

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 72753 / August 4, 2014

ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 3574 / August 4, 2014

Admin. Proc. 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  
ACCOUNTANTS LTD., and  
PRICEWATERHOUSECOOPERS ZHONG  
TIAN CPAS LIMITED

ORDER GRANTING LEAVE TO  
THE ZLCA TO FILE AN AMICUS  
BRIEF

On May 28, 2014, the Zhongguancun Listed Companies Association ("ZLCA") filed a motion for leave to file an amicus brief. The Division of Enforcement opposes the motion and ZLCA, in turn, has filed a reply. We have determined to grant the motion as set forth herein.

By way of background, these proceedings concern respondents' alleged willful refusal 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.<sup>1</sup> The initial decision denied, for a period of six months, the privilege of practicing or appearing before the Commission to four of the five respondents and censured the remaining one. The Commission granted review and the opening brief of the appealing respondents is due September 19, 2014.

In support of its request to file an amicus brief, ZLCA states that the initial decision, unless modified or reversed by the Commission, will have a "significant adverse impact" on ZLCA's members who are U.S. listed and who are audited by a China-based accounting firm. More specifically, ZLCA asserts that respondents have issued audit opinions for certain of its members and that these companies will "face the possibility of having their shares delisted" if they cannot obtain audited financial statements. It desires to file an amicus brief discussing the "broad based policy interests" that, in its view, are implicated by the initial decision. In its reply

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<sup>1</sup> 15 U.S.C. § 7216(b)(1).

brief, ZLCA additionally represents that it "did not speak to or collaborate with any party" in connection with seeking to file an amicus brief in this proceeding.<sup>2</sup>

Rule of Practice 210(d) governs amicus participation in the Commission's administrative proceedings. In relevant part, it provides that: "An amicus brief may be filed conditionally with the motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae is desirable."<sup>3</sup> The Division contends that the Commission should deny the motion for four reasons. None of them is persuasive.

The Division leads off with the argument that the Rules of Practice categorically forbid the filing of amicus briefs in disciplinary proceedings. It relies on Rule 210(a)(1), which states that "[n]o person shall be granted leave to become a party or a non-party participant on a limited basis in an enforcement or disciplinary proceeding," subject to an exception inapplicable here, and that the instant proceeding is a "disciplinary proceeding" within the meaning of that rule.<sup>4</sup> This reliance is misplaced, as the structure of Rule 210 demonstrates. Rule 210 envisions four categories of potential participation in Commission proceedings: Persons can participate or intervene as a party (paragraph (b)), participate as a non-party on a limited basis (paragraph (c)), participate as an amicus (paragraph (d)), or participate by filing a statement of views (paragraph (e)). Thus, even though party participation pursuant to paragraph (b) and limited, non-party

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<sup>2</sup> We note that ZLCA's reply is technically untimely because the Division served its opposition on June 9 and the reply was filed on June 18. Rule of Practice 154(b) provides that "[r]eply briefs [in support of motions] shall be filed within three days after service of the opposition." 17 C.F.R. § 201.154(b). Under Rule 160(a), intermediate weekends and legal holidays are "excluded from the computation when," as here, "the period of time prescribed or allowed is seven days or less." *Id.* § 201.160(a). Here, there were no intermediate weekends and legal holidays, which makes June 12 the end of the three-day response period. Because service of the Division's opposition was by mail, three additional days are "added to the prescribed period for response" under Rule 160(b). June 15 falls on a Sunday, so the due date for the reply was the next day, or June 16. In short, Rule 160(a) and Rule 160(b) work together as follows: (1) the underlying period is computed, excluding intermediate weekends and holidays if the period is seven days or less; (2) if service is by mail, then three additional calendar days are appended to that period; and (3) finally, if the resulting day itself falls on a weekend or holiday, the period runs until the next day that is not a weekend or holiday. *E.g., Nat'l Sav. Bank of Albany v. Jefferson Bank*, 127 F.R.D. 218, 221-222 & nn.6-7 (S.D. Fla. 1989) (interpreting analogous provisions of former Fed. R. Civ. P. 6(a) and 6(e)); 4A Wright & Miller, *Federal Practice and Procedure* § 1171 (2d ed. 1987). Because the Commission has not previously clarified the interaction of these rules and no prejudice would result from accepting ZLCA's two-day-late filing, we will consider its reply.

