sarbanes-Oxley, including Section 106; with Commission and other agency precedents imposing sanctions on regulated entities for failure to produce required documents, irrespective of foreign-law constraints or the availability of judicial enforcement; and with federal court decisions affirming agencies' authority to sanction parties for non-production of documents, where the agency otherwise decided that judicial enforcement was impractical or insufficient to vindicate the agency's interests.

The Hearing Officer should deny Respondents' motions in their entirety, and proceed to a determination of the merits of the OIPs' allegations.

BACKGROUND

A. Sarbanes-Oxley Establishes Registration And Document Production Requirements For Audit Firms

In 2002, Congress enacted Sarbanes-Oxley to combat fraud and enhance transparency after a series of massive corporate scandals shook public confidence in the U.S. capital markets. Sarbanes-Oxley "has been called the most radical redesign of the federal securities laws since the 1930s and the most sweeping legislation affecting accounting, disclosure and corporate governance in a generation." David M. Stuart & Charles F. Wright, *The Sarbanes-Oxley Act: Advancing the SEC's Ability to Obtain Foreign Audit Documentation in Accounting Fraud Investigations*, 2002 COLUM. BUS. L. REV. 749, 750 (quoting sources).

Sarbanes-Oxley created the Board and subjected it to Commission oversight. 15 U.S.C. §§ 7211, 7217. The Act requires public accounting firms to register with the Board if they prepare or issue, or participate in the preparation or issuance of, any audit report with respect to any issuer. *Id.* § 7212(a). Once registered, firms are subject to comprehensive Board oversight, including inspections, investigations, and a reporting regime. *Id.* §§ 7212(d), 7214, 7215. Recognizing that audit firms' documents (including specifically workpapers) are critical to Board oversight, the Act authorized the Board to create rules requiring their retention, availability, and production, *id.* §§ 7214(d), (e), 7215(b)(2), and to suspend or revoke firms' registrations upon their failure to produce documents in connection with a Board investigation, *id.* § 7215(b)(3)(ii). The Board has issued such rules. *See* Board Rules 5103(a) & (b), 5110(a), 5200(a)(3), 5300(b).

Section 106 of Sarbanes-Oxley specifically addresses the registration status of foreign public accounting firms ("foreign firms")[1] and the obligations of firms, both foreign and domestic, to produce foreign firms' documents. Section 106(a) confirms that a foreign firm that prepares or furnishes an audit report with respect to any issuer is "subject to this Act and the rules of the Board and the Commission issued under this Act," and, therefore, is required to register with the Board. 15 U.S.C. § 7216(a)(1). Section 106(a) also authorizes the Board to identify other firms that must register "in light of the purpose of this Act and in the public interest or for the protection of investors." *Id.* § 7216(a)(2).

Separately, Section 106(b) requires *any* foreign firm that engages in certain specified activities to produce documents directly to either the Board or the Commission upon request. *Id.*

[1] The Act defines "foreign public accounting firm" to mean "a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof." 15 U.S.C. § 7216(g).

§ 7216(b)(1). These specified activities (*i.e.*, "triggering conditions") sweep more broadly than the circumstances that require a foreign firm to register under Section 106(a), as discussed in greater detail below. *See infra* Argument Part II.A. Section 106(b) also requires a registered public accounting firm (foreign or domestic) that relies on material services provided by a foreign firm in the conduct of an audit to produce the foreign firm's relevant documents to the Board or Commission upon request. *Id.* § 7216(b)(2). Section 106(e) provides, "A willful refusal to comply, in whole or in part, with any request by the Commission or the Board under this section, shall be deemed a violation of this Act." *Id.* § 7216(e).[2]

B. Respondents Knowingly Failed To Produce Documents Requested By The Commission Under Section 106

Each Respondent registered with the Board between 2004 and 2006 and has since maintained its registration by, among other things, filing annual reports. DTTC Br. at 6-7.[3] According to Respondents' representations in these reports, for at least the last four years, Respondents have all prepared or furnished or played substantial roles in the preparation of or

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[2] In Dodd-Frank, Congress amended Section 106, among other ways, to broaden significantly the activities of foreign firms and registered public accounting firms that make them subject to the document production obligations of Section 106(b), and to add Section 106(e). *See infra* Argument Part II.A.

[3] In their present motions, Respondents variously allege that the Board accepted Respondents' registrations even though Respondents declined to provide their express consent to cooperate in and comply with any request for production of documents. *See, e.g.*, DTTC Br. at 7. Although this assertion is irrelevant to any of the legal issues raised by Respondents' motions, the Division notes that by allowing Respondents to register, neither the Board nor the Commission absolved the firms of their production obligations; to the contrary, the Board issued letters to the firms at the times of their respective registrations, explicitly stating that the firms were obligated to comply with their production obligations under U.S. law, regardless of any reservations claimed by Respondents. In the same vein, in 2004 Board also issued guidance to the firms emphasizing that a firm's failure to cooperate with the Board's production requests could subject the firm to disciplinary sanctions, including substantial civil money penalties and revocation of the firm's registration. This guidance (FAQ 4) stated, "the fact that the firm has not obtained a client consent that might be necessary (under non-U.S. law) to allow the firm to cooperate is not a defense to a disciplinary action for failure to cooperate." This guidance is still available at http://pcaobus.org/Registration/Information/Pages/Non_US_Registration_FAQ.aspx.

furnishing of audit reports for U.S. issuers. Each Respondent acknowledges a portion of this recent activity in its filings in these proceedings. *See* PwC Shanghai Br. at 3; EYHM Br. at 3; BDO Br. at 4; KPMG Answer at 2; DTTC's Motion To Dismiss, File No. 3-14872 (Jun. 20, 2012), at 5. Additionally, each Respondent has designated the U.S. affiliate within its global network of firms as its agent to accept service of any document demand under Section 106, or any action to enforce the demand, under Section 106(d). 15 U.S.C. § 7216(d).

Respondents were engaged to conduct or to participate in audits for the various issuer-clients referenced in the OIPs, and created audit workpapers in the course of those engagements.[4] In March 2011, in relation to a Commission investigation into potential accounting fraud involving DTTC Client A, the Commission sent DTTC, via its U.S. affiliate, a Section 106 demand for audit workpapers and related documents. *See* Second Corrected OIP, File No. 3-14872 ¶¶ 3, 10 (May 9, 2012) ("DTTC Proceeding OIP"). Between February and April 2012, in relation to Commission investigations into potential frauds involving the other nine issuer-clients referenced in these proceedings, the Commission sent Respondents, via their respective U.S. affiliates, Section 106 demands for documents related to their relevant engagements with these

[4] BDO China conducted audits for Omnibus Client A for the years ending December 31, 2010 and December 31, 2011. *See* BDO Answer at 2. DTTC was engaged to conduct an audit for Client G for the fiscal year ending June 30, 2010, *see* DTTC Omnibus Answer at 5, and, upon information and belief, conducted audits for DTTC Client A for the years ended December 31, 2008 and December 31, 2009. EYHM was engaged to conduct audits for Client B for the year ending December 31, 2010, and for Client C for the fiscal years ending September 30, 2010 and September 30, 2011. *See* EYHM Br. at 4-5; EYHM Answer at 3. KPMG Huazhen was engaged to conduct audits for Client D for the year ending December 31, 2010, for Client E for the year ending December 31, 2010, and for Client E for the years ending December 31, 2008, December 31, 2009, and December 31, 2010. KPMG Huazhen Answer at 2-3. PwC Shanghai was engaged to conduct audits for Clients H and I for the fiscal year ending December 31, 2010. PwC Shanghai Answer at 5-6.

clients. *See* OIP, File No. 3-15116 ¶¶ 8-16 ("Omnibus OIP"). Respondents acknowledged receipt of the requests but in all instances refused to provide the requested documents.[5]

C. The Commission Initiated These Proceedings To Determine Whether Respondents Willfully Violated U.S. Securities Laws And, If So, What Remedial Actions Are Appropriate

On May 9, 2012, the Commission instituted the DTTC Proceeding (File No. 3-14872), and on December 3, 2012, the Commission instituted the Omnibus proceeding (File No. 3-15116). The OIPs contend that each of the Respondents willfully violated the securities laws under Rule 102(e)(1)(iii) of the Commission's Rules of Practice, by willfully refusing to produce the requested documents in violation of the firms' obligations under Sarbanes-Oxley Section 106 and the Securities Exchange Act of 1934 ("Exchange Act"). DTTC Proceeding OIP ¶¶14-17; Omnibus OIP ¶¶ 19-32; 15 U.S.C. 7202(b)(1). In both OIPs, the Commission directed that a determination be made as to whether Respondents should be censured or denied the privilege of appearance and practice before the Commission. DTTC Proceeding OIP ¶ 18; Omnibus OIP ¶ 32.

Within seven days after issuance of each OIP, the Division effected service on Respondents by arranging (through the Office of the Secretary) for the mailing of the OIP to the same U.S. affiliates to which the Commission had previously sent the Section 106 requests. On December 20, 2012, the DTTC and Omnibus Proceedings were consolidated.

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[5] Although Respondents allege that China law prohibits them from producing workpapers, this allegation is irrelevant to the issues presented in Respondents' present motions. This allegation, as well as Respondents' contentions that they acted in good faith, also will be irrelevant to the determination of whether Respondents "willfully refused to comply" with the Commission's Section 106 demands, as noted above. To the extent these issues do become relevant at a later stage of this proceeding, the Division reserves the right to challenge Respondents' contentions. The Division does not concede that compliance with the Section 106 demands "would potentially expose Respondents to 'severe sanction in China,'" (DTTC Br. at 1).

ARGUMENT

I. The OIPs Have Been Properly Served

The Commission in its Omnibus OIP expressly provided that it was to be served on Respondents through the U.S. agents that they had designated for receipt of other service of process, under Section 106. The Division duly complied with this instruction. Respondents nevertheless contend that the Division instead was required to undertake the time-consuming (and quite possibly futile) exercise of attempting to serve Respondents by sending the OIP to China's central authority under the Hague Service Convention. Respondents are wrong. Mailing the OIP to the U.S. affiliates in the U.S. was consistent with the Commission's chosen method of service here, the Commission's Rules of Practice, and due process. Service of the OIP in the DTTC proceeding by the same method was likewise proper, and in any event DTTC has waived its objection to service of that OIP. There is no reason now to delay these proceedings while the Division undertakes additional formalities of sending supplemental copies of the OIP to Respondents through other channels, which may not be successful in any event.[6]

A. DTTC Waived Its Objection To Service

DTTC waived any objection to service of the OIP in the DTTC Proceeding, because DTTC affirmatively acknowledged and agreed that "[s]ervice was effected on [DTTC] on May 14, 2012, by delivery upon its registered agent for service of process." Brief in Support of Joint Motion for Adjournment of Hearing and Prehearing Conference, filed May 24, 2012. DTTC's

[6] If it is determined that service on Respondents was improper, the Division would have to attempt other methods of service. The remedy of dismissal is not available for improper service under the Commission's Rules of Practice. *See In the Matter of Alchemy Ventures, Inc.*, Admin. Proc. File No. 3-14720, Admin. Proc. Rulings Rel. No. 702, at p. 2 (Apr. 27, 2012) ("[I]n sharp contrast to practice in the District Courts, there is apparently no remedy for failure to properly serve a respondent in an administrative proceeding – the Division just has to keep trying to serve him.").

motion to dismiss and/or for summary disposition as to that OIP should be denied on that ground. *See Pusey v. Dallas Corp.*, 938 F.2d 498, 501 (4th Cir. 1991) (failure to raise defense of untimely service of process in a pre-answer motion waives the defense).

B. The Method Of Service Comported With The Commission's Instructions And The Commission's Rules of Practice

The Commission in the Omnibus OIP directed service as follows:

> 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.

Accordingly, by mailing the Omnibus OIP to Respondents' U.S. affiliates, the Division complied with the Commission's explicit instruction in the OIP and effectuated service. The Division also complied with Rule 141(a)(2)(iv) of the Commission's Rules of Practice, which provides:

> Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (a)(2) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

17 C.F.R. § 201.141(a)(2)(iv).

Although Respondents have not specifically designated their U.S. affiliates as agents for receipt of Commission orders instituting proceedings, this is of no consequence as to either of the OIPs here. Respondents do not contend that the Commission's chosen method of service was not "reasonably calculated to give notice," nor could they. They all have appeared and answered the OIPs and filed these motions, and, therefore, indisputably had actual notice of these proceedings. "Where there has been actual notice . . . due process has been satisfied, at least in Commission administrative proceedings." *In the Matter of Alchemy Ventures, Inc.*, Admin. Proc.

File No. 3-14720, Admin. Proc. Rulings Rel. No. 702, at p. 3 (Apr. 27, 2012) (internal quotation omitted).

Delivery of the OIPs to the U.S. affiliates – who were authorized to accept service for the very demands that gave rise to the OIPs – satisfied "the core function of service," which "is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." *Henderson v. United States*, 517 U.S. 654, 672 (1996); *see also Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 176 (2d Cir. 1979). Service through the affiliates was reasonably calculated to provide at least as much notice as the methods approved for foreign defendants or respondents (including parties in China) in numerous other cases.[7]

C. Mailing The OIPs To The U.S. Affiliates In The U.S. Was Permissible Under The Rules of Practice

Respondents' challenge to service rests solely on the contention that the steps undertaken by the Division, which occurred wholly within the U.S., were proscribed by Rule 141(a)(2)(iv)

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[7] Federal district courts have upheld non-Hague Convention service of Chinese individuals through various U.S.-based agents or representatives in *Vanleeuwen v. Keyuan Petrochemicals*, 2012 WL 5992134 (C.D. Cal. Nov. 30, 2012) (corporate CEO could be served through corporate registered agent or corporate counsel); *Brown v. China Integrated Energy, Inc.*, 285 F.R.D. 560 (C.D. Cal. July 17, 2012) (three corporate officers could be served through corporate registered agent or corporate counsel); *In re LDK Solar Securities Litigation*, 2008 WL 2415186 (N.D. Cal. June 12, 2008) (several corporate officers and directors could be served through corporation's U.S. subsidiary). In Commission administrative proceedings, service of foreign respondents has been permitted through attorneys, *see Alchemy Ventures*, Admin. Proc. Rulings Rel. No. 702; by publication, *see In the Matter of Brokat Technologies Aktiengesellschaft*, Exchange Act Rel. No. 63715, 2011 WL 121450, at n. 1 (Jan. 14, 2011); *In the Matter of Grant Ivan Grieve a/k/a Gad Grieve*, Admin. Proc. File No. 3-13799, Advisers Act Rel. No. 3061, 2010 WL 2992475, at n. 1 (July 29, 2010); and by e-mail, *see In the Matter of Gregory D. Tindall*, Admin. Proc. File No. 3-14894, Admin. Proc. Rulings Rel. No. 708 (June 20, 2012). All of these methods are consistent with due process. *See Rio Properties, Inc. v. Rio International Interlink*, 284 F. 3d 1007, 1016 (9th Cir. 2002) (citing cases permitting service through alternative means, including by publication, through regular mail, through e-mail, on defendant's attorney, and by international telex).

on the asserted ground that they were "prohibited by the law of the foreign country." This argument fails because Rule 141(a)(2)(iv) does not make service in the U.S. subject to the dictates of foreign law. And even if the Rule could be construed in this manner, Respondents fail to show that China law prohibited the staff from effecting service by mailing the OIPs to the U.S. affiliates.

1. Rule 141(a)(2)(iv)'s Limitation On Service That Is "Prohibited By The Law Of The Foreign Country" Does Not Apply To Service Within the U.S.

Rule 141(a)(2)(iv) excepts from authorized service "upon persons in a foreign country" methods that are "prohibited by the law of the foreign country." This does not mean, however, that service arranged by Commission staff that occurs *solely within the U.S.* is subject to scrutiny under foreign law. The phrase "prohibited by the law of the foreign country" presupposes that the actual proscribed activity would occur *in that foreign country*. This reading is supported by the cross-reference to sub-section (a)(2)'s other methods for service, which include "leaving a copy at the individual's dwelling house or usual place of abode." Service upon a person in a foreign country at the person's house obviously would entail service within the foreign country; such a method of service theoretically could be "prohibited by the law of the foreign country" within the meaning of Rule 141(a)(2)(iv). But the Rule should not be construed to impose foreign-law constraints on service in the U.S.

