



UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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

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In the Matter of :

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

The Honorable Cameron Elliot,  
Hearing Officer

**DIVISION OF ENFORCEMENT’S OPPOSITION TO RESPONDENTS’  
REQUEST FOR ISSUANCE OF A SUBPOENA DIRECTED AT THE SEC**

The Division of Enforcement (“Division”) of the U.S. Securities and Exchange Commission (“SEC” or “Commission”) hereby respectfully opposes the request (“Request”) of respondent firms (“Respondents”) for issuance of the subpoena attached to their motion as Exhibit 1 (the “Proposed Subpoena”). The Proposed Subpoena, broadly summarized, seeks documents since January 1, 2011 related to (1) the SEC’s communications with the China Securities Regulatory Commission (“CSRC”) about the SEC’s requests for assistance to the CSRC; (2) communications between the Chinese government and the SEC regarding audit workpapers associated with Respondents' clients; and (3) communications between the United States government and/or the Public Company Accounting Oversight Board (“PCAOB”) and the Chinese government about cross-border issues, including the recent PCAOB-CSRC

Memorandum of Understanding. As discussed below, the Court should deny the Request and not issue the Proposed Subpoena.

### **Background**

The Order Instituting Proceedings for the DTTC Client A proceeding, dated May 9, 2012 (File No. 3-14872) (“DTTC OIP”), alleges, in relevant part, that “Commission staff has made extensive efforts to obtain [DTTC]’s audit work papers connected to the firm’s independent audit work for an issuer-client (‘Client A’) in relation to a Commission investigation into potential accounting fraud” (DTTC OIP ¶ 3); and “[c]ommencing in June 2010, Commission staff sought to obtain the relevant audit work papers through international sharing mechanisms, however, these efforts have been unsuccessful.” (DTTC OIP ¶ 9). The Order Instituting Proceedings for the Omnibus proceeding, dated December 3, 2012 (File No. 3-15516) (“Omnibus OIP”), does not contain similar allegations with respect to the audit workpapers of Respondents’ issuer-clients that are at issue in the Omnibus proceeding.

On May 15, 2013, following this Court’s order of May 9, 2013 agreeing to the parties’ Stipulated Protective Order (as modified by the Court), the Division made a voluntary production of certain communications between the SEC and the CSRC.<sup>1</sup> These communications pertain to the SEC’s requests for assistance to the CSRC for the audit workpapers of DTTC related to three of its China-based issuer-clients: DTTC Client A; Omnibus Client G; and Longtop Financial Technologies Limited (“Longtop”).<sup>2</sup> The communications are collectively referred to here as the “SEC-CSRC Workpaper Communications.”

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<sup>1</sup> The May 15, 2013 production followed the Division’s productions to Respondents of documents from the files of the 10 underlying investigations, under Rule of Practice 230(a), in late 2012 and early 2013. These earlier productions totaled hundreds of thousands of documents and millions of electronic images.

<sup>2</sup> Longtop is not implicated in this proceeding but its workpapers are the subject of the SEC’s subpoena-enforcement proceeding against DTTC currently pending in the U.S. District Court for the District of Columbia (*SEC v. DTTC*, No. 11mc512 GK).

All or nearly all of the SEC-CSRC Workpaper Communications are protected by Section 24(d) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. 78x(d)] concerning international communication with foreign regulators pursuant to the International Organization of Securities Commissions (“IOSCO”) Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (“MMOU”), and/or Exchange Act Section 24(f) [15 U.S.C. 78x(f)] concerning the sharing of information with any foreign securities authority or any foreign law enforcement authority. *See* Stipulated Protective Order at 2.

On May 15, 2013, the Division produced all of the SEC-CSRC Workpaper Communications in its possession from June 7, 2010, the date of the first request for assistance to the CSRC concerning DTTC’s Client A, to December 3, 2012, the date of the Omnibus OIP.<sup>3</sup> The Division made this production in the spirit of compromise; because the documents arguably related to the allegations in Paragraphs 3 and 9 of the DTTC OIP, even if they did not relate to any allegations in the Omnibus OIP; and because some of the documents related to information obtained by the Division prior to the institution of proceedings, in connection with the investigations leading to the Division’s recommendations to institute proceedings (*see* Rule 230(a) of Commission’s Rules of Practice). The Division made clear that, in agreeing to produce these documents, the Division was not conceding their relevance to these proceedings. Request, Ex. 2.

### Argument

The Court should deny Respondents’ request for issuance of the Subpoena.

