UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72134 / May 9, 2014

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3552 / May 9, 2014

Admin. Proc. File Nos. 3-14872, 3-15116

| | |
|---|---|
| In the Matter of<br><br>BDO CHINA DAHUA CPA CO., LTD., ERNST & YOUNG HUA MING LLP, KPMG HUAZHEN (SPECIAL GENERAL PARTNERSHIP), DELOITTE TOUCHE TOHMATSU CERTIFIED PUBLIC ACCOUNTANTS LTD., and PRICEWATERHOUSECOOPERS ZHONG TIAN CPAS LIMITED | ORDER DENYING THE DIVISION'S MOTION TO STRIKE THE NOTICE OF WITHDRAWAL OF APPEARANCE AND SETTING A BRIEFING SCHEDULE |

These administrative proceedings were instituted pursuant to Rule 102(e)(1)(iii) of our Rules of Practice.[1] They center on the alleged willful refusal of respondents, all accounting firms located in the People's Republic of China, to provide the Commission with audit work papers in violation of their obligations under Section 106 of the Sarbanes-Oxley Act as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[2] On January 22, 2014, the law judge issued an initial decision. That decision denied the privilege of practicing or appearing before the Commission to four of the five respondents for a period of six months.[3] It censured the remaining respondent, Dahua CPA, Ltd. (Dahua).[4]

On February 12, 2014, the Division filed a petition for review and sought review of, among other things, "that portion of the Initial Decision that would exclude Dahua from a practice bar." On February 21, DLA Piper LLP (DLA), which had previously entered an appearance on behalf of Dahua and defended it in the proceedings before the law judge, filed a Notice of Withdrawal of Appearance that purported to be effective February 26. The notice did

1 17 C.F.R. § 201.102(e)(1)(iii).

2 15 U.S.C. § 7216(b)(1).

3 The petition for review and the motion for leave to adduce additional evidence filed by these four respondents will be addressed by separate order.

4 Dahua was formerly affiliated with BDO International Limited and did business as BDO China Dahua CPA Co., Ltd.

not provide a reason for the purported withdrawal and did not identify substitute counsel. The Division filed an opposition to the notice and moved to strike it. DLA filed a response stating in essence that the scope of its agreed-upon engagement with Dahua was limited to the hearing before the law judge only and that it has been discharged as counsel. Attached to the response is a declaration by Zhang Yan, who is described as Dahua's "international liaison," reciting the same facts.

On March 20, Dahua filed, "[p]ursuant to Rule of Practice 102(d)(2)," a notice of appearance "by and through its representative partner Zhang Yan, 11/F B Block Union Square 5022 Binhe Road Shenzhen, China 518033, telephone no. +86 755 82966044, facsimile no. +86 755 82900965, email yan_zhang@dahua-cpa.com." Dahua unqualifiedly represented that it would "accept documents in English," "communicate with the Commission in English," and "abide by the previously agreed terms of the . . . Stipulated Protective Order" and "all other orders concerning confidential treatment of documents."[5]

## DISCUSSION

We have determined to deny the Division's motion to strike DLA's notice of withdrawal.

### A. The requirements of Rule of Practice 102(d)(4)

The Division argues that the Commission should strike the February 21 notice of withdrawal under Rule of Practice 102(d)(4) because DLA has not established good cause insofar as withdrawal would have an adverse effect on the orderly adjudication of this matter. DLA responds that Rule 102(d)(4) does not require withdrawing counsel to offer a reason for withdrawal and that Commission action is unnecessary to make its withdrawal effective.

In our view, a notice of withdrawal that complies with the technical requirements of Rule 102(d)(4) generally is self-effectuating; no additional showing of good cause need be made. That rule provides, among other things, that "[a]ny person *seeking* to withdraw his or her appearance in a representative capacity shall file a notice of withdrawal with the Commission . . . . The notice shall be filed at least five days before the *proposed* effective date of the withdrawal."[6] We reject the Division's contention that italicized language of the rule—*i.e.*, "seeking" and "proposed"—implicitly confers upon us the discretion to strike (or otherwise to reject) a notice of withdrawal whenever we deem appropriate. As a countervailing textual

---

[5] The document management system footer of Dahua's March 20 notice of appearance has some similarities in formatting to that of DLA's February 21 notice of withdrawal (and filings by DLA in other proceedings). We do not draw any further conclusions, but we note that the nondisclosure of attorney participation in the preparation of a filing might raise serious concerns. Among other things, it could permit lawyers to evade the certifications required by Rule 153, 17 C.F.R. § 201.153. *See, e.g.*, *Duran v. Carris*, 238 F.3d 1268, 1273-74 (10th Cir. 2001) (per curiam); *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971).

