ADMINISTRATIVE PROCEEDING
FILE NOS. 3-14872, 3-15116

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

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

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

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PRELIMINARY STATEMENT

The Division of Enforcement's (the "Division") Opposition does not provide any convincing justification for its failure to (1) properly serve the OIP on Respondents; and (2) seek enforcement of its document requests in court before jumping straight to disciplinary proceedings.[1] In an effort to justify its short-circuiting of these processes, the Division's Opposition instead proffers a radical construction of its own authority that would disregard the clear dictates of the applicable statutes and rules, as well as deeply-rooted principles of international comity. The Division's arguments should be rejected.

First, the Division attempts to defend its service of the OIP on Respondents (who are all located in China) "through" their U.S. member firms on the grounds that service occurred "solely within the U.S." Opposition ("Opp."). at 14. This begs the very question of whether such service in the U.S. can be effective on the separate entities located in China. Clearly it cannot: as discussed further below, China law and the Hague Service Convention require that the Division serve the OIP on Respondents through China's Central Authority. In any event, the very rationale for serving the U.S. entities – that such service is "reasonably calculated to give notice" to the Chinese entities – itself underscores that service cannot be effective absent an expectation that it will be conveyed to China, thus contradicting the Division's argument that the service here has occurred "solely within the U.S." Any contrary conclusion would free the

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[1] As the Opposition recognizes, the motion for summary disposition on these grounds applies both to the proceeding initiated against DTTC alone on May 9, 2012 (File No. 3-14872) (the "DTTC Proceeding") and the omnibus proceeding initiated by the Commission on December 3, 2012 (File No. 3-15116) (the "Omnibus Proceeding"). Respondents' Opening Brief inadvertently omitted the file number for the DTTC Proceeding from the caption.

Respondents BDO China Dahua CPA Co., Ltd. ("BDO China"), Ernst & Young Hua Ming LLP ("EYHM"), KPMG Huazhen (Special General Partnership) ("KPMG Huazhen"), and PricewaterhouseCoopers Zhong Tian CPAs Limited ("PwC Shanghai") join in this reply. DTTC also continues to join in PwC Shanghai's Motion for Summary Disposition as to Certain Threshold Issues, and it adopts and incorporates by reference the arguments made in its supporting Reply Memorandum. As explained in Respondents' Opening Brief, at 1 n.1, those arguments provide an additional ground for dismissal of DTTC from the Omnibus Proceeding (which relates to its work for Client G).

Commission to serve its OIPs on foreign entities simply by delivering them to any U.S. person or entity (authorized or not) that might reasonably be expected to alert the foreign entity. Nor is such service justified by the Division's conclusory assertion that resorting to China's Central Authority may lead to significant delays. Indeed, the Division does not explain why (1) in this high-profile case against easily located parties, the Central Authority will be unable to effect service, or (2) outcomes in *other* cases justify the violation of China law, the Hague Service Convention, and the SEC's own rules in *this* case.

Second, the Opposition does not and cannot justify the Division's attempt to proceed directly to the issue of sanctions without first enforcing the document requests in federal court. The Division concedes that a federal court might well not enforce Section 106 requests here, but argues it does not matter. Opp. at 31-32; *see also In the Matter of Deloitte Touche Tohmatsu CPA Ltd.*, A.F. 3-14872, Division of Enforcement's Memorandum of Law in Opposition to DTTC's Motion to Dismiss ("Opp. (A.F. 3-14872)"), 8 n.1. Indeed, the Division now contends that it can seek sanctions for a mere "knowing" failure to produce documents, even in situations—such as a knowing failure to produce attorney-client privileged documents—where a federal court indisputably would not enforce the document requests.[2] Opp. at 39 n.22. This extreme view of Section 106 may serve the Division's current litigation strategy, but it finds no support anywhere. The Division's continued attempt to align Section 106 with statutes concerning the Commission's examination and inspection of regulated entities only highlights the key distinctions: unlike Section 106, the examination provisions do not provide for judicial enforcement of the document requests, and do not limit violations to instances of "willful refusal." The Opposition's strained and unsuccessful attempts to justify the Division's position

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[2] The Division's position that a "knowing failure" to produce documents is the same as a "willful refusal" is just wrong, *id.* at 3, but that is an issue for another day.

make clear that Section 106 requests must be enforced in federal court before sanctions for noncompliance may be imposed.

ARGUMENT

A. The Division's Opposition Fails to Establish That the OIP Was Properly Served on Respondents

1. The Division's Purported Service of the OIPs Does Not Comply with Section 106, China Law, or the Commission's Rules of Practice

The Division does not—and cannot—defend service as authorized under Section 106, because Congress did not provide for (and Respondents did not consent to) service of OIPs on Respondents' U.S. member firms. Instead, the Division now contends that the Commission "expressly provided" that the Omnibus OIP could be served "through the U.S. agents that [Respondents] had designated for receipt of other service of process under Section 106." Opp. at 10.[3] But Commission approval of an OIP cannot trump the statutory limits in Section 106(d), nor can the Commission or the Division simply direct substituted service on unauthorized agents in contravention of the express limitations provided by Congress. Such service therefore remains defective.