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<sup>3</sup> The Division partially redacted certain of the SEC-CSRC Workpaper Communications based on relevance, privilege, or other sensitivities explained in the Division’s cover letter accompanying the May 15, 2013 production to Respondents’ counsel. *See* Request, Ex. 2. Respondents do not take issue with these redactions in the Request.

**A. The Requested Documents Are Irrelevant To The Merits Of These Proceedings**

The Proposed Subpoena seeks documents that are irrelevant to these proceedings, as follows.

1. Documents That Post-Date The Omnibus OIP Cannot Bear On Respondents' Willful Conduct Before the OIP. The Commission instituted these proceedings based on Respondents' prior conduct. Respondents committed their "willful violations" *before* the proceedings were brought. These violations were complete, at the latest, when Respondents submitted responses to Wells notices in which they continued willfully to refuse to produce documents in response to the requests. Whether the SEC can obtain certain of the requested workpapers from the CSRC (or through other alternative means) *after* the OIPs were issued is irrelevant to the merits of the Division's claims against Respondents. Communications related to the SEC's efforts in this regard after the OIPs are similarly irrelevant.

2. The SEC Has Sole Discretion To Allow Foreign Firms To Provide Requested Documents Through Alternative Means Under Section 106(f). The requested documents are irrelevant for the additional reason that they cannot demonstrate a permissible "alternative means" under Sarbanes-Oxley Section 106(f).<sup>4</sup> That provision states: "Notwithstanding any other provisions of this section, the staff of the Commission or the [PCAOB] 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 [PCAOB]." 15 U.S.C. § 7216(f). Thus, Section 106 gives the Commission the *option* of

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<sup>4</sup> The same is true for the SEC-CSRC Workpaper Communications that the Division already produced. Whether the SEC had, or has now, alternative means of obtaining the documents sought by the Section 106 requests at issue in this proceeding is irrelevant to whether the Respondents willfully violated Sarbanes-Oxley by willfully refusing to comply with the Section 106 requests. As the Division has previously indicated, it plans to seek leave to file a motion for summary disposition in which the Division will further explain the narrow scope of the willfulness inquiry under Rule 102(e).

allowing a foreign public accounting firm to satisfy its duties under that section by producing audit work papers to foreign regulators; however, that is a discretionary decision. Whether the SEC could have obtained certain of the requested workpapers by exercising its discretion under Section 106(f) is irrelevant to whether the Respondents willfully refused to comply with the SEC's direct requests to them. Communications related to the SEC's efforts in this regard after the OIPs are similarly irrelevant.

3. Respondents Fail To Show Why The Requested Documents Should Be Expected To Bear On Their Good Faith Or Other Individual Circumstances. Respondents contend the SEC-CSRC Workpaper Communications are "highly relevant" to Respondents' "good faith" and to "the Chinese legal impediments to Respondents' direct production to the SEC." Request at 3. This claim is unsupported by any reference to the documents. These documents deal primarily with the SEC's efforts to obtain the cooperation of the CSRC, not the individual communications between the Respondents and the CSRC. Thus, Respondents fail to show why similar communications or other requested documents that post-date the OIP should be expected to bear on their defenses.

4. The Proposed Subpoena Is Vastly Overbroad. The Proposed Subpoena seeks voluminous materials that are privileged and sensitive and have nothing to do with audit workpapers.

(a) Item 1 seeks information concerning "cross-border cooperation" and "requests for assistance." These are large topic areas that include substantial volumes of information protected by the investigatory law enforcement privilege, among other privileges and protections, and other sensitive information. Since January 1, 2011 (the start date of the Proposed Subpoena), the SEC's Office of International Affairs ("OIA") has sent nine requests

for assistance to the CSRC that do *not* involve audit workpapers (First Declaration of Alberto Arevalo ¶¶16, 18, 19, 21, 24, 13, 57 (Request Ex. 3); Second Declaration of Alberto Arevalo ¶¶7, 8 (Request Ex. 4)). The particular details of these requests and other communications concerning “cross-border cooperation” (unrelated to audit workpapers) are irrelevant to these proceedings. As to the three requests concerning audit workpapers, the Division already has produced the relevant documents.

(b) Item 3 seeks information concerning communications among the entire U.S. and Chinese governments, as well as the PCAOB, concerning “inspections of accounting firms, or any other international or cross-border issues,” “including but not limited to” (a) certain U.S.-China Strategic and Economic Dialogues, and (e) the PCAOB’s recent Memorandum of Understanding (“MOU”) with the CSRC, entered into well after the OIPs. These topic areas are far afield from any relevant issue in these proceedings. As discussed above, whether “alternative means” are “available” to the SEC is irrelevant to whether Respondents willfully violated Sarbanes-Oxley. *See supra* Argument A.2. In any event, contrary to Respondents’ contention, the MOU does not show “that there are clearly alternate means of production available” to the SEC for the workpapers that it sought from Respondents in the underlying investigations at issue here. Request at 5. There has long been in place the IOSCO MMOU to which the SEC and the CSRC are both signatories, but that agreement has not resulted in the production of any audit workpapers to the SEC. First Arevalo Decl. ¶¶36, 40, 60-64; Second Arevalo Decl. ¶15.