<sup>3</sup> 17 C.F.R. § 201.210(d)(2). Rule 210(d)(2) also provides that, "[e]xcept as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support." It is uncontested that ZLCA's motion is timely.

<sup>4</sup> 17 C.F.R. § 201.210(a)(1).

participation pursuant to paragraph (c) are generally forbidden in disciplinary proceedings, Rule 210 nonetheless allows a "person . . . [to] seek to participate in such proceedings as an amicus, pursuant to paragraph (d)."<sup>5</sup> The Commission has previously allowed amicus participation in disciplinary proceedings.<sup>6</sup>

Next the Division contends that ZLCA's motion for leave is deficient because it does not attach the amicus brief that ZLCA proposes to file. Although the Division is correct to note that Rule 210(d) is "based on Rule 29" of the Federal Rules of Appellate Procedure, and that Rule 29 does direct that the "motion . . . be accompanied by the proposed brief," Rule 210(d) itself contains no such requirement.<sup>7</sup> To the contrary, the Commission's Rules of Practice state that that an "amicus brief *may*"—not *must*—"be filed conditionally with the motion for leave."<sup>8</sup>

The Division's third argument is that ZLCA's motion failed "even to identify its members" whose financial statements are audited by respondents, and so did not adequately set forth ZLCA's interest in the proceeding. It relies, again, on Federal Rule of Appellate Procedure 29, which requires amicus briefs filed in the federal courts of appeals to include, among other things, a corporate disclosure statement and "a concise statement of the identity of the amicus curiae."<sup>9</sup> Rule 210 imposes no comparable requirements, however. At any rate, it appears clear what ZLCA's asserted interest is: The motion represents that some of ZLCA's members are audited by respondents and face a risk of being delisted if the initial decision is upheld and they cannot find a replacement auditor.<sup>10</sup> Although it remains to be determined how well-founded this fear is, Rule 210(d) does not require that an amicus prove with certainty that its interests will be harmed by an adverse result in the proceeding.

Finally, the Division argues that the ZLCA's intended brief will not assist with the Commission's decisionmaking, and so is not "desirable" within the meaning of Rule 210. It

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<sup>5</sup> *Adopting Release: Rules of Practice*, Exchange Act Release No. 35833, 1995 WL 368865, 60 Fed. Reg. 32738, 32759 (June 9, 1995).

<sup>6</sup> *E.g.*, *David J. Checkosky*, Exchange Act Release No. 31094, 1992 WL 211479 (Aug. 26, 1992). The Division cites a law judge's order denying leave to file an amicus brief, but the Commission is "not bound by a law judge's initial decision and decline[s] to apply the law judge's reasoning here." *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at \*8 n.48 (Apr. 4, 2014).

<sup>7</sup> *Adopting Release*, 60 Fed. Reg. at 32759; Fed. R. App. P. 29(b).

<sup>8</sup> 17 C.F.R. § 201.210(d)(2) (emphasis added).

<sup>9</sup> Fed. R. App. P. 29(c)(1), (4).

<sup>10</sup> *See generally Securities Industry and Financial Markets Association*, Exchange Act Release No. 72182, 2014 WL 1998525, at \*7 (May 16, 2014) (explaining that associational standing standard employed by the federal courts allows an association to raise claims that do "not turn on the identity of the particular member" advancing them).

asserts that ZLCA lacks any special expertise regarding the issues and that its brief likely would repeat many of the same arguments raised by respondents themselves—*e.g.*, ZLCA's argument that imposing practice restrictions on respondents would have adverse collateral consequences on issuers and investors. ZLCA replies that its amicus brief will offer the "perspective of issuers and their shareholders" and "policy insights" that otherwise will not be presented by the parties.