Recognizing this, the Division attempts to justify its service primarily on the grounds it was "reasonably calculated to give notice" to Respondents under Rule 141(a)(2)(iv). But as demonstrated in Respondents' Opening Brief, that rule does not authorize service that violates foreign law, and China law establishes mandatory and exclusive procedures by which the OIP

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[3] The Division also appears to argue that its attempted service is entitled to deference simply because the OIP was signed by the Commission. *See* Opp. at 11, 14-15. There is no reason to believe that the Commission specifically considered the legal adequacy of service here, and even if it had, that would be no substitute for a full consideration of the issue in this proceeding before Your Honor. Tellingly, the Division fails to cite any authority in support of its proposition.

must be served on Respondents in China through China's Central Authority.[4] The Division contends, however, that neither China law nor the provision of Rule 141(a)(2)(iv) that requires that service conform with foreign law are relevant here because the Division arranged service that allegedly occurred "*solely within the U.S.*" Opp. at 14 (emphasis original). For several reasons, this mischaracterization does not justify the Division's flawed service of the OIP.

First, it is not correct that the Division's attempted service occurred "solely" within the United States. Here, the Division has attempted to use U.S. conduits to reach within China's borders and serve Chinese firms that are otherwise not amenable to such service in the U.S. Opp. at 10 (explaining that the Division served Respondents "*through* the U.S. agents that they had designated for receipt of other service of process.") (emphasis added). As the Opposition concedes, Respondents have not consented to service of an OIP through their U.S. member firms, and therefore service was not complete and effective merely upon the Division's delivery of the OIP to the member firms in the U.S.[5] Instead, the Division employed this method of service on the grounds that it was "reasonably calculated to give notice" to Respondents in China. And it did so precisely because it intended that the U.S. member firms would deliver the OIPs to their China counterparts *in China*. The use of unauthorized U.S. conduits to serve

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[4] The Division also suggests that, Rule 141(a)(2)(iv) notwithstanding, the Commission's OIP did not require that the Division's service on Respondents' respective U.S. member firms comply with foreign law. See Opp. at 14-15 ("the Commission expressly authorized" service of the OIP to the U.S. member firms "regardless of foreign law.") But even if that strained reading of the OIP were correct (and it is not), the Commission would not be permitted to direct service in a manner that violates its own rules of practice. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

[5] The Division repeatedly refers to the U.S. member firms as Respondents' "affiliates." *See, e.g.*, Opp. at 2 ("the Division properly served the [OIPs] on Respondents by mailing them to Respondents' affiliates located in the U.S."). But this is a misleading description of their relationship in these circumstances. While they are all members of global networks of accounting firms, each member firm within these networks is a separate and independent legal entity. *See United States v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39, 41 (D.D.C. 2009) (holding that, rather than "affiliates," each member firm within the global networks is a separate and independent legal entity with no "legal right, authority or ability to obtain documents [from each other] upon demand").

entities located on Chinese soil is not service that occurs "solely within the U.S." It is an attempt to circumvent—and a violation of—the Hague Service Convention and China law.

Second, in any event, the Division is simply wrong that Rule 141(a)(2)(iv)'s "phrase 'prohibited by the law of the foreign country' presupposes that the actual proscribed activity would occur *in that foreign country*." Opp. at 13. The Division contends this construction is "supported by the cross-reference to subsection (a)(2)'s other methods of service" that "obviously would entail service within [a] foreign country." But notably it identifies only one such method—"leaving a copy at the individual's dwelling house"—while omitting other methods in Rule 141(a)(2) that would not necessarily take place within a foreign country, such as "delivering a copy of the order instituting proceedings to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such notice...."

The Division further contends that there is "no valid policy justification" for applying foreign law to the Staff's actions in the U.S., and that doing so would run counter to "principles of customary international law." But this ignores the "valid policy justification" of prohibiting the Division from circumventing foreign law and the treaty obligations of the U.S. (as well as the requirements of SOX and the Commission's own rules) by purporting to serve entities abroad through unauthorized U.S. conduits. Indeed, the Division's position would turn principles of comity on their head by rendering the Hague Service Convention and foreign law governing service a nullity. If the Division's service of the OIPs is proper here, then there is no reason that it would *ever* have to attempt service of a foreign party through the Hague Convention or in the manner required by foreign law. Instead, it could simply serve any U.S. entity or person (authorized or not) that might be "reasonably calculated to give notice" to the foreign party. *That* is a construction of Rule 141 that "would be passing strange." *See* Opp. at 14. Taken to an

extreme, this would permit the Division to effect service through print or television advertisements.