A rule that limits Commission staff's actions in the U.S. pursuant to foreign law would have no valid policy justification. Under comity principles, a court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (internal quotations and citations omitted). Against

the backdrop of this principle, the Commission understandably could issue a rule that declines to recognize service where the underlying steps are prohibited by the foreign country in which they occurred. In that situation, the service-related activity could represent an unreasonable interference with the other country's sovereignty. *Compare* Fed. R. Civ. P. 4(f)(2)(C) (permitting methods of service inside a foreign country in certain circumstances "[u]nless prohibited by the foreign country's law"). But comity principles counsel *against* imposing foreign-law restrictions on service-related activity in the U.S. – particularly by U.S. government representatives – as that would unreasonably undermine *U.S.* sovereignty. *Cf. The Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 79-80 (3d Cir. 1994) (foreign government's law-enforcement activity in own territory could not be enjoined). It would be passing strange to construe a U.S. agency's rule as voluntarily ceding to a foreign government the requirements for authorized conduct by U.S. officials within the U.S.[8]

The Commission's Omnibus OIP appropriately recognizes that Rule 141(a)(2)(iv) did *not* impose a foreign-law limitation on the Division's efforts to serve Respondents through their U.S. affiliates. The OIP directed the Division to serve "Respondents through the respective domestic registered public accounting firms or other United States agents that Respondents have designated." The OIP also provided that, alternatively, the Division could use "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." (emphasis added). Thus, as the OIP makes clear, although the foreign-law restriction potentially

[8] Other principles of statutory construction similarly weigh against a construction of Rule 141 under which the Commission would be deemed to have surrendered the sovereign prerogatives of the United States within its own territory. *See FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (waivers of sovereign immunity must be strictly construed "so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires").

could apply to "other," unspecified methods of service (such as those that might occur within China), it does not and cannot apply to delivery of the OIP to the U.S. affiliates in the U.S.; the Commission expressly authorized the latter regardless of foreign law. This application by the Commission of its own service rules should be accorded deference.

2. China Law Did Not Prohibit Mailing The OIPs To The U.S. Affiliates

Assuming *arguendo* Rule 141(a)(2)(iv)'s foreign-law limitation is capable of being applied to the Division's U.S.-based conduct, Respondents fail to demonstrate that any provision of China law prohibited service of the OIPs through their U.S. affiliates. Respondents have the burden of establishing that the Division's method of service violates foreign law. *In the Matter of Alchemy Ventures, Inc.,* Admin. Proc. Rulings Rel. No. 702, at p. 5. Citing Articles 276 and 277 of China's Civil Procedure Law, Respondents argue that "the SEC has attempted to circumvent the China Law of Civil Procedure and the Hague Service Convention by serving the U.S. member firms in the United States." DTTC Br. at 10-11. However, neither of the cited Articles supports Respondents' position, and their expert's contention that the Articles address U.S.-based conduct is without merit. *See* Declaration of Donald Clarke ("Clarke Decl.") ¶¶ 9-10, 22-23 (addressing contentions of Respondents' expert) **(Attachment 1 hereto)**.

Article 276 addresses requests for assistance between China's courts and foreign courts and is wholly unrelated to the question of serving a Chinese national through U.S. affiliates in the U.S., in a proceeding before a U.S. administrative agency. *See id.* ¶ 22. Article 277 is also irrelevant. Although the last paragraph relates to the service of documents, it addresses only documents that are served *within the territory of China. Id.* ¶ 23 & n.5. Because no documents in these proceedings were served within the territory of China, Article 277 is inapplicable. Clarke Decl. ¶ 23.

Furthermore, Respondents cite no China law provision that purports to prohibit acts of mailing that are initiated and completed in the U.S. That China has objected to service by mail under the Hague Convention (DTTC Br. at 11 n.7; Feinerman Decl. ¶18) is beside the point. The Division did not use Hague Convention procedures, nor was it required to do so. Article I of the Hague Convention states that it shall apply in all cases where a party "transmit[s] a judicial or extrajudicial document for service abroad." Hague Convention, Art. I. Here, no document was transmitted for service abroad, by mail or otherwise; thus, the Hague Convention, and China's objections under the Hague to the mailing of documents to its territory, are inapplicable. Clarke Decl. ¶¶ 15-16; *see also Vanleeuwen v. Keyuan Petrochemicals*, 2012 WL 5992134, at *3 (C.D. Cal. Nov. 30, 2012) (stating, "[t]he Hague Convention does not apply to service effected within the United States," citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988)).

3. Respondents' Contentions About China Law Cannot Be Squared With Numerous Court Decisions And Their Own Conduct Approving Alternate, Non-Hague Service

Furthermore, Respondents' contentions about China law cannot be reconciled with various court decisions and the practices of Respondents themselves, and must be rejected for that reason also. A number of district courts have approved of requests under Fed. R. Civ. P. 4(f)(3) to serve Chinese nationals located in China through entities located in the U.S., without regard to China law, where Hague service had not been attempted. *See supra* Note 7. Yet under Respondents' view, the courts' orders in these cases approved conduct that would violate China law. Respondents' position also means that, by designating their respective U.S. affiliates to receive service of an action to enforce a Section 106 demand, under Section 106(d), Respondents agreed to a violation of Article 277 in those instances where the Board or Commission determine to effect such service. And if, as Respondents apparently posit, in any and all circumstances

"service on a Chinese national must fully comply with the Hague Service Convention and the laws China enacted to implement that Convention" (Feinerman Decl. ¶21), it is difficult to understand how even a Chinese individual (or a China company represented by an individual) could be personally served when traveling in the U.S. Yet the validity of such personal service in the U.S. is widely accepted. *See Burnham v. Superior Court of California*, 495 U.S. 604, 619 (1990) (due process was satisfied to confer jurisdiction on a party personally served within the forum); *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1274-76, 1297 n. 25 (N.D. Cal. 2004) (service of Chinese officials during "their transitory physical presence in the United States" was proper to confer personal jurisdiction on them). For these and the other reasons set forth above and in Professor Clarke's declaration, Respondents fail to show that service here violated China law.

4. Service Of The OIPs Through The Hague Would Have Been Impracticable

The Division's service of Respondents through their affiliates was justified not only under the Omnibus OIP and the Rules of Practice, but also as a matter of practicality. Prior experience of Commission staff has shown that service of defendants or respondents in China through the Hague Service Convention carries a high risk of massive delays or total futility. Since June 2011, pursuant to the Hague Service Convention, Commission staff has requested that China's Central Authority complete 35 separate acts of service on defendants or respondents in China. *See* Declaration of Kurt Gresenz ("Gresenz Decl.") ¶ 4 **(Attachment 2 hereto)**. Of this number, the Authority has successfully completed service only twice (involving two separate documents being served at the same time on the same individual). *Id.* The Authority attempted service in four other instances, from between five to 13 months after the Commission made its requests, but these efforts were unsuccessful. *Id.* The Commission does not have information as to its remaining 29 service requests, all of which have been pending for periods of four months

or longer. *Id*; *see also LDK Solar Secs. Lit.*, No. CV 07-05812, 2008 WL 2415186, at *1 (N.D. Cal. June 12, 2008) (noting plaintiffs' concerns that service in China through the Hague Convention is "too time consuming, costly, and potentially fruitless"); *In the Matter of China Technology Global Corp.*, Admin. Proc. File No. 3-13901, Exchange Act Rel. No. 62305, 2010 WL 2468096 (June 17, 2010) ("Accomplishing service of the OIP in China would likely take months to accomplish . . . .").[9]

II. Section 106 Applies To All Respondents With Respect To All Of Their Issuer-Clients Referenced In The OIP

Four Respondents contend that Section 106(b) did not obligate them to produce documents relating to certain clients, because the firms did not *complete* the audits reports to which the documents relate.[10] In each such case, however, the firm was hired to conduct the audit, and no Respondent disputes that, in fact, it performed audit work before resigning or being terminated. Respondents' argument that they need not produce the requested documents in these circumstances fails. Section 106(b)'s production obligation plainly applies to *all* foreign firms that perform audit or interim review work for a U.S. issuer; this is true regardless of whether a firm also "prepares or furnishes" an audit report under Section 106(a). And, assuming *arguendo* Section 106(b) does not apply unless Section 106(a) is first satisfied – a premise the Division

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[9] Respondents' contention that the Commission's "Office of International Affairs attempted service on China company through procedures established in Hague Service Convention" in the *Carrier1* case is incorrect. DTTC Br. at 11. The respondent for which Hague procedures were attempted in that case was Carrier1 International S.A., a Luxembourg corporation. *See In the Matter of Carrier1 International S.A.,* Admin Proc. File No. 3-14257, Exchange Act Rel. No. 63911, 2011 WL 523396 (Feb. 15, 2011). The China respondent in that proceeding was served through personal service and express mail to its registered agent.

[10] Specifically, Respondents PwC Shanghai and DTTC contend that the Omnibus OIP (File No. 3-15116) should be dismissed entirely as to those firms, and EYHM and KPMG Huazhen contend that the Omnibus OIP should be partially dismissed as to those firms, on the asserted ground that Section 106(b)'s production requirement did not apply to their audit work for Clients B, E, G, H and I.

here disputes – all Respondents here are "subject to this Act" under Section 106(a) by virtue of work they have completed for U.S. issuers and their status as registered firms; thus, they were required to produce the requested documents for these issuer-clients.

A. Section 106(b) Applies On Its Face To Respondents Irrespective Of Whether They Meet Section 106(a)'s Criteria

Section 106 is captioned "Foreign public accounting firms," and provides in part:

> **(a) Applicability to certain foreign firms**
>
> > **(1) In general**
> >
> > Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, broker, or dealer, 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, except that registration pursuant to section 7212 of this title shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.
> >
> > **(2) Board authority**
> >
> > The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, brokers, or dealers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm (or firms) for purposes of registration under, and oversight by the Board in accordance with, this subchapter.
>
> **(b) Production of documents**
>
> > **(1) Production by foreign firms**
> >
> > If a foreign public accounting firm [1] performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, [2] issues an audit report, [3] performs audit work, ***or*** [4] conducts interim reviews, the foreign public accounting firm shall—

> (A) produce the audit work papers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board . . . .

15 U.S.C. § 7216 (bracketed numbering and boldface italics added) **(Attachment 3 hereto)**. As the text demonstrates, Section 106(b)'s production requirement applies to *any* foreign firm that meets one of the four triggering conditions specified by that provision. Here, each Respondent at a minimum "perform[ed] audit work" for each of its respective issuer-clients. Thus, Section 106(b)'s production obligations apply to all Respondents for each such client.

Respondents contend that Section 106(b)'s requirement does not apply unless the requested documents relate to an audit report that the firm first "prepares or furnishes" under Section 106(a). That argument, however, ignores the plain meaning and legislative history of Section 106(b). *First*, Respondents' proposed construction fails to give effect to all of the conditions contained in Section 106(b) that can trigger the provision's production obligation. Section 106(b) includes the phrase "issues an audit report" in a disjunctive list with three other triggering conditions (audit work; interim reviews; and performance of material services that a registered firm relies on in conducting an audit or interim review). Thus, Section 106(b) plainly contemplates that its production requirement may be triggered *in the absence* of a report, *e.g.*, where a firm only "performs audit work" or "conducts interim reviews." By arguing that the production obligation applies *only* where a firm has prepared or furnished an audit report, Respondents improperly read the other three triggering conditions out of the statute. *See Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004); *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 113 (D.C. Cir. 1987) ("To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is . . . an entirely unacceptable method of construing statutes." (internal citations omitted)).

Second, Respondents ignore Congress's deliberate decision in 2010 to amend Section 106(b) to provide the additional triggering conditions. When first enacted in 2002, Section 106(b) required production only where a foreign firm:

> *issues an opinion* or otherwise performs material services upon which a registered public accounting firm relies *in issuing all or part of any audit report or any opinion contained within an audit report.*

Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub. L. No. 107-204, § 106(b) (emphasis added) **(Attachment 4 hereto)**. This language arguably limited Section 106(b) to situations in which an audit report had been issued. The Dodd-Frank amendments, however – reflected in the current provision – expressly *expanded* Section 106(b)'s production requirement to include documents generated in connection with "audit work," "interim reviews," and "perform[ance] of material services upon which a registered firm relies in the conduct of an audit or interim review." Indeed, the relevant portion of the amendment is captioned "Expansion of Audit Information to Be Produced and Exchanged." Dodd-Frank, § 929J **(Attachment 5 hereto)**.

Although Respondents concede that Congress expanded the scope of Section 106(b) in Dodd-Frank (PwC Shanghai Br. at 12), they provide no explanation as to how that amendment could have any meaning under their construction of the statute. If a firm must prepare or furnish an audit report for Section 106(b) even to apply, Congress had no reason to specify triggering mechanisms beyond what the original version of the provision contained. Respondents' construction therefore also violates the well-established canon that courts considering amended statutory language should account for the nature of the amendment in interpreting that language. *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003) ("When Congress acts to amend a statute, we

presume it intends its amendment to have real and substantial effect.") (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)).[11]

Third, Respondents' construction also fails to give effect to the statute's distinction between all public accounting firms and those that are *registered* with the Board. Section 106(b)(1) itself makes this distinction. It imposes a specific production requirement on the broad universe of foreign firms that meet one of the provision's triggering conditions; it does *not* limit the requirement only to registered firms. *Contrast* 15 U.S.C. § 7215(c)(4) (availability of sanctions against registered public accounting firms); 15 U.S.C. § 7216(b)(2) (production obligations of registered public accounting firms). But if, as Respondents claim, the production obligation applies only to foreign firms that prepare or furnish audit reports, then this distinction would be unnecessary, because under Section 106(a)(1), any foreign firm that prepares or furnishes reports must register with the Board, and would therefore fall within the "registered firm" category. Just as Respondents attempt to read the "audit work," "interim review," and "material services" triggers out of Section 106(b), they also ignore the significance of the modifier "registered" and, more specifically, Congress's decision *not* to apply it here. Section 106(b) applies to *all* foreign firms that engage in the conduct it specifies, not only to registered ones.

Although Respondents attempt to justify their interpretation by pointing to the caption of Section 106(a) ("Applicability to certain foreign firms") and to the placement of Section 106(a) before other sub-sections, these arguments do not overcome the Act's language and structure.

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[11] Even assuming Section 106(a) had the gatekeeping function asserted by Respondents when that provision was enacted in 2002 – a proposition that the language of the prior Section 106 does not support either – such a function no longer can exist in light of Dodd-Frank. *See Murphy v. IRS*, 493 F.3d 170, 179 (D.C. Cir. 2007) (holding that an unambiguous amendment to one section of the tax code implicitly amended another, related, section because otherwise the amendment "would have no effect whatsoever").

The "applicability" caption relates not to specific production requirements of Section 106(b), as Respondents erroneously contend, but to the circumstances and manner in which foreign public accounting firms are "subject to this Act" as registered entities. The Act earlier provides that public accounting firms must register with the Board, and thus subject themselves to the Act, if they "prepare or issue, or [] participate in the preparation or issuance of, any audit report." 15 U.S.C. § 7212(a). Section 106(a) addresses the particular applicability of the Act to foreign firms. In particular, that provision addresses limitations on jurisdiction in U.S. courts, and authorizes the Board to identify *additional* foreign firms that are required to register. Nothing in Section 106(a) suggests that it provides a "threshold" test for applying the other subsections of Section 106.

Section 106's other subsections similarly demonstrate the fallacy of Respondents' position. Respondents' claim that Section 106 linearly progresses from the "general" to the "specific" (PwC Shanghai Br. at 10) is belied by Section 106(c) ("Exemption authority") and Section 106(g) ("Definition"), which are indisputably every bit as "general" as Section 106(a). Furthermore, Section 106(d)(2) requires any foreign public accounting firm that "performs audit work" to designate an agent for service of requests under Section 106(b)(1). This provision thus makes clear that foreign firms, such as Respondents, that "perform audit work" must facilitate potential requests for documents even where they did not prepare or furnish reports based on that audit work. Such a requirement would make no sense if the Commission could not in fact request those documents in the absence of a report.

Finally, construing Section 106(b) as a standalone requirement for foreign firms is not overbroad or "untethered," as Respondents argue. The provision is necessarily confined to the firms' work for *U.S. issuers*. Respondents contend that, under the Division's interpretation, a

foreign firm could be required to produce documents "even where the firm is not registered with the Board, the audit client has no connection to the United States, and the audit did not take place under U.S. GAAS." PwC Shanghai Br. at 11. But Section 106(b) applies only to documents related to U.S. issuers by virtue of the term "audit," which the statute defines as "an examination of the financial statements of any issuer by an independent accounting firm in accordance with the rules of the Board or the Commission." 15 U.S.C. § 7201(a)(2). An "issuer" must (1) have securities registered under Section 12 of the Exchange Act; (2) be required to file reports under Section 15(d) of the Exchange Act; or (3) have filed, and not withdrawn, a registration statement under the Securities Act that is not yet effective. *Id.* § 7201(a)(7). In short, "audit work" under Section 106(b) is limited to examinations of *U.S. issuers* that take place in accordance with the Board and the Commission's rules. Under the Division's reading, then, Section 106(b) could not require a foreign firm to produce documents for a non-U.S. issuer, because the firm would not have conducted an "audit" of such an issuer under the statute.[12]

B. Even If Section 106(a) Serves A Gate-Keeping Function, Respondents Satisfy Its Criteria

Even if Section 106(b) is construed not to impose a stand-alone production obligation on foreign firms that meet one of its triggering conditions, that does not change the result here. To the extent Section 106(a) is a "gatekeeper" for the rest of Section 106, there can be no question that all Respondents have rendered themselves "subject to this Act" under Section 106(a) and were therefore required to produce documents for all of their issuer-clients under Section 106(b).