[6] 17 C.F.R. § 201.102(d)(4) (emphasis added).

matter, the rule's consistent use of the word "notice" (as opposed to "motion") is a strong indication that a notice of withdrawal neither seeks nor requires Commission approval.[7] Furthermore, we specifically revised Rule 102(d)(4) in 2004 to remove the prior requirement that counsel file a motion to withdraw. Our commentary accompanying the revisions makes clear that the need for Commission action to make withdrawal effective was "eliminate[d]" and that "only" notice was required.[8] For these reasons, we conclude a notice of withdrawal properly filed and served in accordance with Rule 102(d)(4) is effective without a showing of good cause.

This conclusion does not, however, dispose of the Division's motion to strike. Standing alone, the February 21 notice was deficient because it did not formally apprise an individual authorized to act for Dahua of DLA's intent to withdraw its appearance on Dahua's behalf. Nonetheless, as we also shall explain, under the circumstances of this case—and relying on Dahua's representations as set forth in its March 20 notice of appearance—we find it unnecessary to grant the Division's motion to strike and, accordingly, have determined to deny it.

### B. DLA's notice of withdrawal was deficient because it was not properly served on Dahua

The February 21 notice of withdrawal does not comply with Rule 102(d)(4) because it does not reflect that it was served on anyone at Dahua, let alone someone with authority to appear for Dahua under Rule 102(b). Rule 102(d)(4) requires that a notice of withdrawal "be served on the parties."[9] This requirement ensures "timely notice to both the Commission and the parties of the withdrawal."[10] The "parties" include "*any* person named as a respondent," necessarily embracing the respondent for which counsel entered an appearance.[11] In other words, we require that an attorney who wishes to withdraw his or her appearance serve the notice of withdrawal on the attorney's *own client*—here, Dahua.

---

7 *See, e.g.*, *United States v. Harris*, 491 F.3d 440, 444 (D.C. Cir. 2007) (contrasting a "notice" with a "motion," which "means '[a]n application made to a court or judge'").

8 *Adopting Release*, Exchange Act Release No. 49412, 2004 WL 503739, at *8 (Mar. 12, 2004), 69 Fed. Reg. 13166, 13169 (Mar. 19, 2004); *see also Proposed Rule*, Exchange Act Release No. 48832, 2003 WL 22827684, at *8 (Nov. 23, 2003), 68 Fed. Reg. 68186, 68189 (Dec. 5, 2003) (explaining that the filing of a notice of withdrawal "does not require agency action but informs the agency and parties of counsel's withdrawal").

9 17 C.F.R. § 201.102(d)(4).

10 *Proposed Rule*, 2003 WL 22827684, at *8, 68 Fed. Reg. at 68189.

11 Rule 101(a)(8), 17 C.F.R. § 201.101(a)(8) (emphasis added). By assumption, counsel filing the notice of withdrawal desires to discontinue representing the respondent; in this context, it would be an empty gesture if counsel seeking to withdraw merely notified itself.

When the respondent is an artificial entity (such as Dahua), it has no physical form and can act only through its individual agents.[12] A responsible individual at the client must be formally apprised that the attorney no longer intends to act in a representative capacity. Necessarily, the individual so notified must be someone who is authorized by our Rules of Practice to step in and act for the client in the proceeding: It should be plain that the lawyer could not, for example, simply inform a parking lot attendant at the corporation of the withdrawal. Our requirement runs in tandem with an attorney's professional responsibilities, which require that a withdrawing lawyer provide reasonable notice to the client so that the client can look after its own interests.[13] A partnership can be represented in our proceedings—and therefore can protect its interests in that proceeding—only through an attorney or a "member."[14] The February 21 notice did not on its face comply with Rule 102(d)(4)'s service requirement and so was deficient under that rule.[15]