Third, notwithstanding the Division's contentions otherwise, Articles 276 and 277 of the China Law of Civil Procedure squarely apply in these circumstances and require that the Division attempt service through China's Central Authority. Declaration of James V. Feinerman, ¶¶ 8, 19-25; *see also* Supplemental Declaration of James V. Feinerman ("Suppl. Feinerman Decl."), ¶¶ 6-10, 11-16, 17-20. The Division's argument to the contrary is irreconcilable with its own admission that it has pursued service in China in precisely this manner on *thirty-five* occasions since June 2011. Indeed, as Prof. Feinerman has explained:

> Articles 276 and 277 make clear that any attempt at service must be made "through channels stipulated in the international treaties concluded or acceded to by [China]" or diplomatic channels. These channels are the *exclusive* means for serving process on Chinese nationals located in China.

Declaration of James V. Feinerman, ¶ 24. Article 276 unquestionably is controlling as courts are the institution for service of process in China. Here, the Division has attempted to circumvent this requirement by attempting to effect service "within the territory of [China]" through a U.S. conduit "without permission from the competent authorities." *See* Article 277. This is plainly impermissible under China law, and therefore inconsistent with Rule 141.

The Division is also incorrect that any purported distinction between "civil and commercial" and "administrative" matters renders Article 277 and the Hague Service Convention inapplicable here. China law clearly contemplates that "service of judicial documents in foreign-related administrative case[s]" be addressed through the procedures set forth in the Hague Service Convention. Suppl. Feinerman Decl. ¶¶ 7-9.[6] Indeed, China's view

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[6] Prof. Donald Clarke seems to have omitted from his declaration any reference to the binding decree of the Supreme People's Court in China that makes this clear. *See* Suppl. Feinerman Decl. ¶¶ 7-8.

of the Hague Service Convention seems evident from the SEC's own papers, which provide no indication that, in thirty-five referenced attempts at service, the China Central Authority ever denied the SEC on the grounds that the requests were "administrative." *See* Opp. at 17-18. In any event, Article 277 provides that "in the absence of ... a treaty," such as the Hague Service Convention, requests for "judicial assistance" shall be made and "provided through diplomatic channels." *Id.* ¶¶ 14-16. Thus, the administrative nature of these proceedings does not excuse the Division's noncompliance with China law.

Finally, the Division's examples of circumstances in which service of Chinese entities purportedly can be effected without resort to the Central Authority are wholly inapposite. Neither the Hague Service Convention nor China law prohibits service of Chinese entities abroad where they have consented to service through a U.S. agent, as is the case for service under Section 106(d), or have traveled to the U.S. such that they are amenable to personal service. And the Division's reference to three Ninth Circuit cases involving alternative service in the U.S. under Fed. R. Civ. P. 4(f)(3), *see* Opp. at 12 n.7, is unavailing since the provisions of Rule 4(f)(3) are not the same as the SEC's rule and in any event those cases all presented extenuating circumstances where "plaintiffs have shown some measure of difficulty in effecting service by usual means." *Vanleeuwen v. Keyuan Petrochemicals, Inc.*, No. CV 11-9495 PSG (JCGx), 2012 WL 5992134, at *2 (C.D. Cal. Nov. 30, 2012) ("[A] plaintiff requesting an order pursuant to Rule 4(f)(3) need not prove that other methods of service have been impossible or unduly burdensome, though courts in this jurisdiction have typically granted Rule 4(f)(3) motions when plaintiffs have shown some measure of difficulty in effecting service by usual means."); *see also Brown v. China Integrated Energy, Inc.*, 285 F.R.D. 560 (C.D. Cal. 2012) (defendants' counsel refused to give the plaintiffs information necessary to effect service, and there was reason to

believe defendants were attempting to evade service); *LDK Solar Sec. Litig.*, No. C 07-05182 WHA, 2008 WL 2415186, at *3 (N.D. Cal. June 12, 2008) ("According to the sworn declaration of plaintiffs' counsel, defense counsel has said that 'it might be impossible to serve some of [the unserved defendants].'").[7] Of course, none of these circumstances are present here, *see* Section A.2 *infra*, and so Respondents must be served through China's Central Authority.

2. Any Past Difficulties in Effecting Service Through China's Central Authority Are Not Relevant Here

The Division also contends that its circumvention of the required procedures for serving the OIPs should be excused because its "[p]rior experience ... 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." Opp. at 17. The Division, however, provides no context or detail that could demonstrate that any prior "unsuccessful" attempts at service in China have any bearing on the prospects of successful service in the instant matter. Here, Respondents are prominent Chinese entities with known physical locations in China, and the Chinese authorities are undoubtedly aware of this high-profile proceeding. Nothing in the Opposition offers any basis to conclude that China's Central Authority would be unable to effect service in such circumstances. *Cf. Gateway Overseas, Inc. v. Nishat (Chunian) Ltd.*, No. 05 CV 4260(GBD), 2006 WL 2015188, at *4 (S.D.N.Y. July 13, 2006) ("Plaintiff's mere assertion that attempting to serve defendant . . . through the Hague . . . would be futile is an insufficient defense to defendant' 12(b)(5) motion.").