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[12] While the term "interim review" is not defined in Sarbanes-Oxley, it is clear from the context that the provision relates to an interim review of an issuer, since the Commission can only request workpapers from foreign firms relating to audits of U.S. issuers. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (describing "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (internal citation omitted).

All Respondents are "subject to this Act" under Section 106(a) in at least one of two ways. They have either (1) prepared or furnished audit reports for U.S. issuers, or (2) played such a substantial role in the preparation and furnishing of such reports that the Board has determined under Section 106(a)(2) that the firm "should be treated as a public accounting firm . . . for purposes of registration under, and oversight by the Board." 15 U.S.C. § 7216(a)(2);[13] *see* PwC Shanghai Br. at 3; EYHM Br. at 3; BDO Br. at 4; KPMG Answer at 2; DTTC Omnibus Answer at 5. Indeed, four Respondents prepared or furnished or played a substantial role in audit reports for clients related to Section 106 demands that are at issue in this proceeding.[14] All Respondents indisputably have been registered with the Board during the relevant time period.

Although Respondents (except BDO China) argue that they are only "subject to this Act" under Section 106(a) with respect to the particular *audits* for which they complete *reports*, again, the language and structure of Sarbanes-Oxley wholly undermine this argument. Section 106(a)(1) by its terms applies to *firms*, and does not limit Sarbanes-Oxley's applicability to specific client engagements: "*Any foreign public accounting firm* that prepares or furnishes an audit report with respect to *any* issuer . . . shall be subject to this Act" under 106(a)(1). (Emphases added.) Section 106(a)(2) is similar in this regard: "The Board may . . . determine that *a foreign public accounting firm (or a class of such firms)* . . . should be treated as *a public accounting firm (or firms)* for purposes of registration under, and oversight by the Board . . . ."

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[13] As reflected in the statute's text, Congress authorized the Board to identify additional foreign firms that must register with it. *See* 15 U.S.C. § 7216(a)(2). The Board exercised this authority by issuing Board Rule 2100, which states that "each public accounting firm that (a) prepares or issues any audit report with respect to any issuer; or (b) plays a substantial role in the preparation or furnishing of an audit report with respect to any issuer must be registered with the Board." The Board also has issued Rule 1001(p)(ii), defining "Play a Substantial Role in the Preparation or Furnishing of an Audit Report."

[14] BDO China, EYHM, DTTC, and KPMG Huazhen prepared or furnished or played a substantial role in reports for BDO Client A, Client C, DTTC Client A, Client D, and Client F, respectively.

(Emphasis added.) Thus, Section 106(a) consistently identifies foreign *firms* that are generally subject to the Act's requirements and rules and regulations promulgated thereunder. Insofar as Respondents have in fact prepared or furnished audit reports or played a substantial role in reports for any U.S. issuers, they fall within the Act's scope.

That Respondents are "subject to this Act" on a firm-wide basis under Section 106(a) is further evidenced by their status as Board-registered firms. As registered firms, Respondents are subject to extensive oversight by the Board and the Commission, including Board inspections and investigations. *See* 15 U.S.C. §§ 7214(a)(1), 7215(b)(1). The Board may conduct its investigations, among other ways, by issuing Accounting Board Demands to registered firms for the production of audit work papers and any other relevant information. *Id.* § 7215(b)(2)(B); Board Rule 5103(a). The Commission, meanwhile, sets rules that apply to audit firms, exercises supervisory oversight of the Board, *see Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138 (2010), and may investigate and take appropriate disciplinary action against violations of Board rules.[15] For Respondents to contend in the face of this comprehensive oversight – which includes a requirement that they produce documents in connection with Board investigations – that they are somehow exempt from producing documents required under Section 106(b) to the *Commission* in a situation in which an audit report was not completed, is nonsensical. *See Intercollegiate Broadcast System, Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 771 (D.C. Cir. 2009) (noting

[15] Exchange Act Section 21(a)(1) authorizes the Commission to investigate, among other things, violations of Board rules. 15 U.S.C. § 78u(a)(1). Sarbanes-Oxley Section 3(b)(1) provides, "A violation by any person of this Act, any rule or regulation of the Commission issued under this Act, *or any rule of the Board* shall be treated for all purposes in the same manner as a violation of the [Exchange Act] or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations." 15 U.S.C. § 7202(b)(1) (emphasis added). The Commission is thus authorized under Rule 102(e) to seek remedial action against audit firms, whether foreign or domestic, that violate Board rules. *See infra* Argument Part III.A.1.

"'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'" (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989))). [16]

Furthermore, recognition that Respondents' firm-wide activity renders them subject to the Act does not lead to unacceptable results. Respondents complain that, under the Commission's reading of 106(a), the Commission could seek production of a foreign firm's audit work papers relating to private foreign clients. (PwC Shanghai Br. at 9 n.4). But as explained above, *see supra* Argument Part II.A, Section 106(b) requires production only of documents "related to . . . audit work" for *U.S. issuers*. *See* Section 2(a)(2) ("The term 'audit' means an examination of the financial statements of any issuer . . . ."); Section 2(a)(7) (defining "issuer"). Requiring a foreign firm that performs audit work for U.S. issuers to provide its relevant documents to the Commission is hardly absurd.

C. Allowing Access To Foreign Firms' Workpapers Without A Completed Audit Report Is Supported By Sarbanes-Oxley's Policies

Audit workpapers are critical to the Commission's investigations of suspected issuer fraud. They also enable the Commission to police the conduct of the auditors who create them, and of prior auditors. The mission of protecting investors that is advanced by the securities laws, including Sarbanes-Oxley, weighs decisively in favor of interpreting Section 106(b) as applying

[16] The Act provides additional textual support for the conclusion that, once the Board exercises its authority under Section 106(a)(2) to determine that a firm "should be treated as a public accounting firm . . . for purposes of registration under, and oversight by the Board," the firm is "subject to this Act and the rules of the Board and the Commission under this Act," under Section 106(a)(1). For example, Section 105(b)(1) authorizes the Board to "conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm . . . that may violate any provision of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act." (Emphasis added). The scope of the Board's investigatory authority makes clear that registered public accounting firms are "subject to this Act" within the meaning of Section 106(a)(1).

to firms, like Respondents, that perform audit work without furnishing a report. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984) ("To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.").

Although Respondents observe that one "purpose of Section 106(b) . . . is to protect the ability of U.S. investors to rely on audit reports," PwC Shanghai Br. at 12, this and other statutory objectives do not disappear in the absence of a completed report. To the contrary, the policies underlying Section 106 fully support the Commission's access to audit workpapers in these circumstances.

First, access to current workpapers helps the Commission carry out its specific statutory oversight role regarding auditors. In particular, the workpapers allow the Commission to determine whether an auditor has complied with standards for the conduct of an audit under Section 10A of the Exchange Act. *See* 15 U.S.C. § 78j-1(a). These requirements apply to *all* audits, whether or not they result in reports. *Id.* The Commission could investigate, for example, whether an auditor that identifies material problems has taken the required steps to ensure that management remedies the problems, or, if necessary, that the problems are appropriately reported to the Commission. *Id.* § 78j-1(b).[17] An auditor's failure in this regard could lead to civil penalties. *Id.* § 78j-1(d). In assessing the auditor's compliance, the Commission would rely at least in part on the auditor's workpapers, which are likely to be the best (and possibly only) written evidence of whether, and how, auditors conducted the analyses and evaluations that are at the heart of any thorough audit. Stuart & Wright, 2002 COLUM. BUS. L. REV. at 751-53.

[17] EYHM filed such a report with the Commission regarding Client B.

Second, the Commission may need access to workpapers for an uncompleted audit to help determine the accuracy of reports that were completed for prior years. Audits necessarily look backwards, not just at the reporting year under audit, but also at prior reports. Where an auditor uncovers problems at an issuer, unless those problems are confined solely to the year that is the subject of the audit, the reliability of prior reports may be called into question. Thus an auditor's workpapers for a particular year may well be relevant to the reliability of previous audits and, indeed, may be essential to the Commission's complete assessment of the prior audits. That is because the new workpapers may show where the older workpapers are incomplete or otherwise faulty. For this reason, an auditor that has served a client for multiple years may have an incentive to shield faulty prior audits from review by withholding its current workpapers. Alternatively, a newly-engaged firm that withholds its workpapers may impair the Commission's ability to review the work of the predecessor audit firm.

Third, access to workpapers helps combat fraud generally. In particular, the Commission may need an auditor's workpapers to help investigate fraud by the auditor's issuer-client. *See* Stuart & Wright, 2002 COLUM. BUS. L. REV. at 755 ("Comprehensive SEC investigations require access to the foreign audit workpapers."). Moreover, fraud is not limited to issuer reporting periods for which reports are filed; indeed, the presence of fraud may preclude or delay the filing of a report. Sarbanes-Oxley, which was passed in the wake of massive corporate and accounting fraud, was intended as a broad investor-protection and anti-fraud measure. *See* S. Rep. 107-205, at 2 (July 3, 2002) (Sarbanes-Oxley passed in response to "accounting and investor protection issues raised by the financial revelations involving Enron and other public companies" including "the integrity of certified financial audits; appropriate accounting principles and auditing standards; [and] the effectiveness of the accounting regulatory oversight system"). To further

these goals, the Act placed great emphasis on the importance of auditors, their workpapers, and oversight by the Commission and Board. Although Respondents correctly observe that one of Sarbanes-Oxley's goals was to ensure the integrity of audit reports, they fail to acknowledge the broader context and goals of the Act.

For these and the other reasons discussed above, Respondents were required by Section 106(b) to provide their workpapers for all of the issuer-client engagements implicated in these proceedings.

III. The Commission Is Authorized To Bring These Proceedings Under Rule 102(e) To Remedy Respondents' Willful Violations Of Sarbanes-Oxley

Respondents contend that the Commission cannot seek administrative sanctions against them unless and until it obtains an order from a federal court requiring Respondents to produce documents in response to the Section 106 demands (hereinafter the "court-first" argument). But this argument is unsupported by Sarbanes-Oxley and its policies and contrary to the Commission's longstanding authority (now codified) to discipline accountants and their firms who voluntarily participate in U.S. markets, and, therefore, must be rejected.

The Commission is authorized to institute these proceedings under Rule 102(e)(1)(iii) to determine whether Respondents willfully violated the Sarbanes-Oxley and Exchange Acts and, if so, what remedial action should result. Rule 102(e) is not "an additional weapon in [the Commission's] enforcement arsenal," but a mechanism by which the Commission can "preserve the integrity of its own procedures" and "protect the integrity of its own processes." *Touche Ross & Co. v. SEC*, 609 F.2d 570, 579, 581 (2d Cir. 1979) (construing predecessor Rule 2(e)). An audit firm's compliance with Section 106 of Sarbanes-Oxley is central to the Commission's procedures and processes, because the Commission may use the required documents to investigate financial frauds and to oversee audit firms whose work is relied upon by U.S.

investors. *See supra* Argument Part II.C. These documents ultimately may be used in a disciplinary proceeding against an accountant or firm for improper professional conduct during an audit. *See* 17 C.F.R. § 201.102(e)(iv). By providing for a determination whether Respondents willfully violated Section 106 by willfully refusing to comply with the Commission's document demands, these proceedings enable the Commission to remedy the harms caused to its processes by Respondents.

Although Respondents try to analogize these proceedings to a subpoena-enforcement action overseen by a federal judge, this analogy fails. These are not proceedings to "enforce" any Section 106 demand, nor does the Commission seek the production of any documents. The Commission therefore was not required first to file a civil lawsuit, just as it has not been required to file such lawsuits before bringing numerous other administrative proceedings against accountants or their firms seeking sanctions for other types of transgressions. *See* X LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION, at 4933 n.67 (3d ed. 2005) (listing numerous proceedings). The questions for the Hearing Officer are: (1) did the Commission issue demands to Respondents under Section 106, and (2) did Respondents willfully refuse to comply with them? Neither the Constitution nor any statute, nor any principle of statutory construction, requires a federal court to answer these questions first.

The Commission's authority to initiate these proceedings against Respondents is analogous to its authority to initiate administrative proceedings against broker-dealers and investment advisors, among others, for failing to make documents available under the Exchange Act or the Investment Advisers Act of 1940. In all cases it is irrelevant whether the Commission could "enforce" its document demands in federal court, or even whether the court would have jurisdiction to hear such an enforcement action. Thus, in *In re Dominick & Dominick, Inc.*,

Admin. Proc. File No. 3-7502, 50 S.E.C. 71, 1991 WL 294209 (May 29, 1991), the Commission found that Dominick, a broker-dealer registered with the Commission but based in Switzerland, willfully violated Exchange Act Rule 17a-4(j) by refusing to provide its books and records to Commission staff as required by the Rule. In rejecting Dominick's claim that Swiss secrecy laws prevented its compliance, the Commission "emphasize[d] that the purpose this action is not to compel the production of documents from Switzerland. . . . The primary purpose of these proceedings is to impose remedial relief on the basis of Dominick's failure to satisfy this obligation." *Id.* at *6 n.16. Similarly here, the purpose is not to compel Respondents to produce audit workpapers for their respective issuers. Rather, the purpose of these proceedings is to protect the integrity of the Commission's processes by imposing remedial relief in response to Respondents' failure to satisfy their statutory obligations under Section 106. *See also In the Matter of Alan J. Ridge and Co., Ltd.*, No. 80-16, Comm. Fut. L. Rep. (CCH) ¶ 21,819 (March 22, 1989) (rejecting claim that British law prevented compliance with CFTC's disclosure requirements, noting administrative proceeding did "not seek to compel conduct by a foreign trader which would violate the laws of his home country," but rather sought "to impose sanctions for a past violation of Commission regulations and its order").

The court-first argument is also refuted by case law confirming agencies' authority to impose sanctions, including debarment, on parties that refuse to comply with document demands, irrespective of whether a federal judge first confirmed the "validity" of the demand. *Uniroyal, Inc. v. F. Ray Marshall*, 482 F. Supp. 364 (D.D.C. 1979) upheld an agency's debarment of a government contractor, after the contractor declined to produce documents relating to employment discrimination claims against it. The court rejected the argument that the agency lacked debarment authority based on the contractor's failure to produce documents. *See*

id. at 371. The court also rejected the notion that the agency's only option was "to begin the cumbersome and time-consuming process of seeking enforcement of its discovery requests in federal district court." *Id.* at 373. Requiring such a procedure would have "substantially undermine[d] the purposes and effectiveness" of the regulatory scheme, and "it should therefore not be adopted unless clearly required." *Id.* at 373; *see also International Union v. NRLB*, 459 F.2d 1329, 1334 n.26, 1339 (D.C. Cir. 1972) (agency that could petition court for subpoena enforcement was separately obligated to sanction non-producing party to "permit[] vindication of the tribunal's authority in situations where vindication might, as a practical matter, be impossible otherwise"). Similarly here, Section 106 contains no clear requirement that the Commission first proceed in federal court, and imposing such a requirement would substantially undermine the Commission's ability to protect its processes. Accordingly, Respondents' position must be rejected.

The Division respectfully refers the Hearing Officer to the Division's Opposition To DTTC's Motion To Dismiss The OIP (File No. 3-14872) filed July 5, 2012 ("July 2012 Opposition"), in which the Division provides further details on the purposes and consequences of these proceedings, and which the Division incorporates here by reference. Although Respondents here still press the court-first argument, as before, it is unavailing.

A. Sarbanes-Oxley Does Not Require Judicial Enforcement Of Section 106 Demands Prior To The Commission's Institution Of Disciplinary Proceedings

1. The Statute's Language And Structure Plainly Authorized The OIPs Without A Prior Judicial Enforcement Action

The language and structure of Rule 102(e) and Section 106 fully support the Commission's authority to institute this proceeding, without first bringing a judicial enforcement action. Section 106(b)(1) provides that a foreign firm meeting one of it triggering conditions

"*shall* produce" its audit work papers and related documents "to the Commission . . . upon request." 15 U.S.C. § 7216(b)(1) (emphasis added). Section 106(e) provides that "[a] willful refusal to comply" with such a request by the Commission "*shall* be deemed a violation of this Act." *Id.* § 7216(e) (emphasis added). These provisions clearly provide a basis for the Commission's authorizing a Hearing Officer to decide whether Respondents have "willfully violated" the securities laws under Rule 102(e).

In support of its court-first argument, the only provisions that Respondents cite are (1) the statute's direction to *firms* that upon receiving a Section 106 demand they "shall . . . be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for such documents," *id.* § 7216(b)(2)(B), and (2) the statute's grant of discretion to the Commission that it "*may allow* a foreign public accounting firm . . . to meet production obligations under this section through alternate means, such as through foreign counterparts of the Commission," *Id.* § 7216(f) (emphasis added). The first provision merely confirms that the Commission has the *option* of seeking judicial enforcement of the demands. The second provision is even further afield; it provides the Commission with flexibility to relieve firms from the mandatory production requirement of Section 106(b)(1)(A), by making other arrangements with the firm. Neither provision in any respect speaks to, let alone casts doubt on, the Commission's authority to bring these proceedings under Rule 102(e).