The present situation brings into sharp relief why adherence to this service requirement protects the integrity of our administrative proceedings and promotes their just and orderly determination. The Division's petition for review, filed more than a week before the February 21 notice of withdrawal, explicitly seeks to increase the discipline imposed on Dahua. It argues that the Commission should enter an order barring Dahua from serving as a principal auditor and issuing audit opinions and barring Dahua from playing a 50% or greater role in the preparation or furnishing of an audit report filed with the Commission. Additionally, we might on our own initiative raise and determine any issues found to be material in the course of our review.[16] Furthermore, portions of the record—*e.g.*, material containing commercially sensitive, proprietary information or sensitive inter-governmental communications—have been designated "OUTSIDE COUNSEL'S EYES ONLY," and so cannot, by the terms of the stipulated protective

---

[12] *See, e.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014); *Bus. Guides, Inc. v. Chromatic Commc'ns*, 498 U.S. 533, 548 (1991).

[13] *E.g.*, D.C. R. Prof'l Conduct R. 1.16(d) ("In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client . . . ."); N.Y. Code Prof'l Responsibility DR 2-110(A)(2) ("A lawyer shall not withdraw from employment until the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client . . . .").

[14] Rule 102(b), 17 C.F.R. § 201.102(b).

[15] We note also that the February 21 notice identified the respondent merely as "Dahua CPA, Ltd., 12th Floor, 7th Building, No. 16 Xi Si Huan Zhong Road, HaiDan District, Beijing, China 100039 (attn.: Gaolei Li, Executive Assistant to Managing Partner, tel. +86 10 5835 0046, ligaolei@dahuacpfi.com)." It is not apparent that Li, whose title is given as an "Executive Assistant to Managing Partner," would be authorized to appear on behalf of Dahua.

[16] Rule 411(d), 17 C.F.R. § 201.411(d).

order, be reviewed directly by any respondent.[17] The same would be true of any briefs filed in the proceeding that cite or reference such material. And of course, we expect even unrepresented parties to comply with our rules, to file all required papers, and to comply with all orders: "Parties, including those appearing *pro se*, are obligated to familiarize themselves with the Rules of Practice."[18] Failure to make a required filing may result in the imposition of sanctions, which may include the entry of a default, the making of an adverse finding as to particular matters, or the determination of the proceeding on the basis of the other side's evidence or briefing.[19]

These circumstances illustrate why we have an interest in being assured that when an attorney seeks to withdraw, he or she has properly informed someone authorized to act for the client that the client thereafter must represent itself or obtain substitute counsel.[20] Indeed, our Rules of Practice anticipate that when an attorney does withdraw, the respondent immediately will "keep current" its notice of appearance to designate a new individual authorized to represent the entity under Rule 102(b).[21] We insist that parties "keep the information contained in the

---

[17] It is undisputed that the stipulated protective order continues to bind DLA and Dahua. The Commission retains jurisdiction to ensure that obligations thereunder are, and will continue to be, appropriately discharged. *See* Rule 102(e)(1)(ii), 17 C.F.R. § 201.102(e)(1)(ii); D.C. R. Prof'l Conduct R. 3.4(c).

[18] *Adopting Release, Rules of Practice*, Exchange Act Release No. 35833, 1995 WL 368865, at *36 (June 9, 1995), 60 Fed. Reg. 32738, 32754 (June 23, 1995).

[19] Rule 180(c) & cmt. (c), 17 C.F.R. § 201.180(c).

[20] *Cf.* D.C. R. Prof'l Conduct R. 1.16(b) (providing that a lawyer ordinarily may withdraw only if doing so "can be accomplished without material adverse effect" on the client's interests). Nothing herein should be understood as receding from our oft-stated views that the "Commission does not have a general obligation to ensure the competence or suitability of . . . representation," *Kevin Hall, CPA*, Exchange Act Release No. 61162, 2009 WL 4809215, at *21 (Dec. 14, 2009), and that respondents do not have a statutory or constitutional right to appointment of counsel in our administrative proceedings, *Demitrios Julius Shiva*, Exchange Act Release No. 38389, 1997 WL 112328, at *3 n.14 (Mar. 12, 1997). We may choose in appropriate circumstances to exercise our *authority* to require compliance with our rules and to protect the integrity of our processes, but we do not thereby assume the *responsibility* in every case to superintend the relationship between respondents and their attorneys. *See, e.g.*, *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc) (explaining "the mere fact that the [the agency] has acknowledged the existence of its authority to [act] *sua sponte* in what it deems to be 'exceptional situations' is not sufficient to establish" when "the [agency] is *required* to [act] on its own motion") (emphasis in original).