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[7] The Division does not reference in its Opposition the numerous decisions from other jurisdictions in which courts have refused to order alternative service under Rule 4(f)(3) before the plaintiff has attempted service through the Hague Convention. *See, e.g., In re GLG Life Tech Corp. Sec. Litig.*, No. 11 Civ. 09150 (KBF) (GWG), 2012 U.S. Dist. LEXIS 161171, at *9-10 (S.D.N.Y. Nov. 9, 2012) ("[I]n cases involving service on a person residing in a country that is a signatory to the Hague Convention, courts have often imposed a requirement that litigants first attempt service by means of the Hague Convention before seeking court-ordered alternative service under section 4(f)(3).").

Regardless, the Division's alleged difficulties—in other, previous matters—in successfully serving defendants or respondents in China through the Hague Service Convention do not justify a violation of the Commission's own rules, U.S. treaty obligations, and China law in this proceeding. They certainly do not permit such violations before the Division has even *attempted* service through the proper channels. *Compare In re Alchemy Ventures, Inc.*, SEC Rel. No. 702 (S.E.C. Apr. 27, 2012) (directing service on respondent's U.S. counsel after the Division had made multiple efforts to serve the respondent, and the respondent had made efforts to evade service and had made "no effort to show" that directed service would violate foreign law).[8]

B. The Section 106 Requests Must Be Enforced in Federal Court Before the Commission Can Initiate Administrative Proceedings Against Respondents

The Division rightfully still does not contest that (1) its Section 106 requests can only be enforced in federal court, Opp. at 31-32; and (2) if given the opportunity, a federal court might well determine that the Section 106 requests are unenforceable and refuse to order Respondents to comply with them, *id.* But the Division continues to proffer a construction of Section 106 under which it can somehow sanction Respondents for failing to comply with document requests that a federal court has never enforced and might never enforce. *Id.* (arguing that the SEC may impose sanctions for failure to satisfy "statutory obligations under Section 106," and in such

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[8] The Division also makes for the first time the wholly-belated argument that DTTC somehow waived its objections to service in the DTTC proceeding based on a single line in an early joint motion that was filed solely for limited case management purposes and in no way endorsed the propriety of service. See Brief in Support of Joint Motion for Adjournment of Hearing and Prehearing Conference, filed May 24, 2012. DTTC asserted its objection days later on June 4, 2012, when it filed its answer in that proceeding, which was the first time it was required to raise the objection. SEC Rule of Practice 220(c) ("A defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer."). And DTTC continued to raise it throughout the DTTC Proceeding (in its motion to dismiss) and in the Omnibus Proceeding (in its answer and in the Opening Brief here). *See also* Order Regarding Motion Requesting Extension of Time to File Initial Decision (Feb. 5, 2013) (not finding waiver of DTTC's service objections). Despite numerous opportunities, the Division never before has contended that DTTC waived its objections to service, and instead it admitted in its Opposition Brief in the DTTC Proceeding that Section 106 "says nothing about the proper manner of service in administrative proceedings" and that "DTTC's registered agent has not consented to accept service of the OIP." Opp. (A.F. 3-14872) at 19. The Division's argument is therefore unwarranted and untimely.

circumstances it is "irrelevant whether the Commission could 'enforce' its document demands in federal court."). As the Division acknowledges, this construction of Section 106 is so broad that, according to the Division, an audit firm could violate the federal securities laws—and be subject to sanction without any judicial process—by refusing to produce attorney-client privileged materials in response to a Section 106 request. *See id.* at 39 n.22. Throughout its Opposition, the Division grasps for authority to support such a radical construction of Section 106, but none is available.[9]

The Division argues that the plain language of Section 106 supports its position because it provides that a foreign audit firm "shall produce" its audit workpapers and other documents "to the Commission ... upon request," and that the "willful refusal to comply ... with any request of the Commission" violates SOX. Opp. at 33-34. The Division contends that this language establishes a mandatory and unqualified "statutory obligation" to produce documents and that Section 106's judicial enforcement provision "merely confirms" that the SEC also has "the *option* of seeking judicial enforcement of the demands." *Id.* at 34 (emphasis original). The Division is simply wrong. Respondents are either legally required to comply with the Section 106 requests, or they are not. Section 106 provides (and the Division concedes) that only a federal court can determine the enforceability of a document request. And until it does, there is no enforceable obligation ("statutory" or otherwise) to produce documents under Section 106, and certainly no possibility of a "willful refusal" to do so.