Contrary to Respondents' contentions, there is no evidence that Congress "modeled Section 106 upon the statutory provisions governing the Commission's investigative subpoena authority." (DTTC Br. at 13). Respondents contend that, under Section 106, an administrative proceeding is available only where an audit firm "willful[ly] refus[es] to comply" with a judicial *order* directing compliance. *See id.* But this contention is belied by the statute's express

language, which states that "[a] willful refusal to comply . . . with any ***request by the Commission*** . . . under this section, shall be deemed a violation of this Act." 15 U.S.C. § 7216(e) (emphasis added). Although Respondents quote statutes conferring subpoena authority on the Commission, these similarly undercut Respondents' position. *See* DTTC Br. at 14 (citing 15 U.S.C. §§ 77v, 78u, 80b-9(c), and 80a-41(c)). All of these provisions, quite unlike Section 106 or Rule 102(e), provide for possible punishment only in the event of disobedience with a "court order" (DTTC Br. at 13). None of them expressly defines a "violation" for purposes of Rule 102(e), as does Section 106(e) (defining conduct that constitutes "a violation of this Act").

Legislative history and context, meanwhile, further support the Commission's exercise of authority here. In Dodd-Frank, not only did Congress explicitly expand the triggering conditions for a foreign firm's production under Section 106, *see supra* Argument Section II.A; it also added subsection (e) to Section 106, defining a willful refusal to produce documents as a violation of the securities laws. Respondents suggest that Section 106 be construed in light of two pre-Sarbanes-Oxley cases in which courts declined to sanction foreign entities for failing to produce documents because of foreign-law constraints. (DTTC Br. at 14-16). But to whatever extent knowledge of these cases can be imputed to Congress, they do not help Respondents. The question here is whether Respondents committed specific statutory violations, thereby triggering the Commission's authority to seek remedial relief for the purposes of protecting its processes and, ultimately, advancing its regulatory mission. That is very different than the question of whether a federal court should use its general contempt powers to sanction a third-party subpoena recipient for disobedience. This is particularly true where, as in *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987), the third party otherwise has no connection to the underlying investigation or case. *See id.* at 498 ("[T]he bank, against whom the order is directed, is not

itself the focus of the criminal investigation in this case but is a third party that has not been accused of any wrongdoing.").[18] The court there questioned whether it should exercise its contempt power absent further direction from Congress. *See id.* at 498-99. Although the court ultimately decided that it should not do so based on the circumstances of the case, it had "no doubt that Congress could empower courts to issue contempt orders in any of these cases," and expressly did *not* "decide the general issue of whether a court may ever order action in violation of foreign laws." *Id.* at 498-99.

The Supreme Court's decision in *Societe Internationale Pour Participations v. Rogers*, 357 U.S. 197 (1958), also does not support Respondents' position. Although the Court in that case found that a party's complaint should not have been dismissed for failure to comply with a pretrial production order under the circumstances of the case, the Court did not foreclose other "handicap[s]" on the party, including the drawing of adverse inferences by the district court. *Id.* at 198, 212-13; *see also International Union*, 459 F.2d at 1339 (ordering agency to impose sanction of adverse inferences on non-producing party). In short, Respondents' cited authorities do not support the notion that Congress, in enacting Sarbanes-Oxley and Dodd-Frank, sought to constrain the Commission's authority to seek remedial relief from foreign audit firms under Rule 102(e) for failing to produce requested documents. To the contrary, they only reinforce that Congress sought to affirm and strengthen the Commission's authority in this regard.[19]

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[18] The Division makes no representation as to whether it suspects that any of the Respondents, or any persons associated with the Respondents, committed wrongful conduct with respect to their issuer-client engagements, apart from Respondents' failures regarding the Section 106 demands. However, the Section 106 demands seek documents that would facilitate the Commission's oversight of Respondents and could be used to investigate Respondents' conduct with respect to the underlying frauds or potential frauds. *See supra* Argument Part II.C.

[19] Furthermore, Respondents ignore multiple instances in which courts *have* ordered foreign entities to produce documents, or imposed sanctions for failure to produce, notwithstanding claims about foreign law restrictions. *See Richmark Corp. v. Timber Falling Consultants*, 959

2. A Section 106 Demand Is Appropriately Compared To Other Statutory Obligations To Produce Documents

As noted, a Section 106 demand is akin to the types of demands that the Commission may issue to other regulated entities under the securities laws. *See Dominick*, *supra* pp. 31-32. Respondents concede that these other demands do *not* require judicial affirmation of their "validity." DTTC Br. at 16 (conceding that other demands "create an unqualified 'statutory obligation'"). Although Respondents try to distinguish Section 106 demands from these other statutory obligations, the comparison between them is apt in all important respects. First, the governing statutes expressly stipulate that the recipient entities must furnish the documents. *Compare* 15 U.S.C. § 7216(b)(1) (recipient "shall" produce) with 15 U.S.C. § 78q(a) (specified entities "shall . . . furnish such copies . . . as the Commission, by rule, prescribes");15 U.S.C. § 80b-4 (same); 15 U.S.C. § 80a-30(b) ("All records required to be maintained and preserved . . . shall be subject" to examinations). Second, the required documents can be and are used by the Commission for a variety of purposes, including but not limited to investigations.[20] Third, audit

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F.2d 1468, 1477 (9th Cir. 1992) (affirming sanctions against Chinese corporation for refusing to comply with discovery order, notwithstanding fact that compliance would constitute violation of Chinese state secrecy laws); *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984) (affirming civil contempt finding and daily fine of $25,000 against foreign bank for failure to comply with grand jury subpoena); *In re Sealed Case*, 825 F.2d at 497-98 (recognizing decisions "order[ing] a person to produce documents in contravention of foreign law").

[20] The Enforcement Division's Manual, which provides guidance to Division staff but does not create any rights, substantive or procedural, enforceable at law by any party (*see* Section 1.1), states:

> The staff may request information from regulated entities, such as registered investment advisers and broker-dealers. Pursuant to Sections 17(a) and (b) of the Exchange Act and Section 204 of the Advisers Act and the rules thereunder, regulated entities *must* provide certain information to the staff even without a subpoena.
>
> Records from regulated entities – especially broker-dealers, transfer agents, and investment advisers – are often essential cornerstones of an

firms, like the other entities subject to the various statutory obligations regarding their documents, also are generally subject to heightened regulatory oversight. *See supra* Argument Section II.B. [21]

Contrary to Respondents' assertions, the Commission's construction of Section 106 does not unreasonably burden foreign firms compared to domestic firms. *See* DTTC Br. at 17. As an initial matter, Respondents' contention that the Commission could not seek sanctions against a domestic firm "for failing to produce documents without a federal court first passing on the validity of the document request" (DTTC Br. at 17), is flatly wrong. Section 106(b)(2) requires "*[a]ny* registered public accounting firm that relies, in whole or in part, on the work of a foreign public accounting firm in issuing an audit report, performing audit work, or conducting an interim review" to produce the audit work papers of the foreign public accounting firm upon request. 15 U.S.C. § 7216(b)(2). A domestic firm's "willful refusal to comply" with such a request would violate Sarbanes-Oxley. *Id.* § 7216(e). Thus, Section 106 subjects domestic and

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> investigation. Because regulated entities must produce certain records without a subpoena, the staff can often obtain documents, such as brokerage account statements or account opening documents, which might otherwise require a subpoena to obtain from an individual.

SEC's Enforcement Manual § 3.2.4, *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[21] The requirements of Exchange Act Section 17(a) and (b) apply to "[e]very national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer municipal advisor, registered securities information processor, registered transfer agent, nationally recognized statistical rating organization, and registered clearing agency and the Municipal Securities Rulemaking Board." 15 U.S.C. § 78q(a), (b).

foreign firms alike to remedial measures with respect to their handling of a foreign firm's audit workpapers.[22]

More fatal still, Respondents wholly ignore the Commission's authority under Section 102(e) to seek remedial action against any registered firm, foreign or domestic, that fails to comply with an Accounting Board Demand issued by the PCAOB. Section 105(b)(2) of the Act authorizes the Board to issue rules that "require the production of audit work papers and any other document or information in the possession of a registered public accounting firm . . . *wherever domiciled*, that the Board considers relevant or material to the investigation." *Id.* § 7215(b)(2)(B) (emphasis added). The Board has issued rules that do exactly that, *see* Board Rule 5103(a),[23] and provide that the demanded documents "shall be" readily available for inspection or produced, *see* Board Rule 5103(b). In the event the recipient firm fails to comply, the Board can bring a disciplinary proceeding seeking suspension or revocation of the firm's registration. *See* 15 U.S.C. § 7215(b)(3); Board Rules 5110, 5300; *In the Matter of the Application of R.E. Bassie & Co.*, Admin. Proc. File No. 3-14130, 2012 WL 90269, at *12 (Jan. 10, 2012) (sustaining Board's revocation of registered firm's registration for failure to cooperate with

[22] For this same reason, Section 106 does not uniquely subject foreign firms to the theoretical possibility that the Commission might seek from them the production of attorney-client communications or other sensitive documents under the provision's literal language (DTTC Br. at 17 n.9). Under Section 106, the Commission could seek the same *scope* of materials from either a domestic or foreign firm. *See* Section 106(b)(2)(A) (requiring "[a]ny registered public accounting firm" to "produce the audit work papers of the foreign public accounting firm and *all other documents*" (emphasis added)). In any event, Respondents contention that the Commission could seek sanctions based on the non-production of documents protected by the attorney-client privilege is overblown. If it were ever the case that the Commission instituted an administrative proceeding based specifically on an audit firm's failure to produce privileged documents, the Commission could consider the alleged nature of the privilege, or other sensitivity of the information, in assessing what remedial action, if any, should be imposed in those circumstances.

[23] Board Rule 5103(a) provides that the Board may issue a "demand for the production of audit work papers or any other document or information in the possession of a registered public accounting firm . . . wherever domiciled, that the Board or its staff considers relevant or material to [a Board] investigation."

accounting board demand). Separately, the *Commission* can bring a proceeding seeking remedial action against the firm under Rule 102(e) in the same manner as for a violation of the Exchange Act, as described in Sarbanes-Oxley Section 3(b). *See* 15 U.S.C. § 7202(b) ("[A] violation of any rule of the Board shall be treated for all purposes in the same manner as a violation of the [Exchange Act]."). For this reason also, domestic firms as well as foreign firms are expressly subject to remedial measures for failure to produce required documents, without prior judicial approval of the "validity" of the underlying demand.

Finally, to whatever extent foreign firms do have different potential liabilities compared to domestic firms regarding their documents, any such difference is mandated by the statute and not unreasonable. Foreign firms such as Respondents that elect to engage in U.S. capital markets pose obviously higher risks to Commission processes and, ultimately, to the transparency of U.S. markets and investors. That higher risk derives from the possibility that the Commission may face additional obstacles in seeking documents from foreign firms based in certain countries – such as claims that production is prohibited by foreign law. Thus Section 106 provides the Commission with requisite, targeted authority to ensure fair markets for investors regardless of the nationality of the issuer's auditor. Moreover, Section 106 is analogous to other federal statutes that subject foreign entities to specific liabilities for their nonproduction of documents in response to agency demands. *See* 26 U.S.C. § 7456 (subjecting a foreign entity that refuses to comply with a U.S. Tax Court demand for documents "wherever situated" to an order striking pleadings, dismissing the proceeding, or rendering a default judgment against the entity).

3. The Hearing Officer Can Decide Whether Respondents Willfully Refused To Comply With The Section 106 Demands

Respondents argue, "[u]ntil a court has enforced the Section 106 requests, Respondents have not failed to comply – much less 'willfully refused to comply' – with the requests." (DTTC Br. at 18). Respondents confuse two basic concepts: (1) whether a request under Section 106 exists, and (2) whether such a request should be enforced. Respondents ignore the first question, but that is the one for the Hearing Officer to decide in this proceeding. Moreover, this determination can be made *without* deciding the enforcement question. If a request to a foreign firm meets Section 106's criteria, it is valid *per se*, because Congress already has decided by whom and to whom the demand may be issued, the types of documents the demand may seek, and – most important – that the recipient "shall" produce or make available the requested documents. Accordingly, Congress already has determined the "respective rights and obligations" of the parties and there is nothing left to contest in that regard. *See* Restatement (Third) of Foreign Relations § 442 (Comment b) at 350-51 (1986) ("Whether an agency's authority to require disclosure includes authority to demand production of documents or information located abroad *is a matter of interpretation of the governing statutes . . . by the agency itself*" (emphasis added)).

Indeed, the statutorily-authorized nature of the Commission staff's demand for documents was the basis for the Commission's decision, in *Dominick*, that the respondent had willfully violated the Exchange Act by failing promptly to furnish the documents as required under the statute and implementing regulations. *See Dominick*, 1991 WL 294209, at *3 ("By letter dated February 6, 1990, the Commission's Division of Enforcement made a formal demand pursuant to Section 17a-4(j) under the Exchange Act requiring Dominick to furnish promptly certain books and records relating to the operations of Dominick's Basel branch office . . . .").

The respondents' knowing failure to produce the documents constituted a willful violation *irrespective* of whether a court had issued an order compelling production of the documents. *See id.* at *6 n.16 ("[T]he purpose of this action is not to compel the production of documents from Switzerland."). So too here. The Hearing Officer does not need a judicial determination of the validity of the Commission's Section 106 requests before determining whether Respondents willfully refused to comply with those requests.

B. The OIPs Raise No Constitutional Issues

The Commission's institution of this proceeding without first enforcing the requests does not run afoul of separation of powers or due process principles. At bottom, Respondents' constitutional argument is merely a challenge to the Commission's inherent authority to conduct proceedings that could lead to their sanction, even while Sarbanes-Oxley expressly defines the violation upon which such remedial action would be based. The courts already have resoundingly rejected Respondents' position. In *Touche Ross*, the court of appeals upheld the Commission's authority under the predecessor rule to Rule 102(e) to discipline professionals, including accountants, who appear before it. 609 F.3d at 580-81; *see also Checkosky v. SEC*, 23 F.3d 452, 455 (D.C. Cir. 1994) (agreeing with *Touche Ross* that Rule 2(e) was validly promulgated). Congress then codified this authority as part of the Sarbanes-Oxley Act. 15 U.S.C. § 78d-3. Under this authority, the Commission has sought remedial relief against numerous accountants based on a wide range of activity alleged to be unethical or improper professional conduct or otherwise a willful violation of the securities laws. *See* LOSS ET AL., *supra* p. 31. Respondents proffer no valid reason why the Commission may direct findings as to whether an accountant or firm helped manipulate a company's reported earnings, *see In the Matter of Robert W. Armstrong, III*, Admin Proc. File No. 3-9793, Exchange Act Rel. 51920,

2005 WL 1498425, at *11-12 (June 24, 2005), or engaged in reasonable or unreasonable conduct in supervising an audit, *see In the Matter of Gregory M. Dearlove, CPA*, Admin Proc. File No. 3-120624, Initial Decision Rel. No. 315, 2006 WL 2080012, at *1, 57 (July 27, 2006), but allegedly may not, consistent with constitutional principles, direct findings as to whether a firm willfully refused to comply with a statutory obligation to produce documents. *See International Union*, 459 F.2d 1329 at 1338-39; *Uniroyal*, 482 F. Supp. at 372-76 (upholding contractor's debarment for failure to produce documents).

For the same reasons, Respondents' contention that the Commission "is necessarily an interested party concerning the validity of its requests," raises no genuine issue. The Commission is also an "interested party" when it seeks remedial action against professionals based on other conduct. The combination of investigative and adjudicative functions in a single agency is a basic feature of the administrative state and by itself does not violate separation of powers or due process. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975).[24]

C. This Proceeding Is Not Arbitrary Or Capricious

Nor were the Commission's decisions to institute these proceedings arbitrary or capricious. Citing the Division's internal guidance on subpoena enforcement, Respondents contend that the Commission failed to provide a reasoned explanation for not seeking judicial enforcement of the Section 106 demands (DTTC Br. at 19-20). No such explanation was required, because Section 106 demands are not "effectively equivalent in every relevant respect" to subpoenas (*Id.* at 20). A Section 106 demand seeks a statutorily-identified category of

[24] Respondents again purport to rely on the Department of Justice's 2002 report regarding the use of subpoenas by administrative agencies. *See* DTTC Br. At 19. As the Division explained in its July 2012 Opposition, the Justice Report recognized that the requirement of agencies to go to court to enforce subpoenas does *not* limit agencies' ability to bring disciplinary or other collateral actions to encourage compliance with subpoenas. *See* July 2012 Opposition at 16-17.

documents from a statutorily-identified recipient, and provides that the recipient "shall" produce the specified documents. Unlike the subpoena statutes, Section 106 expressly provides that a "willful refusal to comply" constitutes a violation of the securities laws. A Section 106 demand is also a new tool, having only been created (in its current form) in 2010. Thus, by seeking remedial action for Respondents' willful violations of Section 106 rather than enforcement of the requests, the Commission did not depart from any prior agency practice. Indeed, Respondents cannot point to a single prior instance of the SEC's taking a different form of action in response to an accounting firm's willful violation of Section 106. And even if there were such a prior practice from which the Commission departed here, principles of administrative law would not have required the Commission to explain its decision to exercise its discretionary disciplinary authority in this way. *See generally Heckler v. Chaney*, 470 U.S. 821 (1985) (finding that agency's decision whether or not to take enforcement action soundly within the agency's discretion and accordingly, presumptively unreviewable as arbitrary or capricious); *Sierra Club and Valley Watch, Inc. v. Jackson,* 648 F.3d 848, 855 (D.C. Cir. 2011) (enforcement committed to agency's discretion where agency is not required to pursue violators in every case nor required to choose one particular enforcement strategy over another and "no meaningful guidelines defin[e] the limits of the agency's discretion" (omitting citation)).