In part, the Division's point is well taken. The purpose of an amicus brief is to set forth a position on the "legal or policy issues in the proceeding" in a way that "add[s] something distinctive to the presentation of the issues, rather than serving as a mere conduit for the views of one of the parties."<sup>11</sup> An amicus brief that "merely duplicate[s] the arguments of the parties . . . waste[s] the court's time."<sup>12</sup> But some amount of overlap is inevitable—especially since an amicus may not inject new "issues that have not been presented by the parties"<sup>13</sup> or enlarge the record with new evidence bearing on adjudicative facts<sup>14</sup>—so an amicus need not show that the parties are inadequately or incompletely briefing the case.<sup>15</sup> Furthermore, because the decision whether to grant leave to file typically is made at an early stage of review proceedings, and because the Commission's rules do not require that the proposed amicus brief be tendered along

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<sup>11</sup> *Adopting Release*, 60 Fed. Reg. at 32759; 16AA Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3975.1 (4th ed. 2014).

<sup>12</sup> *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J., in chambers); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

<sup>13</sup> *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001); *see also Federal Practice and Procedure: Jurisdiction* § 3975.1 & n.4 (collecting cases).

<sup>14</sup> *See, e.g., Weinstock v. Columbia University*, 224 F.3d 33, 46 (2d Cir. 2000); *Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 22 n.8 (1st Cir. 1982); *Smith v. United States*, 343 F.2d 539, 541 (5th Cir. 1965).

<sup>15</sup> *Neonatology Assocs.*, 293 F.3d at 131. The Division asserts that the Commission applied a different standard in *KMPG Peat Marwick LLP*, Exchange Act Release 44050, 2001 WL 223378 (Mar. 8, 2001). There, the Commission issued an opinion finding that the respondent, an accounting firm, had violated Rule 2-02(b) of Regulation S-X. Almost a month after the respondent filed a motion for reconsideration, a professional association sought leave to file an amicus brief. *Id.* at \*7 n.18. In denying the motion for leave to file an amicus brief, the Commission relied upon the untimeliness of that motion, the association's failure to provide any explanation for the delay, and the fact that the Rules of Practice explicitly forbid unsolicited responses to motions for reconsideration. Thus, in the context of "amicus filings on reconsideration," the Commission held that "only under extraordinary circumstances" would leave to file an amicus brief be granted. *Id.*; *cf. also* D.C. Cir. R. 35(f) ("No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court."). The professional association's proposed brief, which "merely reiterate[d]" the respondent's arguments urging reconsideration, did not satisfy that standard. Amicus participation in other contexts—*e.g.*, before the Commission issues a final order—is not governed by *KMPG Peat Marwick LLP*'s "extraordinary circumstances" test.

with the motion seeking leave, it would be difficult, as a practical matter, to determine in advance that amicus participation could not possibly contribute to the briefs of the parties.

Considering these circumstances, we find that ZLCA has sufficiently described how its intended brief might be "desirable" within the meaning of Rule 210(d)(2) and, accordingly, have determined to allow ZLCA to file an amicus brief. If that brief merely repackages respondents' arguments, it is unlikely to make a contribution to the Commission's resolution of this proceeding. After the amicus brief has been filed, the Division may seek leave for a modest expansion of the length limitation for its combined principal and response brief if it demonstrates that additional space is essential to answering the amicus.

Accordingly, it is ORDERED that ZLCA's motion for leave to file an amicus brief is GRANTED. ZLCA shall file its amicus brief, not to exceed 5,000 words in length, within the time allowed for the appealing respondents to file their consolidated opening brief.

For the Commission, by the Office of General Counsel, pursuant to delegated authority.

Lynn M. Powalski  
Deputy Secretary