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[9] The Division argues that requiring it first to enforce its Section 106 requests in court before seeking sanctions against Respondents would "substantially undermine the Commission's ability to protect its processes," *see* Opp. at 33, but it offers no reason why that is so. First of all, the Commission has far more straightforward options than this disciplinary proceeding to deal with the profession-wide problem presented here. For example, it could initiate a rulemaking proceeding to address solutions to the inability of all Chinese audit firms to produce audit workpapers without the risk of potential criminal sanctions in China. But the Commission instead opted to pursue this issue through Rule 102(e) proceedings on the basis of an alleged violation of Section 106, and so it must deal with the applicable legal standards as adopted by Congress, including the requirement of judicial enforcement and, ultimately, proof of a "willful refusal" to produce the documents.

The Division's reliance on *Uniroyal* and *International Union* undermines its contention that an agency can bypass the question of a discovery request's validity and proceed directly to sanctions. *See* Opp. at 32-33 (citing *Uniroyal, Inc. v. F. Ray Marshall*, 482 F. Supp. 364 (D.D.C. 1979); *Int'l Union v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972)). Neither case bypassed the objections of a document request recipient and proceeded directly to sanctions. In *Uniroyal*, the validity of the document requests could be determined by an administrative law judge in connection with the imposition of sanctions, but only because, unlike Section 106, the relevant legal framework did not require judicial enforcement in court of the discovery requests at issue.[10] *Uniroyal*, 482 F. Supp. at 367-68. And while *International Union* permitted the NLRB to draw an adverse inference based on a "really intransigent party['s]" noncompliance with a subpoena without first seeking judicial enforcement, the court held that would not be permissible where, as here, a defendant offers an "excuse for its nonproduction of the contested documents." *Int'l Union*, 459 F.2d at 1339 & n.45 (explaining that the adverse inference rule is premised on the "commonsense inference that if the evidence would do the suppressing party any good, he would readily produce it," and is "inapplicable in situations where a party has a constitutional right to suppress the evidence in question").

The Division also continues to argue that Section 106 is "akin" to the provisions governing the Commission's examination authority, which "do not require judicial affirmation of their 'validity.'"[11] Opp. at 37. The principal reason for this kinship, argues the Division, is that

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[10] Moreover, the holding in *Uniroyal* was highly dependent on the fact that "[g]overnment contracts have traditionally occupied a special place in the law, and the government has generally been deemed to be vested with far greater powers with respect to such contractors than it is with respect to others, including those merely subject to general administrative regulations." 482 F. Supp. at 369.

[11] This is also the Division's core argument for why its construction of Section 106 does not pose serious concerns under the U.S. Constitution and Administrative Procedures Act. *See* Opp. at 42-43 (arguing that Respondents "proffer no valid reason why the Commission ... may not... direct findings as to whether a firm willfully refused to comply with a *statutory obligation to produce documents*" (emphasis added)); *id.* at 43 (arguing

both Section 106 and the examination provisions use the term "shall." *See* 15 U.S.C. § 7216(b)(1) (foreign audit firm "shall produce" audit workpapers); *id.* § 78q(a) (certain entities "shall . . . furnish such copies . . . as the Commission, by rule, prescribes); *id.* §80a-30(b) (certain records "shall be subject" to examination). But the Division ignores two crucial points. First, statutes governing SEC investigative subpoenas—which the Division admits do require judicial affirmation—similarly employ mandatory language. *See, e.g.*, 15 U.S.C. § 78u(b) (authorizing the SEC to "*require* the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry" (emphasis added)); *id.* § 80b-9(b) (same); *id.* § 80a-41(b) (same). Section 106's use of a mandatory term like "shall" therefore provides no basis for distinguishing it from SEC subpoena provisions. Second, unlike Section 106 and every provision governing SEC subpoenas, none of the examination provisions include a judicial enforcement provision and none reserve sanctions for instances of "willful refusal."[12] *Compare id.* § 78q(a) (stating only that regulated entity "shall . . . furnish" records, without referencing judicial enforcement or willfulness). These are critical differences and must not be ignored in construing Section 106. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (courts should "give effect, if possible, to every clause and word of a statute").[13]

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the decision to institute these proceedings is not arbitrary and capricious because "Section 106 demands are not 'effectively equivalent...' to subpoenas"). But as demonstrated above, Section 106 requests are properly viewed as investigative demands, and therefore must be subject to judicial enforcement in order to (1) provide recipients with due process and (2) be reconciled with the Commission's existing rules, policies, practices, and prior conduct in this case.

[12] For these reasons, the Division's reliance on the settled order in *In re Dominick & Dominick, Inc.*, Rel. No. 34-29243 (May 29, 1991)—which involved a broker-dealer's obligations under the examination and inspection provisions—is entirely misplaced.