Although Respondents contend that the Commission established a "position" with respect to the availability of relief in administrative proceedings, by including a copy of Form 1662 with the Section 106 requests, this is incorrect. The Form is captioned, "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission *Subpoena*." (Howe Declaration dated June 20, 2012, Exh. 2, at 4) (emphasis added). The Form, on its face, does not apply to Section 106 demands. The Form

also does not address in any way the Commission's authority to bring an administrative proceeding to remedy a "willful refusal to comply" with a Section 106 demand. The Form provides only that the Commission *"may* seek a court order" in the event of noncompliance by a *subpoena* recipient, and that the recipient's failure to comply with such an order could subject it "to civil and/or criminal sanctions for contempt of court." (emphasis added). Because the Form does not address disciplinary measures that the *Commission* might impose based on a willful refusal to comply with a Section 106 demand, it does not speak to any relevant Commission practice one way or the other.

Nor can Respondents claim that, by including the Form 1662, the Commission caused Respondents to be unfairly surprised by the proceedings. Months before the Commission instituted these proceedings, Commission staff issued Wells notices to Respondents alerting them to the possibility of these proceedings and to the administrative sanctions that might result from them.[25]

[25] While Respondents contend that it is telling that the staff chose to provide them with a Form 1662 in lieu of a Form 1661, that is not true for the simple reason that Form 1661 is likewise inapplicable, on its face, to Section 106 demands. Form 1661 is a form to be provided to entities statutorily required to furnish records for examination by the SEC under Section 17(a) of the Securities Exchange Act of 1934, Section 204 of the Investment Advisers Act of 1940, and related statutes. Howe Decl. Exh. 3. It is not, as currently drafted, applicable to foreign public accounting firms required to produce documents in response to a Section 106 demand.

CONCLUSION

For the reasons set forth above, the Division of Enforcement respectfully submits that that Respondents' Motions for Summary Disposition as to Threshold Issues should be denied.

Dated: February 22, 2013

Respectfully submitted,

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COUNSEL FOR DIVISION OF ENFORCEMENT

ATTACHMENT 1
TO ENFORCEMENT DIVISION'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTIONS FOR SUMMARY DISPOSITION AS TO THRESHOLD ISSUES

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

In the Matter of	:
BDO CHINA DAHUA CPA CO., LTD.,	:
ERNST & YOUNG HUA MING LLP,	:
KPMG HUAZHEN (SPECIAL GENERAL PARTNERSHIP),	:
DELOITTE TOUCHE TOHMATSU CERTIFIED PUBLIC ACOUNTANTS LTD., and	:
PRICWATERHOUSECOOPERS ZHONG TIAN CPAs LIMITED	:

DECLARATION OF DONALD CLARKE

I, Donald Clarke, declare as follows:

1. I am a professor of law at the George Washington University Law School ("GWULS"). I have been retained by the U.S. Securities and Exchange Commission's Division of Enforcement ("Division") in the above-captioned proceeding. I submit this declaration in support of the Division's Consolidated Opposition to Respondents' Motions for Summary Disposition As To Certain Threshold Issues in the above-captioned proceeding .

I. Personal Background and Qualifications

2. I have been employed at GWULS since 2005. My academic specialization is the law of the People's Republic of China in general and the legal regime of Chinese economic reform in particular. I speak and read Chinese fluently.

3. From 1988 through 2004, I was on the faculty of the University of Washington School of Law ("UWLS"), and I have been a visiting professor at New York University Law School, University of California at Los Angeles School of Law, and Duke Law School. From 1995 to 1998, I was on a leave of absence from the UWLS and worked as an attorney at Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss"), a large United States law firm with a substantial China business practice. During that period, I visited China and Hong Kong approximately twice a year in the course of my work at the firm, a substantial amount of which was related to China. From 1998 through 2003, I regularly

worked with Paul, Weiss as a consultant on Chinese law matters. Since that time I have maintained an independent consulting practice.

4. I have published widely in the field of Chinese law; a list of publications is set forth in my curriculum vitae, attached hereto as Exhibit 1.

5. I graduated *cum laude* from Harvard Law School in 1987, where my studies focused on East Asian legal systems and I served as an editor of the *Harvard Law Review*. I earned a graduate degree (Master of Science with Honors) in the Government and Politics of China from the School of Oriental and African Studies at the University of London in 1983. I also studied Chinese history for two years at Beijing University and Nanjing University in China from 1977 to 1979. I earned my undergraduate degree from Princeton University in 1977.

6. I have served as adviser or consultant on Chinese law matters to a number of bodies, including the Asian Development Bank, the Agency for International Development, and the World Bank's Financial Sector Reform and Strengthening Initiative. I have testified on aspects of the Chinese legal system before the Congressional-Executive Commission on China and the United States-China Economic and Security Review Commission. I have been appointed to the Academic Advisory Group to the US-China Working Group of the United States Congress. I am admitted to practice in the state of New York (1988) and am a member of the Council on Foreign Relations.

7. A full copy of my curriculum vitae is attached hereto as Exhibit 1.

II. Factual Background and Assumptions

8. For the purposes of this opinion, I accept as true the following factual background and U.S. legal context, as explained to me by the Division and based on documents I received:

    a. On May 9, 2012, the U.S. Securities and Exchange Commission ("Commission") issued an Order Instituting Proceedings ("OIP") against a China-based accounting firm located in Shanghai, China ("Respondent" or "firm").

    b. On December 3, 2012, the Commission issued an OIP against five China-based accounting firms, including the firm subject to the earlier OIP ("Respondents" or "firms"). The firms are located in either Beijing or Shanghai, China. The OIP states, in part:

> 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 Division served the OIPs by causing them to be sent by U.S. certified mail to the U.S. affiliates of the Respondents that are located in the United States ("U.S. affiliates").

d. I also understand that prior to mailing the OIPs to the U.S. affiliates, the Division did not undertake to serve the Respondents using the channels established by the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (the "Hague Convention").

e. Commission Rule of Practice 141(a)(2)(iv) states:

> Upon persons in a foreign country. Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (a)(2) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

f. I have been asked to assume, solely for purposes of this Declaration, that the clause "provided that the method of service used is not prohibited by the law of the foreign country" in Rule 141(a)(2)(iv) was intended by the Commission to apply to all other methods of service, wherever performed, including even methods of service that occur solely in the United States. Put another way, I have been asked to assume that Rule 141(a)(2)(iv) does *not* authorize service in the United States that is reasonably calculated to give notice, where such service is "prohibited by the law of the foreign country" in which the respondent is located.

III. Summary of Declaration

9. With the factual understandings and assumptions set forth above, I have been asked to provide my professional opinion as to whether "the method of service used" in these proceedings is "prohibited by the law" of China, as those two phrases are used in Rule 141(a)(2)(iv). Specifically, I have been asked to address in this declaration the two sources of a possible prohibition offered by Respondents: (i) the Hague Convention, and (ii) Articles 276 and 277 of China's Civil Procedure Law (the "Civil Procedure Law"). I conclude that they do not prohibit the method of service used in this proceeding.

10. *First*, neither the Hague Convention nor the Civil Procedure Law appears even to be applicable to this proceeding, which is neither civil nor commercial but instead administrative and does not involve courts. The documents in question are neither judicial nor extrajudicial. *Second*, even if they do apply to administrative proceedings such as this one, both the Hague Convention and the Civil Procedure Law deal with actions within the territory of China. Since the method of service used in this proceeding involved no actions within the territory of China, they are inapplicable.

11. My opinion herein is based upon my academic and professional legal studies, research, teaching, and publishing over the course of many years as a professor of law, as well as my review of the relevant laws, regulations, and rules.

12. In preparing this declaration I have examined, among other documents, those that I have cited in the body of the declaration as well as the following:

- Respondent DTTC's Motion to Dismiss The Commission's Order Instituting Administrative Proceedings and Memorandum in Support, filed June 20, 2012;
- Division of Enforcement's Memorandum of Law In Opposition to Deloitte Touche Tohmatsu CPA LTD's Motion To Dismiss The Order Instituting Proceedings, filed July 5, 2012;
- Respondents' Motion For Summary Disposition As To Certain Threshold Issues and Memorandum In Support, filed by Counsel for Deloitte Touche Tohmatsu CPA LLP, on February 1, 2013;
- The Declaration of James Feinerman filed in support of the above-referenced Respondents' Motion for Summary Disposition, together with the exhibits attached thereto (the "Feinerman Declaration");
- *In the Matter of Alchemy Ventures*, SEC Admin. Proc. Ruling Rel. No. 702 (April 27, 2012); and
- *Rules of Practice*, SEC Release No. 34-35833, File No. S7-40-92 (June 9, 1995).

IV. Analysis

A. The Hague Convention

13. The Hague Convention does not appear to apply to this proceeding.

14. First, the current proceeding is administrative, whereas the Hague Convention by its terms applies to "civil and commercial matters." I know of no basis in Chinese law for understanding the corresponding terms in Chinese, respectively *minshi* and *shangshi*, to include administrative proceedings. Moreover, an authoritative treatise, citing the negotiating history, states that the term "judicial documents" does not include documents issued by an administrative tribunal or agency.[1] Nor do such documents appear to come within the category of "extrajudicial documents."[2]

15. Second, even if the Hague Convention applies to these proceedings and the OIPs count as judicial or extrajudicial documents, the OIPs were not served "abroad." They were served

[1] 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE 158 (2000) (citing Service Convention Negotiating Document at 79).

[2] Ristau explains the meaning of "extrajudicial documents" as follows:

> The concept of an "extrajudicial document," and the notion that such a document must be formally served, though unknown in American law, is well-established in civil law jurisdictions (and to some extent also in the United Kingdom). The deliberations of the 1977 "Special Committee" brought out that extrajudicial documents differ from judicial documents in that they are not directly connected with a contested lawsuit; they are distinguished from purely private documents by the fact that their issuance requires the intervention of an "authority" or a "judicial officer." Examples given were demands for payment, notices to quit leaseholds and protests of bills of exchange which under the laws of several jurisdictions are issued by a notary public or an administrative officer of a court and require service by a process-server.

Id.

in the United States. China's objection to Article 10 of the Hague Convention, noted in Para. 18 of the Feinerman Declaration, states that China "opposes the service of documents *in the territory of the People's Republic of China* by the methods stipulated in Article 10 of the Convention."[3] Since no documents have been served in the territory of the People's Republic of China, China's objection is not relevant to this proceeding.

16. The Department of State advice quoted in Para. 18 of the Feinerman Declaration to the effect that litigants should refrain from using service by mail is not applicable to the present proceedings. The advice appears under the heading, "Hague Service Convention Treaty Obligation to Refrain From Service by Mail." As noted above, the Hague Convention does not appear to apply to these proceedings. Furthermore, the context indicates that the term "service by mail" in the heading refers not to service by mail in general, but instead to *the service by mail to which China has objected in the Hague Convention*, i.e., service by mail into the territory of China.

17. Para. 8 of the Feinerman Declaration states that "the exclusive method for serving Chinese nationals with . . . 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." The basis for this statement, however, is not provided. The assertion that the Hague Convention governs administrative proceedings, that the documents in question come within the definition of "judicial" or "extrajudicial" documents, and that exclusivity applies is not supported by any reference to authority either in Para. 8 or elsewhere in the Declaration.

B. The Civil Procedure Law

18. Respondents have cited no Chinese legal authority to the effect that the provisions of the Civil Procedure Law would apply to the present proceedings.

19. *First*, as a general matter, the Civil Procedure Law governs the procedure for litigating *civil* matters in *courts*.[4] It does not govern administrative proceedings. I know of no grounds for believing that the type of proceeding being conducted in this matter would be considered a civil matter under Chinese law. As in U.S. law, it would be considered administrative, and courts are not involved.

20. *Second*, even assuming for the sake of argument that the Civil Procedure Law did apply in the abstract, the provisions cited by the Respondents are not relevant to the current proceedings.

21. The Feinerman Declaration discusses only two provisions of the Civil Procedure Law: Article 276 and Article 277.

22. Article 276, as can been seen from its translation in Exhibit C to the Feinerman Declaration, does not apply to the present proceedings. It says merely that in accordance with international treaties or the principle of reciprocity, Chinese courts and foreign

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[3] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Accession Instrument of China, deposited May 6, 1991, effective Jan. 1, 1992, 1658 U.N.T.S. 651 (1991) (emphasis added).

[4] *See, e.g.*, Civil Procedure Law, Articles 1, 2, 3, 4, 6.

courts may request each other's assistance. This proceeding does not involve a request for assistance from a court of the United States or China to a court of the other country.

23. Article 277 is equally inapplicable. The first paragraph concerns (i) requests for judicial assistance and (ii) attempts by foreign embassies or consulates to serve documents on, or conduct investigations of, their own citizens within China. Neither matter is implicated in this case. The second paragraph does indeed relate to the service of documents, but only insofar as those documents are served *within the territory of China*.[5] As no documents in this proceeding were served within the territory of China, Article 277 is inapplicable.

C. Chinese Nationals and Service in China

24. The argument of the Respondents in some places treats the Hague Convention and the Civil Procedure Law as if they were about service *on Chinese nationals*. I believe it is important to state more precisely what they are about: they are about service *within the territory of China*. Failure to distinguish these two concepts can lead to mistakes.

25. For example, Para. 21 of the Feinerman Declaration, referring to earlier statutory language about service "within the territory of the People's Republic of China," states that *"[t]herefore*, service on a Chinese national must comply with the Hague Service Convention and the laws China enacted to implement that Convention" (emphasis added). But the conclusion about service *on a Chinese national* does not follow from the premise about service *within the territory of China*. Service on a Chinese national in the United States, for example, need not comply with the Hague Convention, and I do not believe U.S. courts and administrative bodies would defer to Chinese domestic legislation that purported to prohibit such service.[6]

26. The same analysis applies to service on Chinese nationals *in China*. I disagree with Para. 24 of the Feinerman Declaration, where it states that the cited provisions of the Civil Procedure Law make it clear that the specified channels are "the *exclusive* means for serving process on Chinese nationals located in China." I know of no basis for this statement. As noted above, Article 277 of the Civil Procedure Law is concerned less with *who* is being served than with *activities that take place in China*. Article 277 contains *no prohibition* on serving Chinese nationals in China by methods that do *not* involve serving documents within the territory of China. The current proceeding involves precisely such a method: service on Respondents through parties located in the United States.

V. Conclusion

27. Respondents have asserted that the Civil Procedure Law and the Hague Convention, which by its terms applies to civil and commercial matters, apply to administrative proceedings such as the present one. I know of no basis in Chinese law for the assertion

[5] The relevant language from the official Chinese version of Article 277 is unambiguous. Precisely translated, that language states, "Except in the circumstances stipulated in the preceding paragraphs, without the approval of the competent authorities of the People's Republic of China, no foreign organ or individual may, *within the territory of the People's Republic of China*, serve documents or engage in investigation and evidence collection." (Emphasis added.)

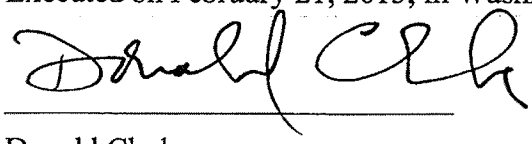
[6] And, of course, there remains the problem that compliance is necessary only in areas covered by the Hague Convention, i.e., civil and commercial litigation.

that the Civil Procedure Law (and through it, the Hague Convention) apply to administrative proceedings of this nature, and Respondents have not provided one.[7]

28. Respondents have asserted that the Hague Convention and the Civil Procedure Law govern service *on Chinese nationals* and prohibit the method of service used in this proceeding. I conclude that the plain language of both the Hague Convention and the cited provisions of the Civil Procedure Law speak not of service on Chinese nationals, but of service *within the territory of China*. Whether or not the Hague Convention and the Civil Procedure Law apply to administrative proceedings such as this one, the fact remains that no service was attempted within the territory of China. Thus, their cited prohibitions simply do not apply.

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

Executed on February 21, 2013, in Washington, D.C.