5. The SEC-CSRC Workpaper Communications Do Not Show That These Proceedings Have An Improper Purpose. Respondents contend that these proceedings “are being used by the SEC primarily as a negotiating tool in its ongoing dialogue with the Chinese Government.” Request at 3; *see id.* at 5 (arguing that “issues central to this proceeding” include

“the conduct of the SEC and the use of these proceedings”). This claim is unsupported and provides no justification for seeking additional discovery from the SEC. At most the SEC-CSRC Workpaper Communications and the Second Arevalo Declaration show that the SEC has pursued these proceedings while also maintaining discussions with the CSRC. This is not improper. The Division has always been transparent that it would welcome a decision by the CSRC to facilitate the productions of complete sets of audit workpapers requested by the SEC consistent with existing international protocols.

#### **B. The Division Made A Complete Production**

The Division’s production of the SEC-CSRC Workpaper Communications that pre-dated the December 3, 2012 Omnibus OIP was complete. Contrary to Respondents’ contentions, the December 3, 2012 cutoff was not “arbitrary.” It was the date of the OIP, and, therefore, the last possible date on which the Division could have obtained documents “prior to the institution of proceedings in connection with the investigation leading to the Division’s recommendation to institute proceedings.” Rule of Practice 230(a). Respondents note that the last correspondence in the production is dated November 6, 2012, and that the SEC met with the CSRC on November 26, 2012. Correspondence referencing this meeting is contained in Communication From SEC to CSRC Number 47, and Communication From CSRC to SEC Numbers 24, 25, and 26 on the logs that the Division provided to Respondents. Request Ex. 2.

The Division produced all responsive communications that it told Respondents that it would provide (*i.e.*, those pertaining to the SEC’s requests for audit workpapers). At no time did the Division commit to collecting and reviewing internal “notes, agendas, briefing papers, or any other documents reflecting the content of meetings.” It would be unduly burdensome to collect these documents and to prepare them for production. *See infra* Argument Part C. This is

particularly true because internal SEC documents referencing communications with the CSRC could not materially affect resolution of these proceedings. To the extent the SEC's relations with the CSRC are relevant at all, the simple fact is that the CSRC has not produced any audit workpapers to the SEC despite the SEC's numerous requests over the course of three years that it do so. *See, e.g.*, Second Arevalo Decl. ¶¶15-16.

**C. The Proposed Subpoena Would Impose An Undue Burden On Multiple SEC Divisions And Offices**

The Request should be denied because it would impose an undue burden on multiple Divisions and Offices within the SEC. Items 1 through 3 of the Proposed Subpoena seek "all documents . . . reflecting, or referring" to the various categories of communications, meetings, negotiations, or agreements identified by these requests and their sub-parts. This implicates voluminous internal, non-public documents from scores of SEC custodians, many if not most of which likely are subject to one or more privileges or protections from disclosure. The Proposed Subpoena would require the SEC to gather and review potentially responsive e-mails and/or hard copy documents (such as notes) from many custodians within the Division of Enforcement alone: (1) attorneys and accountants from at least eight different investigative teams in various SEC regional offices and Washington, D.C.; (2) pertinent litigation counsel; and (3) certain staff involved in cross-border issues. The SEC would have to make additional, collection efforts within the SEC's OIA, Office of Chief Accountant, Division of Corporation Finance, and Office of the Chairman, among other offices and divisions. And once gathered and identified as responsive, most of the documents very likely would be subject to one or more privileges or protections from disclosure, including, but not limited to, the attorney-client privilege, work product protection, deliberative process privilege, and the investigatory/law enforcement privilege. Requiring the SEC to gather, review, and produce and/or put on a privilege log all



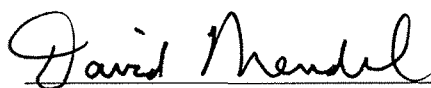
documents responsive to this request would impose an undue burden on the SEC and would threaten to undermine prompt resolution of these proceedings.

### CONCLUSION

For the reasons set forth above, the Division respectfully submits that that Respondents' Request be denied.

Dated: May 28, 2013

Respectfully submitted,



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