[13] The Division also conflates the SEC's extensive regulatory oversight and authority over broker-dealers and investment advisers with its more limited oversight of accounting firms. See Opp. at 31. For example, broker-dealers and investment advisors are subject to routine, periodic, or special examinations by the SEC, and are required to maintain certain books and records for that purpose. *See* 15 U.S.C. § 78o; *see also* 17 C.F.R. §§ 240.17a-3, -4. The SEC itself does not have similar authority over accounting firms—particularly foreign accounting firms like Respondents. Section 106's procedural safeguards, including that document requests be enforced in federal court, reflects this more limited oversight role.

Finally, the Division engages in a prolonged and unsuccessful effort to show that its distorted construction of Section 106 maintains an even balance between domestic and foreign audit firms. The bottom line, however, is that the Commission itself cannot demand that domestic firms produce documents related to their domestic audits without a subpoena, and it cannot sanction them for the failure to produce such documents without judicially enforcing the subpoena. It is of no moment whether, under Section 105, the PCAOB can sanction domestic audit firms for noncompliance with document demands without first enforcing them in federal court, because that statute applies to *PCAOB* document demands only. If anything, the express inclusion of this authority in Section 105, but not in Section 106, suggests a deliberate choice by Congress. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (where Congress includes "particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Recognizing the weakness of its position, the Division attempts to provide a *post hoc* rationale for the disparate treatment between domestic and foreign firms that results from its proffered construction of Section 106. *See* Opp. at 40 ("any such difference" is "not unreasonable" because "[f]oreign firms ... that elect to engage in U.S. capital markets pose obviously higher risks ... ."). But that rationale is completely inconsistent with the plain language of the statute and its legislative history. *See* 15 U.S.C. § 7216(a)(1) (foreign firms are subject to SOX only "in the *same* manner and to the *same* extent" as domestic public accounting firms) (emphasis added); S. Rep. No. 107-205, at 11 (2002) ("there should be no difference in treatment of a public company's auditors . . . simply because of a particular auditor's place of operation"). It is also inconsistent with well-established principles of international comity that require respect for foreign law in exactly these circumstances. *In re Sealed Case*, 825 F.2d 494,

498 (D.C. Cir. 1987) (it "causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question").[14] Indeed, it is even inconsistent with the Division's own prior briefs in the DTTC Proceeding. DTTC Proceeding, Opp. (A.F. 3-14872) at 5 (quoting S. Rep. No. 107-205, at 11-12 (2002)). The Division's latest arguments do not justify its extreme interpretation of Section 106.

CONCLUSION

For the reasons stated above, summary disposition should be granted and this proceeding should be dismissed.

Dated: March 8, 2013

Respectfully submitted,

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[14] To the extent that the Division is suggesting that it has, or ever would, bring a Section 102(e) proceeding against a domestic firm for failure to produce documents either in place of, or prior to, seeking to enforce the subpoena in federal court, such an assertion is fanciful. Respondents know of no case in which the Division has ever proceeded in that fashion, and cannot imagine that any such effort would be successful if attempted. There is no justification for subjecting the China firms to this disciplinary proceeding when the Division has never and never could do the same to domestic firms.

CERTIFICATE OF COMPLIANCE

I certify that Reply Memorandum in Support of Respondents' Motion for Summary Disposition as to Certain Threshold Issues ("Reply") complies with the length limitations of SEC Rule of Practice 154(c) because it contains 6,581 words (as determined by the Microsoft Word 2010 word-processing system used to prepare the Reply), excluding attachments and other parts of the Reply exempted by Rule 154(c).

Dated: March 8, 2013

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
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In the Matter of	)
BDO China Dahua CPA Co., Ltd.;	)
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Deloitte Touche Tohmatsu CPA Ltd.;	)
PricewaterhouseCoopers Zhong Tian CPAs Limited	)
Respondents.	)

SUPPLEMENTAL DECLARATION OF JAMES V. FEINERMAN
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I, James V. Feinerman, declare as follows:

1. I have been retained by counsel for Deloitte Touche Tohmatsu CPA Ltd. (now known as Deloitte Touche Tohmatsu CPA, LLP) ("DTTC") in the above-captioned action. I submitted a declaration in this matter on February 1, 2013 in support of Respondents' Motion for Summary Disposition as to Certain Threshold Issues and Memorandum in Support. I submit this supplemental declaration in response to the Declaration of Donald Clarke submitted in support of the Division of Enforcement's Consolidated Opposition to Respondent's Motions for Summary Disposition as to Certain Threshold Issues.

2. I incorporate herein by reference the qualifications and understanding of the factual background set forth in my earlier declaration of February 1, 2013.

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

4. My opinions in this supplemental declaration address whether the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, (the "Hague Service Convention") and China's Civil Procedure Law, specifically Article 277, apply to this proceeding because it may be characterized as an "administrative" proceeding.