Donald Clarke

[7] I note the assertion in Respondents' brief that the SEC has in the past sought to serve documents pursuant to the channels provided in the Hague Convention. The issue here, however, is whether Articles 276 and 277 of the *Chinese* Civil Procedure Law—the only provisions of Chinese law mentioned by Respondents—cover administrative proceedings of this kind and prohibit the method of service used. It is this claim that the Respondents have left unsupported.

EXHIBIT 1
TO DECLARATION OF
DONALD CLARKE

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CURRENT POSITION

- Professor, George Washington University Law School, Washington, DC (from Jan. 2005)

Courses taught:
- Chinese Law
- Chinese Business Law
- Business Organizations
- Law and Development

OTHER POSITIONS AND VISITORSHIPS

- Visiting Professor, Duke University Law School, Durham, NC (Spring 2012)

- Visiting Professor, University of California at Los Angeles School of Law, Los Angeles, CA (Fall 2008)

- Visiting Professor, New York University School of Law, New York, NY (2007-08)

- Professor, University of Washington School of Law, Seattle, Washington (1988-2004)

- Attorney, Paul Weiss Rifkind Wharton & Garrison, New York, New York (Sept. 1995-Aug. 1998) (on leave from University of Washington)
  Areas of practice: Corporate, East Asia (focusing on China)

- Lecturer in Commercial Law of the Far East, Department of Law, School of Oriental and African Studies, University of London, UK (Sept. 1985-July 1988)

EDUCATION

- *Harvard Law School*, Cambridge, Mass., USA (1983-85, 1986-87)—JD cum laude 1987
  Activities: Editorial Board, *Harvard Law Review*
  Harvard International Law Journal

- *School of Oriental and African Studies*, University of London, UK (1981-83)—MSc 1983
  in Government and Politics of China
  Honors: Award of Distinction for thesis

- *Beijing University and Nanjing University*, People's Republic of China (1977-79)—
  Non-degree academic exchange program
  Major area of study: Chinese history

- *Princeton University*, Princeton, New Jersey, USA (1973-77)—BA cum laude 1977
  Major areas of study: International affairs (Woodrow Wilson School of Public and International Affairs); Certificate of Proficiency in East Asian Studies

SCHOLARSHIPS AND FELLOWSHIPS

- Rowdget Young Visiting Fellow, Faculty of Law, University of Hong Kong, June 2005
- Fulbright Research Fellowship, 2003 (Tsinghua University Faculty of Law, Beijing)
- Visiting Fellow, China Law Center, Yale Law School, Fall 2001
- Research Fellowship, National Program, Committee on Scholarly Communication with the People's Republic of China, 1991-92
- Foreign Language and Area Studies Fellowship, 1986-87 (Harvard Law School)
- Foreign Language and Area Studies Fellowship, 1984-85 (Harvard Law School)
- Commonwealth Scholarship, 1981-83 (University of London)
- Canada-China Exchange Scholarship, 1977-79 (Peking University, Nanking University)

PROFESSIONAL ASSOCIATIONS AND MEMBERSHIPS

- Member, Council on Foreign Relations
- Member, New York Bar
- Member, Executive Editorial Board, *American Journal of Comparative Law*
- Member, Editorial Board, *The China Quarterly*
- Member, Editorial Board, *Journal of Comparative Law*
- Member, Academic Advisory Group, US-China Working Group, United States Congress
- Affiliate Professor, University of Washington School of Law
- Director, U.S. China Law Society
- Director, Pacific Rim Law and Policy Association (publisher of *Pacific Rim Law and Policy Journal*)
- Member, Advisory Board, Center for Real Estate Law, Peking University Law School

CONSULTANCIES (SELECTED)

- Financial Sector Reform and Strengthening (FIRST) Initiative, *Amendments to the Securities Law of the People's Republic of China*, 2004-2005
- Asian Development Bank, *Economic Law in the People's Republic of China: Retrospect and Prospect*, 2004-2005
- Asian Development Bank, *Amendments to the Company Law of the People's Republic of China*, 2001-2005
- Agency for International Development, *Commercial Law Reform in the Former Soviet Republics*, 2002
- Asian Development Bank, *China's Legal and Administrative System*, 2001

PROFESSIONAL ACTIVITIES

- Co-editor (with Prof. Veronica Taylor) of *Asian Law Abstracts*, a journal of the Social Science Research Network (www. ssrn.com)
- Establishment and maintenance of Chinese Law Prof Blog (chineselawblog.net), a member of the Law Professor Blogs Network
- Establishment and maintenance of the Chinalaw listserv (formerly the Chinese Law Net), an Internet discussion group on issues of Chinese law (web site address: chinalawlist.org)
- Refereeing of grant applications to various bodies, including the Committee on Scholarly Communication with China and the Social Sciences and Humanities Research Council of Canada
- Refereeing articles and book manuscripts for various journals and publishers including the China Quarterly, Oxford University Press, and Stanford University Press

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"Bill Jones: An Appreciation," *Washington University Law Quarterly*, vol. 74 (Fall 1996): 545-546

"Methodologies for Research in Chinese Law," *University of British Columbia Law Review*, vol. 30, no. 1 (1996): 201-209

"One Step Back Permits Two Steps Forward," *China Rights Forum*, Fall 1996: 8-11

"Developing P.R.C. Property and Real Estate Law: Revised Land Registration Rules" (with Nicholas C. Howson), *East Asian Executive Reports*, vol. 18, no. 4 (April 15, 1996): 9, 13-17

"Implementation of Central Policy and the Law in China," *European Association for Chinese Law Information Bulletin* (1991)

"Foreign Economic Laws and Bureaucracy in China," *European Association for Chinese Law Information Bulletin*, vol. 5, no. 4 (December 1989): 3-7

Review of Frank K. Upham, *Law and Social Change in Postwar Japan* (1987), in *Bulletin of the School of Oriental and African Studies* (1989)

Contribution on the People's Republic of China for "Crime and Punishment" section of the *Encyclopaedia Britannica* (1989)

Review of Michael J. Moser (ed.), *Foreign Trade, Investment, and the Law in the People's Republic of China* (2nd ed. 1987), in *Lloyd's Maritime and Commercial Law Quarterly*, 1989, Part 1: 129-130 (February 1989)

"Relief on the Way for Foreign Investors," *South* (June 1987): 32

Review of J. Oldham (ed.), *China's Legal Development* (1986), in *China Quarterly*, no. 109 (March 1987): 122-123

Review of D.T.C. Wang, *Les sources du droit de la République populaire de Chine* (1982), in *China Quarterly*, no. 108 (December 1986): 727-728

Review of M.D. Pendleton, *Intellectual Property Law in the People's Republic of China* (1986), in *European Intellectual Property Review*, vol. 8, no. 10 (October 1986): 323-324

Review of D. Solinger, *Chinese Business Under Socialism. The Politics of Domestic Commerce, 1949-1980* (1984), in *China Quarterly*, no. 106 (June 1986): 348-350

Review of P. Gladwin & A. Hameed, *Guide to the Patent Law of the People's Republic of China* (1985), in *European Intellectual Property Review*, vol. 8, no. 5 (May 1986): 160

"China's New Rule of Law," *Britain-China*, no. 31 (Spring 1986): 11-14

"Proposed Consent Agreement Between General Motors Corporation and Toyota Motor Corporation," *Harvard International Law Journal*, vol. 25, no. 2 (Spring 1984): 421-427

LECTURES, INTERVIEWS, PRESENTATIONS, AND CONFERENCE APPEARANCES

"Local Government Bonds in China: What's Behind Them?", presentation at Shanghai Forum 2012, sponsored by Fudan University and Korean Foundation for Advanced Studies, Shanghai, May 27, 2012 (in Chinese)

"China's Stealth Urban Land Revolution," presentation at Perspectives on Chinese Law conference, George Washington University Law School, Washington, DC, April 13, 2012

Panelist in "Who Makes Your iPhone? China Migration, Labor, and Human Rights," Program in Public Law, Duke Law School, Durham, NC, April 4, 2012

Panelist in "China's Environmental Policy," Duke Law School, Durham, NC, March 29, 2012

Interviewed by Radio Australia on recent developments in Chinese law, Mar. 21, 2012

Roundtable participant in conference on Democracy in China and Southeast Asia: Local and National Perspectives, Princeton University, Princeton, NJ, March 15, 2012

"China's Stealth Urban Land Revolution," Duke Law School, Durham, NC, Feb. 29, 2012

Participated in panel on "The Rule of Law and Economic Background" at conference on "Patents, Trade, and Innovation in China", George Washington University Law School, Washington, DC, Dec. 13, 2011

Panelist at NYU Law School's 17th Annual Timothy A. Gelatt Dialogue on the Rule of Law in Asia, China's Quest for Justice: Law and Legal Institutions Since the Empire's Collapse, Nov. 7, 2011

"Zhongguo de yinxing chengshi tudi geming" (China's Stealth Urban Land Revolution), presentation to Hongfan Institute of Law and Economics, Beijing, June 25, 2011 (in Chinese)

"Recent Developments in China's Legal System and Their Implications for Rule of Law," presentation sponsored by Economist Intelligence Unit, Shanghai, May 27, 2011

"Derivative Actions in China," invited lecture at Hong Kong University Faculty of Law, Hong Kong, May 12, 2011

Commentator, conference on *Criminal Justice in China: Comparative Perspectives*, sponsored by Chinese University of Hong Kong, Hong Kong, May 7-8, 2011

"Derivative Actions in China," presentation to faculty at Fordham University Law School, New York, March 7, 2011

"Derivative Actions in China," presentation to faculty at Duke University Law School, Durham, March 3, 2011

Discussant, *Second Sino-American Dialogue on the Rule of Law and Human Rights*, sponsored by the National Council on US-China Relations and the China Foundation for Human Rights Development, Xiamen, Dec. 7-8, 2010

"Transnational Litigation Involving China," presentation at conference on *Law and Business inChina*, sponsored by the Faculty of Law and the Asian Studies Program of Pontificia Universidad Católica de Chile, Santiago, Nov. 25-26, 2010

"Understanding the Chinese Legal System: Searching for the Right Paradigm," invited lecture at University of Buenos Aires Faculty of Law, Buenos Aires, Nov. 22,2010

"Is Chinese Law Different?", invited lecture at Universidad Torcuato Di Tella Faculty of Law, Buenos Aires, Nov. 22, 2010

"Governance and China's Evolving Relationship with Its Citizens," panel presentation at *Economist* conference *China Summit: China and the New World Disorder*, Beijing, Nov. 3, 2010

"Derivative Actions in the People's Republic of China," presentation at conference on *The Prospect of Structural Reform of the Corporate Legal System*, sponsored by Tsinghua University Faculty of Law, Beijing, Oct. 30-31, 2010

"The Interface Between the Regulation of China's Internal Market and the Global Trading System," seminar presentation, Yale Law School, Oct. 5, 2010

"The Interface Between the Regulation of China's Internal Market and the Global Trading System," seminar presentation, Columbia Law School, New York, Sept. 28, 2010

Commentator at conference on *The Global Financial Crisis and China's Development*, sponsored by the University of Chicago Center in Beijing and Renmin University School of Economics, Beijing, July 30-31, 2010

"Local Experimentation in the Chinese Legislative System," paper presented at *China-US Rule of Law Dialogue*, sponsored by the China-US Exchange Foundation, Beijing, July 29-30, 2010

"Shareholder Derivative Suits in China," invited lecture, Hong Kong University Faculty of Law, Hong Kong, June 1, 2010

Panelist on "Business Law" panel at George Washington University Law School-Georgetown University Law Center conference *Six Decades of Asian Law: A Celebration of Professor Jerome Cohen*, Washington, D.C., February 19, 2010

"Lawyers and the State in China: Recent Developments," testimony at hearing on *Human Rights and Rule of Law in China*, Congressional-Executive Commission on China, Washington, D.C., October 7, 2009

"Trends in Comparative Corporate Law Scholarship," panel presentation at Association of American Law Schools Mid-Year Conference, Long Beach, California, June 9, 2009

"Who and What Matters in Chinese Stock Markets: Implications for Regulation," presentation at symposium *A New Era Dawns for Asian Capital Markets*, Asia Law Society, University of Michigan Law School, Ann Arbor, 21 March 2009

"The Concept of the Extra-Legal in Chinese Law," presentation at Global Law Workshop, George Washington University Law School, Washington, D.C., 23 February 2009

"Is Chinese Law Different?", lecture presented at United States Naval Academy, Annapolis, Maryland, 13 February 2009

"Does Chinese Law Matter?", presentation to United States Treasury Department, Washington, D.C., 12 February 2009

"The Concept of the Extra-Legal in Chinese Law and Its Significance," lecture presented at seminar *Are Politics Really in Command? China and the Rule of Law*, Norwegian Centre for Human Rights, China Programme, Oslo, 16 January 2009

"Private Enforcement of the Public Interest in China: Potential and Pitfalls," lecture presented at UCLA Center for Chinese Studies, Los Angeles, 24 November 2008

"The Ecology of Corporate Governance in China," presentation at UCLA School of Law Faculty Colloquium, Los Angeles, 14 November 2008

"Selfishness in the Public Interest? The 'Private Attorney-General' in China," lecture presented at School of International Relations and Pacific Studies, University of California at San Diego, 30 October 2008

"New Developments in Chinese Property Law," presentation at 2008 US-China Business Law Conference at UCLA, Los Angeles, 24 October 2008

"The Ecology of Corporate Governance in China," presentation at University of Illinois Law School Faculty Workshop, Champaign, Ill., 20 October 2008

"Delaware's Dysfunctional Derivative Suit Doctrine," lecture presented at Faculty of Law, Renmin University, Beijing, 11 June 2008 (in Chinese)

"Three Concepts of the Independent Director," paper presented at Contemporary Corporate Law Scholarship Reading Group (seminar course conducted by Prof. Jeffrey Gordon, Columbia Law School), 23 April 2008

"Chinese Corporate Governance in Global Context," lecture presented at Yale University, sponsored by Yale Working Group on Corporate Governance and Millstein Center for Corporate Governance and Performance, 22 April 2008

"Corporate Governance Institutions in China," presentation at New York University School of Law Faculty Workshop, 14 April 2008

Commentator at *Conference on Law, Commerce and Development*, New York University School of Law, New York, 12 April 2008

Discussant at panel on *New Dimensions in China Watching: Internet Forums and the Study of Contemporary China*, Association for Asian Studies Annual Meeting, Atlanta, 3 April 2008

"Chinese Corporate Governance: All Sizzle, No Steak?", roundtable presentation at Council on Foreign Relations, New York, 19 November 2007

"The Institutional Environment of Chinese Corporate Governance," lecture presented at China House series on *The Legal Infrastructure of New China*, New York University, New York, 14 November 2007

"Forum Non Conveniens Issues in China-Related Litigation," presentation at *Global Justice Forum*, Columbia Law School, New York, 2 November 2007

"The Ecology of Chinese Corporate Governance," presentation at Chinese Law Workshop, Yale Law School, New Haven, 29 October 2007

"Private Attorney-General Litigation in China," paper presented at conference on *Chinese Justice*, Fairbank Center for East Asian Research, Harvard University, 12 October 2007

"The Ecology of Chinese Corporate Governance," lecture delivered at Max Planck Institute, Hamburg, Germany, 30 July 2007

Discussant at panel on *Comparative Corporate Governance: Law in Context*, Law and Society Association Annual Meeting, Berlin, 26 July 2007

"The Ecology of Chinese Corporate Governance," paper presented at panel on *Law and Development: The China Consensus?*, Law and Society Association Annual Meeting, Berlin, 26 July 2007

"China: Creating a Legal System for a Market Economy," report delivered at symposium on *Development and Reform of China's Legal and Judicial System: Review and Prospect*, sponsored by the Asian Development Bank, Beijing, 14-15 May 2007

Commentator, conference on *China's Financial System Reforms and Governance*, School of Advanced International Studies, Johns Hopkins University, Washington DC, 16 April 2007

"Is Chinese Law Different?", public lecture sponsored by East Asian Studies Program, Princeton University, Princeton, New Jersey, 10 April 2007

"The Role of Law in China's Economic Development," public lecture sponsored by Department of Economics, Middlebury College, Middlebury, Vermont, 5 April 2007

Panelist, "The Academic Perspective and Recent Research," *OECD-China Policy Dialogue on Corporate Governance*, sponsored by the OECD, Shanghai Stock Exchange, State Assets Supervision and Administration Commission, Chinese Securities Regulatory Commission, Development Research Center, Government of Japan, Global Corporate Governance Forum, and Millstein Center for Corporate Governance and Performance at Yale School of Management, 29-30 March 2007

Public lecture, "The Ecology of Chinese Corporate Governance," sponsored by Asian Institute of International Financial Law, Faculty of Law, University of Hong Kong, 2 March 2007

"The Rule of Law in China," roundtable discussion (with Jerome A. Cohen), MITRE Corporation, Washington, DC, 2 February 2007

Guest lecturer, National Taiwan University Faculty of Law, "The Institutional Environment of Corporate Governance in China" (in Chinese), 22 December 2006

Guest lecturer, New York University Law School, "Chinese Constitutional Law", 14 November 2006