[21] Rule 102(d)(2), 17 C.F.R. § 201.102(d)(2) (requiring parties to "file with the Commission" and "keep current" contact information).

notice . . . up-to-date" to ensure the "expeditious service of orders as well as other efforts to contact a party."[22]

### C. It is unnecessary to grant the Division's motion to strike

Although the February 21 notice of withdrawal was by itself deficient, as supplemented by Yan's declaration attached to DLA's response and Dahua's March 20 notice of appearance, the record now shows that Dahua has been fully apprised of DLA's withdrawal and has chosen to represent itself. Dahua eventually did a file a notice of appearance by and through a responsible "representative partner" with current contact information. Relying on that fact—as well as accepting Dahua's representations in its March 20 notice—we deny the Division's motion to strike DLA's notice of withdrawal. We direct that Dahua be served by email as well as by mail to ensure that it expeditiously receives orders, decisions, and other papers.

* * *

By separate order, we granted the Division's petition for review of the law judge's initial decision; in that order, we also determined, on our own initiative, to review what sanctions, if any, are appropriate in this matter.[23] Accordingly, IT IS ORDERED, pursuant to Rule 450(a), that the Division and Dahua shall file briefs as follows:[24]

> Opening brief: The Division shall file an opening brief, not to exceed 5,000 words, by June 23, 2014. The brief shall be limited to the scope of remedies imposed on Dahua.
>
> Response brief: Dahua shall file a response brief, not to exceed 5,000 words, by August 7, 2014. The brief shall be limited to responding to the Division's opening brief.

Because Dahua did not file a petition for review or a cross-petition for review, it is not entitled to challenge any of the findings or conclusions made by the law judge.[25] As provided by Rule 450(a), no briefs in addition to those specified in this schedule may be filed without leave

---

22 *Adopting Release*, 1995 WL 368865, at *21, 60 Fed. Reg. at 32747; *id.* at *28, 60 Fed. Reg. at 32750 ("The notice [of appearance] will provide an address of record where the party can be served with subsequent orders.").

23 That order is being issued concurrently with this one.

24 17 C.F.R. § 201.450(a).

25 Rule 410(b), 17 C.F.R. § 201.410(b); *Jacob Wonsover*, Exchange Act Release No. 41123, 1999 WL 100935, at *11 & n.63 (Mar. 1, 1999); *cf. El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (explaining the "firmly entrenched rule" that, "[a]bsent a cross-appeal, an appellee . . . may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary") (quotation marks omitted).

of the Commission.[26] Pursuant to Rule 180(c), failure by the Division to file a brief in support of the petition may result in dismissal of this review proceeding.[27] Failure by Dahua to file a response brief may result in determination of the proceeding as to Dahua on the basis of only the opening brief and the Commission's consideration of the record or such other sanction as the Commission finds appropriate under Rule 180(c).[28]

We remind the parties that two versions of each document containing information subject to the stipulated protective order must be filed: (1) a complete version of the document marked "CONFIDENTIAL" for filing under seal and (2) a redacted version of the same document for the public file.

By the Commission.

Lynn M. Powalski
Deputy Secretary

---

[26] Attention also is called to Rules 150-153, 17 C.F.R. §§ 201.150-153, with respect to form and service, and Rule 450(b) and (c), 17 C.F.R. §§ 201.450(b), 201.450(c), with respect to content and length limitations (except as modified in this order). Requests for extensions of time to file briefs or for additional words are disfavored.

[27] 17 C.F.R. § 201.180(c).

[28] *Id.*; *see also Casco Indem. Co. v. R.I. Interlocal Risk Mgmt. Trust*, 113 F.3d 2, 3-4 (1st Cir. 1997); *United States v. Everett*, 700 F.2d 900, 902-03 n.5 (3d Cir. 1983).