Summary of Opinions

5. For the reasons stated in my prior declaration and the additional reasons set forth below, I conclude that under Chinese law, service of documents originating from an administrative proceeding must be made under the terms of the Hague Service Convention. Even if this proceeding fell outside of the Hague Service Convention, because of the requirements of Article 277, service must be effected via other diplomatic channels. My understanding is that the Division of Enforcement has done neither of these things in attempting to effect service on DTTC.

The Hague Service Convention Applies to Administrative Proceedings

6. Professor Clarke stated in his Declaration that the Hague Service Convention does not apply to this proceeding because this is an administrative proceeding and Chinese law only applies the Hague Service Convention to "civil and commercial matters" and therefore excludes administrative matters.

7. Administrative proceedings fall within the Hague Service Convention, as the highest court in China recognized nearly a decade ago. On July 20, 2004 the Supreme People's Court of the People's Republic of China issued a binding decree on the lower courts in China that have responsibility for officiating document requests from foreign-related administrative cases. General Office of Supreme People's Court (No. 348), "Circular of the General Office of the Supreme People's Court on the Service Abroad of Judicial Documents in Foreign-related Administrative Cases" (the Circular) (Exhibit A).

8. Having anticipated that lower Chinese courts would be handling increasingly more foreign-related administrative cases after China's accession to the World Trade Organization, this binding Circular mandates that documents to be delivered in a foreign administrative proceeding must be delivered through the mechanisms of the Hague Service Convention and in accordance with Chinese law:

> Where any judicial document in a foreign-related administrative case is to be delivered to any country which is a party to the Hague Convention, such document shall be delivered in a way as provided in the Hague [Service] Convention by requesting the country

concerned to provide judicial assistance by referring to the Hague Convention and the relevant procedures as provided by China's domestic law.

9. Thus, it is apparent that under Chinese law, "foreign-related administrative cases" are to be dealt with in the same manner as "civil and commercial matters"; by following the terms of the Hague Service Convention and Chinese law.

10. Various other countries, and the Special Commission on the practical operation of the Hague Service Convention, have adopted a similar view. Several countries' highest courts have held that matters considered in their legal regimes to fall outside a restrictive interpretation of "civil or commercial matters" are to be governed by the Hague Service Convention. *See, e.g.*, HR 21 February 1986, NJ 1985, p. 149 (Arcalon / Ramar), *RvdW* 1986, p.50 & HR 15 June 2000 NJ 2000, p. 642 (Neth.) (request from Bankruptcy court); *Re State of Norway's Application*, (1989) All Eng. Rep. 1989 (House of Lords), p.745 (UK House of Lords) (request from tax case); Oberlandesgericht Munich, (OLGZ) 9 May 1989, RIW, 1989, p.483 (Germany) (request re punitive damages). Additionally, the Special Commission in 1989 and again in 2003 found that "civil and commercial matters" should be interpreted broadly and without exclusive reference to one or another country's laws. *Report of the 1989 Special Commission on the practical operation of the Hague Service Convention*, op. cit., paras. 7-10 & *Conclusion and Recommendations of the 2003 Special Commission on the practical operation of the Hague Service Convention*, op. cit. No. 69.

Article 277 Applies to Administrative Proceedings

11. Professor Clarke stated in his Declaration that Article 277 of the Civil Procedure Law of the People's Republic of China (the Civil Procedure Law) is not applicable to this case because it applies only to civil, and not administrative proceedings. The Supreme People's Court interpretation of Chinese administrative law, makes clear that Article 277 applies in this case.

12. In addition, Article 97 of the Interpretation of the Supreme People's Court on Several Issues Regarding Implementation of the PRC Administrative Procedure Law states:

> The people's court adjudicating administrative cases may, in addition to following the Administrative Procedure Law and this Interpretation, apply by analogy the relevant civil procedure provisions. (Exhibit B)

13. Where, as here, there is no Administrative Procedure law that governs service of documents, Article 277 of the Civil Procedure Law is applicable pursuant to Article 97.

14. Article 277 provides that judicial assistance should be requested and provided through channels either stipulated by international treaties to which China has acceded or through

diplomatic channels. Thus, even if administrative cases were not covered by the Hague Service Convention under Chinese law, the service attempted by the SEC in this proceeding independently violated Article 277.

15. Under Article 277, service may be effected in only two ways, either through an applicable treaty mechanism for service of process between China and a foreign country, or if no such treaty is applicable, through diplomatic channels:

> A request for providing of judicial assistance shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China; *if there is no treaty regarding judicial assistance between China and the foreign country, such a request may be made through diplomatic channels.* (emphasis added)

16. For this reason, even if the Hague Service Convention did not apply to the service of documents in administrative cases such as this one, service must still be effected through diplomatic channels, which provide the only other legal route for service according to Chinese law.