"The Institutional Environment of Corporate Governance in China", lecture presented as part of Clarke Program Colloquium Series, Cornell Law School, 3 November 2006

"The Role of Non-Legal Institutions in Chinese Corporate Governance", paper presented at authors' workshop on *A Decade After Crisis: The Transformation of Corporate Governance in East Asia* sponsored by the Center of Excellence Program in Soft Law at the University of Tokyo, the Center on Financial Law at Seoul National University, and the Center for Japanese Legal Studies at Columbia Law School, Tokyo, 1 October 2006

"The Institutional Environment of Chinese Corporate Governance", paper presented at panel on *Legal Aspects of the Economic Transformation in China*, annual conference of the International Society for New Institutional Economics, Boulder, Colorado, 23 September 2006

"Law and the Economy in China: The Past Decade", paper presented at authors' workshop on *Developments in Chinese Law: The Last Ten Years*, sponsored by *The China Quarterly* and All Souls College, Oxford University, Oxford, UK, 15 September 2006

"The Institutional Environment of Corporate Governance in China and Its Policy Implications", paper presented at conference on *Corporate Governance in East Asia: Culture, Psychology, Economics and Law*, Berkeley Center for Law, Business and the Economy, Boalt Hall School of Law, 5 May 2006

Guest lecturer, Yale Law School, "Recent Revisions to China's Securities Law", 4 April 2006

Commentator, Roundtable on "China's Emerging Financial Markets: Opportunities and Obstacles," Transactional Studies Program, Columbia Law School, New York, 19 January 2006

Speaker at Timothy A. Gelatt Memorial Dialog on Law and Development in Asia, New York University Law School, New York, 18 January 2006

Speaker and participant in workshop on administrative rule-making under China's new Securities Law, sponsored by the FIRST Initiative, the Finance and Economics Committee of the National People's Congress, and the World Bank, Beijing, 14-15 January 2006

Panelist, "The Globalization of American Law? Comparative Law and the New Legal Transplants", Section on Comparative Law, American Association of Law Schools annual meeting, Washington, DC, 5 January 2006

Panelist, "Improving the Fairness and Transparency of Judicial Decisions", conference on *Rule of Law Developments in China*, sponsored by the Bureau of Democracy, Human Rights, and Labor, Department of State, Washington, DC, 7 November 2005

Interviewed on BBC World Service on recent developments in death penalty procedures in China, 26 October 2005

"Lost in Translation: Legal Transplants in Chinese Corporate Law", Rowdget Young Visiting Fellow Lecture, University of Hong Kong Faculty of Law, Hong Kong, 4 June 2005

"The Independent Director in Chinese Corporate Governance", invited paper presented at 4th Asian Corporate Governance Conference, co-hosted by Asian Institute of Corporate Governance, Korea University and Center for Financial Law, Seoul National University, sponsored by World Bank Global Corporate Governance Forum, Seoul, 19-20 May 2005

"The Legacy of History in China's Legal System", paper presented at conference on *The Rule of Law: Chinese Law and Business*, Centre for Socio-Legal Studies, Oxford University, May 11-13, 2005

"The Emerging Private Sector and China's Legal System", paper presented at conference on *China's Economic and Sociopolitical Transformation: Measuring China's Emerging Private Sector and Its Impact*, Washington, DC, 22 April 2005

"How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China", paper presented at conference on *New Scholarship in Chinese Law: A Celebration in Honor of Stanley Lubman*, Center for Chinese Legal Studies, Columbia Law School, New York, 15 April 2005

"Lost in Translation? Corporate Law in China", paper presented at conference on *Asia in a Globalizing World*, Center for East Asian and Pacific Studies, University of Illinois at Urbana-Champaign, 9 April 2005

Guest lecturer in course on "China and Globalization", Prof. Reuven Avi-Yonah, University of Michigan Law School, Ann Arbor, 1 April 2005

"Law, Institutions, and Property Rights", paper presented at conference on *China's Economy: Retrospect and Prospect*, Woodrow Wilson International Center for Scholars, Washington, DC, 2 March 2005

"Insider Trading Law in the United States and China", lecture presented in Chinese at East China University of Politics and Law, Shanghai, 25 November 2004

"Law, Property Rights, and Institutions" (with Peter Murrell and Susan Whiting), paper presented at conference on *China's Economic Transition: Origins, Mechanisms, and Consequences* (Part II), University of Pittsburgh, 5-7 November 2004

"The Independent Director in Chinese Corporate Governance", opening paper presented at conference on *Amendment of the Company Law* organized by the Legislative Affairs Office of the State Council, the China Securities Regulatory Commission, and the Shanghai Stock Exchange, 10 October 2004

"Insider Trading Law in the United States and China", talk presented to Shanghai Institute of Law and Economics, Beijing, 28 September 2004

"China's Proposed Bankruptcy Law", commentator at conference on *Legal and Financial Infrastructure Requirements for Residential Mortgage Securitization in China* organized by Beijing University School of Law, Center for Real Estate Law and Financial Law Institute, Beijing, 17 July 2004

"Does Law Matter in China?", talk presented at Global Business Center, University of Washington School of Business, 15 January 2004

"Why China Should Not Adopt United States Insider Trading Law", paper presented at conference on *Corporate Fraud and Governance: American and Chinese Perspectives* organized by Shanghai Jiaotong University and New York University School of Law, Shanghai, 16 December 2003

"Human Rights and Culture", paper presented at conference on *Sino-U.S. Human Rights Conference* organized by Georgetown University Law Center, Beijing, 14 December 2003

"The History of Corporate Governance in China", commentator at conference organized by Shanghai Institute of Law and Economics, Beijing, 15 November 2003

"Professional Ethics of Defense Lawyers", commentator at conference on *The Defense Functions of Lawyers and Judicial Justice* organized by the All-China Lawyers Association, the American Bar Association, Renmin University of China, and New York University School of Law, Beijing, 21 September 2003

"The Independent Director in Chinese Corporate Governance", lecture presented at Tsinghua University Faculty of Law, Beijing, 10 April 2003

"The Independent Director in Chinese Corporate Governance", paper presented to the School of Business and Management, Hong Kong University of Science and Technology, 7 March 2003

"Assessing the Value of Law in China's Economy" (with Peter Murrell and Susan Whiting), paper presented at conference on *China's Economic Transition: Origins, Mechanisms, and Consequences* (Part I), University of Toronto, 15-17 November 2002

"China's Entry into the WTO: Prospects for Compliance", paper presented at conference on *China's Accession to the World Trade Organization*, Georgetown University Law Center, 10 Oct. 2002

"How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China", paper presented at conference on *The Reform of Corporate Law Under Global Competition*, Commercial Law Research Center of the Faculty of Law, Tsinghua University, Beijing, China, 15 Sept. 2002

"Zhongguo youdai fazhan duoyuanhua de jiandu jizhi" (China Has Yet to Develop a Multidimensional Monitoring Mechanism), *21 Shiji Jingji Baodao* (21st Century Economic Report), 19 Aug. 2002, p. 39, col. 1 (interview)

Testified before the Congressional-Executive Commission on China, Washington, D.C., on issues relating to China's compliance with its WTO commitments, 6 June 2002

"Business Regulation in the Bureaucratic State: Enterprise Law in China", paper presented at panel on *The Rule of Law and Enterprise Reform in China*, Association for Asian Studies annual meeting, 5 April 2002

"What WTO Accession Does *Not* Mean for China", paper presented at panel on *WTO and the International Rule of Law*, American Society of International Law annual meeting, 15 March 2002

Testified before United States-China Security Review Commission, Washington, DC, on issues relating to China's WTO accession, 18 Jan. 2002

"The Independent Director in Chinese Corporate Governance", paper presented at conference on "Protection of Investors' Interests: International Experience and Chinese Practice", Commercial Law Research Center of the Faculty of Law, Tsinghua University, Beijing, China, 18-19 November 2001

"Economic Development and the Rights Hypothesis: The China Problem", paper presented at conference on *Law Reform in Developing and Transitional Economies*, Ulaanbaatar, Mongolia, 2-3 July 2001

Interviewed for feature entitled "Detained in China", broadcast on PBS, *The News Hour with Jim Lehrer*, 18 May 2001 <http://www.pbs.org/newshour/bb/asia/jan-june01/detained_05-18.html>

"Empirical Research in Chinese Law," paper presented to Rule of Law Workshop, Stanford Law School, 18 April 2001

"Transparency in China's Regulation of International Trade," presentation made to audiences from Chinese government, business, and academia in Beijing and Shanghai as part of 5-member United States government mission, 13-25 March 2000

"Courts and Markets in Post-Socialist Transition: China," paper presented at workshop on *Courts and Markets in Post-Socialist Transition*, University of Wisconsin School of Law, 3 March 2000

"Incentives and the Top-Down Model of Regulation in Chinese Land Law," paper presented (in Chinese) at *International Conference on the Legal Framework for Rural Land Use Rights in China*, China Institute for Reform and Development, Haikou, Hainan Province, China, 12-14 January 2000

"Corporate Governance in China," paper presented to members of Project on Corporate Governance in China, Stanford University, Stanford, California, 29 October 1999

"Alternative Approaches to Chinese Law," lecture delivered at UCLA School of Law, Los Angeles, 28 October 1999

Panelist on "Rule of Law in China – Recent Developments and Prospects," Inaugural Session of Global Business Briefing Series, Pacific Council on International Relations, Los Angeles, 28 October 1999

"Misunderstanding Chinese Law: The Lure of the 'Rule of Law' Paradigm," lecture delivered at Faculty of Law, City University of Hong Kong, 27 September1999

Guest lecturer, Chinese administrative law class of Prof. Wang Xixin, Beijing University Faculty of Law, Beijing, China, 23 September 1999

"Bankruptcy in Capitalist and Reforming Socialist Economies," brief course taught to delegation of North Korean legal officials and academics at Beijing University, Beijing, China, 20-23 September 1999

"Misunderstanding Chinese Law: The Lure of the 'Rule of Law' Paradigm," lecture delivered at Faculty of Law, Waseda University, Tokyo, Japan, 23 June 1999

"The Enforcement of Civil Judgments in China," lecture delivered at Faculty of Law, Waseda University, Tokyo, Japan, 19 June 1999

"China's Revised Criminal Law," paper presented at conference on *Contemporary Chinese Legal Development*, sponsored by Chinese Law Society of America, Harvard Law School, Cambridge, Mass., 26-27 March 1999

"Alternative Approaches to Chinese Law," lecture delivered at Yale Law School, 25 March 1999

Commentator, conference on *Administrative Law Reform in China*, sponsored by UCLA Center for Chinese Studies, International Studies & Overseas Programs, UCLA School of Law and Southern California China Colloquium, Los Angeles, 6 March 1999

Participant, *U.S.-China Symposium on the Legal Protection of Human Rights*, The Aspen Institute, 11-13 December 1998

"Private Enforcement of Intellectual Property Rights," paper presented at *Sino-U.S. Conference on Intellectual Property Rights and Economic Development: 1998 Chongqing*, sponsored by the National Bureau of Asian Research, Chongqing, China, 16-18 September 1998

Commentator, conference on *Law and Development in Asia*, co-sponsored by Asian Development Bank and Harvard University, Council on Foreign Relations, New York, 21 May 1998

"Introduction to U.S. Capital Markets for Chinese Enterprises," speech (in Chinese) presented at Investment Promotion Forum sponsored by United Nations Industrial Development Organization, Beijing, 31 March 1998

"Legal Order as a Prerequisite for Cooperation: The China Problem," paper presented at *Inaugural University of California at San Diego Social Sciences Research Conference on Cooperation Under Difficult Conditions*, Graduate School of International Relations and Pacific Studies, 18 October 1997

"Recent Developments in Criminal and Administrative Punishments in China," paper presented at University of Washington School of Law Conference on Asian Law, Seattle, Washington, 3 August 1996

"Enforcement of International Awards Involving China and Hong Kong," paper presented at EuroForum conference on *Dispute Resolution in China and Hong Kong*, London, 31 May 1996

"China and the WTO," paper presented at American Conference Institute conference on *Doing Business in China and Hong Kong*, New York, 10 May 1996

"Recent Developments in Chinese Foreign Investment Law," talk presented at conference on *Trade and Investment in Emerging Markets: China and India*, New York University School of Law, 17 November 1995

Commentator on China at *Timothy A. Gelatt Dialogue on Law and Development in Asia*, New York University School of Law, 14 September 1995

"Round Pegs and Square Holes: China and the GATT," paper presented at panel on *China in the World Economic Order* at the annual meeting of the Association for Asian Studies, Washington, DC, April 1995

"Civil Rights in China," talk delivered to Civil Rights Committee of the Seattle-King County Bar Association, Seattle, March 1995

"Foreign Business Law and China's Application to the GATT/WTO," paper presented at 1990 Institute Conference on Chinese Foreign Trade and Investment Law, San Francisco, March 1995

"China and the GATT/WTO," talk delivered to the World Affairs Club, Juneau, Alaska, March 1995

"The Chinese Court System," paper presented at *Winter Workshop on East Asian Law*, Center for Pacific Rim Studies, University of California at Los Angeles, January 1995

"Enforcement of Civil Judgments in a Changing Society: A Chinese Example," paper presented at annual meeting of the Law and Society Association, Phoenix, Arizona, 17 June 1994

"The Enforcement of Civil and Economic Judgments in China," paper presented at symposium on *The Chinese Legal System*, sponsored by the China Quarterly and the School of Oriental and African Studies, University of London, London, U.K., 10-12 May 1994

"GATT Membership for China?," paper presented at symposium on *Pacific Rim Trade*, University of Puget Sound School of Law, Washington, 5 November 1993

"The Creation of a Legal Structure for Market Institutions in China," paper presented at conference on *The Evolution of Market Institutions in Transition Economies*, Graduate School of International Relations and Pacific Studies, University of California, San Diego, 14-15 May 1993

Chair/discussant at panel on "Theoretical Perspectives in China's Legal Reform," conference on *Chinese Law -- A Re-Examination of the Field: Theoretical and Methodological Approaches to the Study of Chinese Law*, Faculty of Law, University of British Columbia, Vancouver, 22 March 1993

"Research Methodologies in Chinese Law," paper presented at conference on *Chinese Law -- A Re-Examination of the Field: Theoretical and Methodological Approaches to the Study of Chinese Law*, Faculty of Law, University of British Columbia, Vancouver, 22 March 1993

"Enforcement of Civil Judgments in China," talk delivered at *China Studies Seminar*, University of British Columbia, October 1992

Discussant at conference on *The Modernization of Chinese Law on Both Sides of the Taiwan Straits*, National Taiwan University College of Law, September 1992

"Enforcement of Civil Judgments in the People's Republic of China: Notes from the Field," talk delivered at Attorney-General's Chambers, Hong Kong, August 1992

"Dispute Resolution in China," talk delivered at Chinese University of Hong Kong, November 1991

Interviewed on modern Chinese law for program on East Asian legal systems broadcast by BBC World Service (London), September 1991

Discussant at panel on *New Perspectives on Chinese Economic Development*, Western Economic Association Annual Conference, Seattle, 30 June-3 July 1991

"The Trials of the June 4th Defendants," talk delivered at *East Asian Legal Studies Lunchtime Colloquium*, Harvard Law School, 22 March 1991

"What's Law Got to Do with It? Legal Institutions and Economic Reform in China," talk delivered at *East Asian Legal Studies Workshop*, Harvard Law School, 21 March 1991

Guest lecturer, Chinese law class of Prof. William C. Jones, Washington University School of Law, St. Louis, Missouri, 30 January 1991

"Legal Problems of Industrial Economic Reform in China," talk delivered to *Faculty Forum*, Washington University School of Law, St. Louis, Missouri, 30 January 1991

Speaker and panel chairman, "Chinese Business Law," at *China Trade Update: Doing Business with China in the 1990s*, conference sponsored by the Washington State China Relations Council, Seattle, Washington, 5 November 1990

"The Future of Democracy in China," panel discussion sponsored by the Council of International Organizations, Citizens International Center, Seattle, Washington, 21 April 1990

"Why Laws Fail: Central Legislation and the Structure of the Chinese Polity," paper delivered at *Winter Workshop on East Asian Law*, Center for Pacific Rim Studies, University of California at Los Angeles, 20 January 1990

"The Legal Background to the Behavior of State-Owned Enterprises," paper delivered at conference on *Ownership Reforms and Efficiency of State-Owned Enterprises* sponsored by the Institute of Economics of the Chinese Academy of Social Sciences and the Ford Foundation, Shenzhen, China, 6 January 1990

"Implications of Recent Events in China for Sino-U.S. Relations," panel discussion sponsored by U.S.-China People's Friendship Association and the East Asian Resource Centre, University of Washington, 11 July 1989

"Law and Economic Reform in China," *London China Seminar*, School of Oriental and African Studies, University of London, 19 May 1988

"Urban Enterprises and the Role of Law in China's Economic Reforms," Conference on *The Chinese Developmental State: Change and Continuum*, Institute of Development Studies, University of Sussex, 7-9 April 1988

Interviewed for feature entitled "How is China Run?", broadcast on BBC World Service, *The World Today*, 25 March 1988

"The 13th Congress of the Chinese Communist Party and China's Legal Reforms," Asian Studies Centre, St. Antony's College, Oxford University, 8 March 1988

"Chinese Economic and Legal Reforms," John F. Kennedy School of Government, Harvard University, 24 March 1987

Co-organizer and discussant, Conference on *China: Law and Trade 1986*, School of Oriental & African Studies, University of London, 30 June 1986

"The Role of Law in Modern China," Great Britain China Centre, London, 17 April 1986

"The Foreign Economic Contract Law," Law-China Society Seminar on China's Economic Laws, London, 17 April 1986

ATTACHMENT 2
TO ENFORCEMENT DIVISION'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTIONS FOR SUMMARY DISPOSITION AS TO THRESHOLD ISSUES

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

In the Matter of	:
BDO CHINA DAHUA CPA CO., LTD., ERNST & YOUNG HUA MING LLP, KPMG HUAZHEN (SPECIAL GENERAL PARTNERSHIP), DELOITTE TOUCHE TOHMATSU CERTIFIED PUBLIC ACOUNTANTS LTD., and PRICWATERHOUSECOOPERS ZHONG TIAN CPAs LIMITED	:

DECLARATION OF KURT GRESENZ

I, Kurt Gresenz, declare:

1. I am over the age of eighteen years. The facts I set forth below are based upon my personal knowledge or upon information contained in the files of the U.S. Securities and Exchange Commission ("Commission").

2. I am a lawyer in the Commission's Office of International Affairs ("OIA"). I am a member in good standing of the bar of the District of Columbia. My job title is Senior Legal Advisor. My duties include, among other things, working with the Commission's foreign counterparts in connection with Commission enforcement matters that involve foreign jurisdictions.

3. In my capacity as a Senior Legal Advisor in OIA, I am familiar with efforts to serve legal documents on persons and entities located in the Peoples' Republic of China ("China") pursuant to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"). Among other things, I have worked with the Commission's Division of Enforcement on matters involving these efforts; signed letters to the Central Authority in China in connection with these efforts; and reviewed Commission records detailing these efforts from June 2011 to the present.

4. Since June 2011, Commission staff has requested that China's Central Authority complete 35 separate acts of service upon parties in China in connection with 14 Commissions cases (both U.S. federal district court civil actions and Commission administrative proceedings). To the best of my information as of the date of execution of this declaration, the results of these efforts are as follows:

- The Central Authority reports that it has only successfully completed service in two instances (it reportedly served the same party, at the same time, with two separate documents in response to two distinct Commission service requests);
- The Central Authority reports that it tried to complete service in four additional instances, but that its efforts were not successful. In connection with these failed service attempts, the passage of time between the Central Authority's receipt of the Commission's service request and the attempted service reportedly ranged from approximately five to thirteen months; and
- Of the remaining 29 instances for which the Commission requested service under the Hague Service Convention, Commission staff has not been informed

of any other service attempts, whether successful or unsuccessful. In addition, the requests for these 29 acts of service have been pending anywhere from approximately four to thirteen months.

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

Executed on February 21, 2013 in Washington, DC.

Kurt Gresenz

ATTACHMENT 3
TO ENFORCEMENT DIVISION'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTIONS FOR SUMMARY DISPOSITION AS TO THRESHOLD ISSUES

Subsec. (c)(6)(A). Pub. L. 111–203, §929F(h)(1), substituted "any person who is, or at the time of the alleged failure reasonably to supervise was, a supervisory person" for "the supervisory personnel" in introductory provisions.

Subsec. (c)(6)(B). Pub. L. 111–203, §929F(h)(2), in introductory provisions, substituted "No current or former supervisory person" for "No associated person" and "any associated person" for "any other person".

Subsec. (c)(7)(B). Pub. L. 111–203, §982(f), in heading, inserted ", broker, or dealer" after "issuer" and, in text, substituted "a registered public accounting firm under this subsection" for "an issuer under this subsection" and "any issuer, broker, or dealer" for "any issuer" in two places.

2008—Subsec. (b)(5)(B)(ii)(II). Pub. L. 110–289 inserted "and the Director of the Federal Housing Finance Agency," after "Commission,".

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

§ 7216. Foreign public accounting firms

(a) Applicability to certain foreign firms

(1) In general

Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, broker, or dealer, 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, except that registration pursuant to section 7212 of this title shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.

(2) Board authority

The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, brokers, or dealers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm (or firms) for purposes of registration under, and oversight by the Board in accordance with, this subchapter.

(b) Production of documents

(1) Production by foreign firms

If a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall—

(A) produce the audit work papers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board; and

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

(2) Other production

Any registered public accounting firm that relies, in whole or in part, on the work of a foreign public accounting firm in issuing an audit report, performing audit work, or conducting an interim review, shall—

(A) produce the audit work papers of the foreign public accounting firm and all other documents related to any such work in response to a request for production by the Commission or the Board; and

(B) secure the agreement of any foreign public accounting firm to such production, as a condition of the reliance by the registered public accounting firm on the work of that foreign public accounting firm.

(c) Exemption authority

The Commission, and the Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as the Commission (or Board) determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.

(d) Service of requests or process

(1) In general

Any foreign public accounting firm that performs work for a domestic registered public accounting firm shall furnish to the domestic registered public accounting firm a written irrevocable consent and power of attorney that designates the domestic registered public accounting firm as an agent upon whom may be served any request by the Commission or the Board under this section or upon whom may be served any process, pleadings, or other papers in any action brought to enforce this section.

(2) Specific audit work

Any foreign public accounting firm that performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or, performs interim reviews, shall designate to the Commission or the Board an agent in the United States upon whom may be served any request by the Commission or the Board under this section or upon whom may be served any process, pleading, or other papers in any action brought to enforce this section.

(e) Sanctions

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

(f) Other means of satisfying production obligations

Notwithstanding any other provisions of this section, the staff of the Commission or the

Board may allow a foreign public accounting firm that is subject to this section to meet production obligations under this section through alternate means, such as through foreign counterparts of the Commission or the Board.

(g) Definition

In this section, the term "foreign public accounting firm" means a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof.

(Pub. L. 107–204, title I, § 106, July 30, 2002, 116 Stat. 764; Pub. L. 111–203, title IX, §§ 929J, 982(g), July 21, 2010, 124 Stat. 1859, 1930.)

REFERENCES IN TEXT

This Act, referred to in subsecs. (a), (c), and (e), is Pub. L. 107–204, July 30, 2002, 116 Stat. 745, known as the Sarbanes-Oxley Act of 2002. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2010—Subsec. (a)(1). Pub. L. 111–203, § 982(g)(1), substituted "issuer, broker, or dealer" for "issuer".

Subsec. (a)(2). Pub. L. 111–203, § 982(g)(2), substituted "issuers, brokers, or dealers" for "issuers".

Subsec. (b). Pub. L. 111–203, § 929J(1), added subsec. (b) and struck out former subsec. (b) which related to deemed consent to production of audit workpapers by foreign and domestic firms.

Subsecs. (d) to (g). Pub. L. 111–203, § 929J(2), (3), added subsecs. (d) to (f) and redesignated former subsec. (d) as (g).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

§ 7217. Commission oversight of the Board

(a) General oversight responsibility

The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 78q(a)(1) of this title, and of section 78q(b)(1) of this title shall apply to the Board as fully as if the Board were a "registered securities association" for purposes of those sections 78q(a)(1) and 78q(b)(1).

(b) Rules of the Board

(1) Definition

In this section, the term "proposed rule" means any proposed rule of the Board, and any modification of any such rule.

(2) Prior approval required

No rule of the Board shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 7213(a)(3)(B) of this title with respect to initial or transitional standards.

(3) Approval criteria

The Commission shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors.

(4) Proposed rule procedures

The provisions of paragraphs (1) through (3) of section 78s(b) of this title shall govern the proposed rules of the Board, as fully as if the Board were a "registered securities association" for purposes of that section 78s(b), except that, for purposes of this paragraph—

(A) the phrase "consistent with the requirements of this chapter and the rules and regulations thereunder applicable to such organization" in section 78s(b)(2) of this title shall be deemed to read "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors"; and

(B) the phrase "otherwise in furtherance of the purposes of this chapter" in section 78s(b)(3)(C) of this title shall be deemed to read "otherwise in furtherance of the purposes of title I of the Sarbanes-Oxley Act of 2002".

(5) Commission authority to amend rules of the Board

The provisions of section 78s(c) of this title shall govern the abrogation, deletion, or addition to portions of the rules of the Board by the Commission as fully as if the Board were a "registered securities association" for purposes of that section 78s(c), except that the phrase "to conform its rules to the requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter" in section 78s(c) of this title shall, for purposes of this paragraph, be deemed to read "to assure the fair administration of the Public Company Accounting Oversight Board, conform the rules promulgated by that Board to the requirements of title I of the Sarbanes-Oxley Act of 2002, or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board".

(c) Commission review of disciplinary action taken by the Board

(1) Notice of sanction

The Board shall promptly file notice with the Commission of any final sanction on any registered public accounting firm or on any associated person thereof, in such form and containing such information as the Commission, by rule, may prescribe.

(2) Review of sanctions

The provisions of sections 78s(d)(2) and 78s(e)(1) of this title shall govern the review by the Commission of final disciplinary sanctions imposed by the Board (including sanctions imposed under section 7215(b)(3) of this title for noncooperation in an investigation of the Board), as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 78s(d)(2) and 78s(e)(1), except that, for purposes of this paragraph—

(A) section 7215(e) of this title (rather than that section 78s(d)(2)) shall govern the extent to which application for, or institution by the Commission on its own motion of, re-

ATTACHMENT 4
TO ENFORCEMENT DIVISION'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTIONS FOR SUMMARY DISPOSITION AS TO THRESHOLD ISSUES

Public Law 107–204
107th Congress

An Act

To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.

July 30, 2002
[H.R. 3763]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sarbanes-Oxley Act of 2002.
Corporate responsibility.
15 USC 7201 note.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Sarbanes-Oxley Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(d) REPORTING OF SANCTIONS.—

(1) RECIPIENTS.—If the Board imposes a disciplinary sanction, in accordance with this section, the Board shall report the sanction to—

(A) the Commission;

(B) any appropriate State regulatory authority or any foreign accountancy licensing board with which such firm or person is licensed or certified; and

(C) the public (once any stay on the imposition of such sanction has been lifted).

(2) CONTENTS.—The information reported under paragraph (1) shall include—

(A) the name of the sanctioned person;

(B) a description of the sanction and the basis for its imposition; and

(C) such other information as the Board deems appropriate.

(e) STAY OF SANCTIONS.—

(1) IN GENERAL.—Application to the Commission for review, or the institution by the Commission of review, of any disciplinary action of the Board shall operate as a stay of any such disciplinary action, unless and until the Commission orders (summarily or after notice and opportunity for hearing on the question of a stay, which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that no such stay shall continue to operate.

(2) EXPEDITED PROCEDURES.—The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of the duration of a stay pending review of any disciplinary action of the Board under this subsection.

SEC. 106. FOREIGN PUBLIC ACCOUNTING FIRMS.

(a) APPLICABILITY TO CERTAIN FOREIGN FIRMS.—

(1) IN GENERAL.—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, except that registration pursuant to section 102 shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.

(2) BOARD AUTHORITY.—The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm

(or firms) for purposes of registration under, and oversight by the Board in accordance with, this title.

(b) PRODUCTION OF AUDIT WORKPAPERS.—

(1) CONSENT BY FOREIGN FIRMS.—If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented—

(A) to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report; and

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

(2) CONSENT BY DOMESTIC FIRMS.—A registered public accounting firm that relies upon the opinion of a foreign public accounting firm, as described in paragraph (1), shall be deemed—

(A) to have consented to supplying the audit workpapers of that foreign public accounting firm in response to a request for production by the Board or the Commission; and

(B) to have secured the agreement of that foreign public accounting firm to such production, as a condition of its reliance on the opinion of that foreign public accounting firm.

(c) EXEMPTION AUTHORITY.—The Commission, and the Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as the Commission (or Board) determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.

(d) DEFINITION.—In this section, the term "foreign public accounting firm" means a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof.

SEC. 107. COMMISSION OVERSIGHT OF THE BOARD.

(a) GENERAL OVERSIGHT RESPONSIBILITY.—The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 17(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(a)(1)), and of section 17(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(b)(1)) shall apply to the Board as fully as if the Board were a "registered securities association" for purposes of those sections 17(a)(1) and 17(b)(1).

(b) RULES OF THE BOARD.—

(1) DEFINITION.—In this section, the term "proposed rule" means any proposed rule of the Board, and any modification of any such rule.

(2) PRIOR APPROVAL REQUIRED.—No rule of the Board shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 103(a)(3)(B) with respect to initial or transitional standards.

ATTACHMENT 5
TO ENFORCEMENT DIVISION'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTIONS FOR SUMMARY DISPOSITION AS TO THRESHOLD ISSUES

Public Law 111–203
111th Congress

An Act

July 21, 2010
[H.R. 4173]

To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Dodd-Frank Wall Street Reform and Consumer Protection Act.
12 USC 5301 note.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Dodd-Frank Wall Street Reform and Consumer Protection Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of jurisdiction of that department or agency, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Collection of information pursuant to section 204 shall be an administrative action involving an agency against specific individuals or agencies pursuant to section 3518(c)(1) of title 44, United States Code.".

SEC. 929J. EXPANSION OF AUDIT INFORMATION TO BE PRODUCED AND EXCHANGED.

Section 106 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7216) is amended—

(1) by striking subsection (b) and inserting the following:

"(b) PRODUCTION OF DOCUMENTS.—

"(1) PRODUCTION BY FOREIGN FIRMS.—If a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall—

"(A) produce the audit work papers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board; and

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

"(2) OTHER PRODUCTION.—Any registered public accounting firm that relies, in whole or in part, on the work of a foreign public accounting firm in issuing an audit report, performing audit work, or conducting an interim review, shall—

"(A) produce the audit work papers of the foreign public accounting firm and all other documents related to any such work in response to a request for production by the Commission or the Board; and

"(B) secure the agreement of any foreign public accounting firm to such production, as a condition of the reliance by the registered public accounting firm on the work of that foreign public accounting firm.";

(2) by redesignating subsection (d) as subsection (g); and

(3) by inserting after subsection (c) the following:

"(d) SERVICE OF REQUESTS OR PROCESS.—

"(1) IN GENERAL.—Any foreign public accounting firm that performs work for a domestic registered public accounting firm shall furnish to the domestic registered public accounting firm a written irrevocable consent and power of attorney that designates the domestic registered public accounting firm as an agent upon whom may be served any request by the Commission or the Board under this section or upon whom may be served any process, pleadings, or other papers in any action brought to enforce this section.

Designation.

"(2) SPECIFIC AUDIT WORK.—Any foreign public accounting firm that performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or, performs interim reviews, shall designate to the Commission or the Board an agent in the United States upon whom may be served any request by the Commission or the Board under this section or upon whom may be served any process, pleading, or other papers in any action brought to enforce this section.

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

"(f) OTHER MEANS OF SATISFYING PRODUCTION OBLIGATIONS.—Notwithstanding any other provisions of this section, the staff of the Commission or the Board may allow a foreign public accounting firm that is subject to this section to meet production obligations under this section through alternate means, such as through foreign counterparts of the Commission or the Board.".

SEC. 929K. SHARING PRIVILEGED INFORMATION WITH OTHER AUTHORITIES.

Section 24 of the Securities Exchange Act of 1934 (15 U.S.C. 78x) is amended—

(1) in subsection (d), as amended by subsection (d)(1)(A), by striking "subsection (f)" and inserting "subsection (g)";

(2) in subsection (e), as added by subsection (d)(1)(C), by striking "subsection (f)" and inserting "subsection (g)";

(3) by redesignating subsection (f) as subsection (g); and

(4) by inserting after subsection (e) the following:

"(f) SHARING PRIVILEGED INFORMATION WITH OTHER AUTHORITIES.—

"(1) PRIVILEGED INFORMATION PROVIDED BY THE COMMISSION.—The Commission shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by—

"(A) any agency (as defined in section 6 of title 18, United States Code);

"(B) the Public Company Accounting Oversight Board;

"(C) any self-regulatory organization;

"(D) any foreign securities authority;

"(E) any foreign law enforcement authority; or

"(F) any State securities or law enforcement authority.

"(2) NONDISCLOSURE OF PRIVILEGED INFORMATION PROVIDED TO THE COMMISSION.—The Commission shall not be compelled to disclose privileged information obtained from any foreign securities authority, or foreign law enforcement authority, if the authority has in good faith determined and represented to the Commission that the information is privileged.

"(3) NONWAIVER OF PRIVILEGED INFORMATION PROVIDED TO THE COMMISSION.—

"(A) IN GENERAL.—Federal agencies, State securities and law enforcement authorities, self-regulatory organizations, and the Public Company Accounting Oversight Board shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by the Commission.