Article 277 and the Hague Service Convention Apply to the SEC's Service of the OIP on Respondents' U.S. Member Firms

17. Professor Clarke states further that Article 277 and the Hague Service Convention are inapplicable because they would only concern documents served in the territory of China, and the Division of Enforcement attempted to serve its documents on entities in the United States.

18. I understand, as set out in my prior declaration, that the Division of Enforcement sent documents to U.S.-based firms designated by the China-based firms pursuant to Section 106(d) of Sarbanes-Oxley as agents to accept "requests" and "process, pleadings, or other papers in any action to enforce" a Section 106 request in an attempt to effect service on the firms *in* China.

19. In his declaration, Professor Clarke opines that "[s]ervice on a Chinese national in the United States, for example, need not comply with the Hague Convention." Clarke Decl. at ¶25. That is not the situation here. The Division of Enforcement did not serve a Chinese citizen who was physically in the United States or take the analogous step of serving an agent appointed for this purpose. The Chinese firms did not appoint an agent for service of the OIP in this proceeding, as foreign private issuers (FPIs) are required to do. SEC Form F-X requires FPIs to appoint an agent for service of process, in "any investigation or administrative proceeding

conducted by the Commission." Unlike FPIs, the China firms did not appoint the U.S.-based firms to accept service of documents for an administrative proceeding by the SEC.

20. Finally, Professor Clarke suggests that the Division of Enforcement's service did not occur within the territory of China and China law is inapplicable because the Division of Enforcement mailed the OIP to the U.S. firms in the United States. That is a fiction. The Division of Enforcement sent the OIP to the U.S. firms to forward to the Chinese firms within the territory of China. Article 277 and the Hague Service Convention are applicable in this matter.

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

Executed on March 8, 2013 in Washington, D.C.

James V. Feinerman

EXHIBIT A

【Title】Circular of the General Office of the Supreme People's Court on the Service Abroad of Judicial Documents in Foreign-related Administrative Cases[现行有效]
【法规标题】最高人民法院办公厅关于向外国送达涉外行政案件司法文书的通知 [Effective]

Date issued:	07-20-2004	发布日期：	2004-07-20
Effective date:	07-20-2004	生效日期：	2004-07-20
Issuing authority:	Supreme People's Court	发布部门：	最高人民法院
Area of law:	Administrative Litigation	类别：	行政诉讼

Circular of the General Office of the Supreme People's Court on the Service Abroad of Judicial Documents in Foreign-related Administrative Cases

最高人民法院办公厅关于向外国送达涉外行政案件司法文书的通知

（法办[2004]346号）

（相关资料：相关论文1篇）

各省、自治区、直辖市高级人民法院，解放军军事法院，新疆维吾尔自治区高级人民法院生产建设兵团分院：

我国加入世界贸易组织以后，我国法院审理的涉外行政案件将不断增加，为保护中外当事人的合法权益，确保我国法院审判工作顺利进行，现可参照我国加入的海牙民商事送达公约，请求外国协助送达我国涉外行政案件司法文书。现就我国向外国送达涉外行政案件司法文书的做法通知如下：

对于需要向海牙民商事送达公约成员国送达涉外行政案件司法文书的，可参照1965年订立于海牙的《关于向国外送达民事或商事司法文书和司法外文书公约》和我国内相关程序向有关外国提出司法协助请求，通过公约规定的途径送达。

(General Office of the Supreme People's Court No. 346 [2004])

2004年7月20日

The Higher People's Courts of all provinces, autonomous regions and municipalities directly under the Central Government, the PLA Military Court, and Higher People's Court of Xinjiang Uygur Autonomous Region, the Production and Construction Corps Branch:

（相关资料：相关论文1篇）

Chinese courts will handle increasingly more foreign-related administrative cases after China's accession to WTO. For protecting the legitimate rights and interests of Chinese and foreign parties and ensuring that Chinese courts conduct the trials well, China may request a foreign country to provide assistance in the service of judicial documents in a foreign-related administrative case handled by a Chinese court by referring to the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters [1965] (hereinafter the "Hague Convention") to which China has acceded. The method for China to deliver abroad judicial documents in foreign-related administrative cases is hereby stipulated as follows:

Where any judicial document in a foreign-related administrative case is to be delivered to any country which is a party to the Hague Convention, such document shall be delivered in a way as provided in the Hague Convention by requesting the country concerned to provide judicial assistance by referring to the Hague Convention and the relevant procedures as provided by China's domestic law.

July 20, 2004

EXHIBIT B

第八章 其他

Chapter Eight Others

第九十七条 人民法院审理行政案件，除依照行政诉讼法和本解释外，可以参照民事诉讼的有关规定。

Article 97 The people's court adjudicating administrative cases may, in addition to following the Administrative Procedure Law and this Interpretation, apply by analogy the relevant civil procedure provisions.