

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

Administrative Proceedings Rulings  
Release No. 5765 / May 31, 2018

Administrative Proceeding  
File No. 3-18099

In the Matter of

**Black Diamond Asset  
Management LLC and  
Robert Wilson**

**Order Allowing  
Telephonic Testimony**

On May 22, 2018, the Division of Enforcement submitted a motion in limine to, among other things, allow third-party witness Steven M.H. Wallman to testify by telephone at the hearing. The Division represents that it plans to call Wallman as a rebuttal witness if necessary; Wallman's testimony will not exceed forty-five minutes; and Wallman would have to travel from his home in Virginia. Respondents have not filed a response. *See Black Diamond Asset Mgmt. LLC*, Admin. Proc. Rulings Release No. 5751, 2018 SEC LEXIS 1212, at \*1 (ALJ May 23, 2018).

Neither the Administrative Procedure Act nor the Securities and Exchange Commission's Rules of Practice address—let alone prohibit—telephonic testimony. *See* 5 U.S.C. §§ 554, 556; 17 C.F.R. §§ 201.325, .326. In certain circumstances, I have allowed it in the past. *See, e.g., Edward M. Daspin*, Admin. Proc. Rulings Release No. 3586, 2016 SEC LEXIS 476, at \*1 (ALJ Feb. 9, 2016). And one might argue that as long as respondents are provided a reasonable opportunity to be heard and present their evidence, including the ability to fully cross-examine a witness testifying under oath by telephone, the Constitution and the Rules are satisfied. *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); 17 C.F.R. §§ 201.325, .326; *see also SEC v. O'Brien*, 467 U.S. 735, 742 (1984) (holding that the Confrontation Clause of the Sixth Amendment applies only to criminal proceedings); *accord Curtis I. Wilson*, Securities Exchange Act of 1934 Release No. 26425, 1989 WL 992510, at \*4–5 (Jan. 6, 1989) (finding “no unfairness” in allowing a witness to testify by telephone in a hearing before a National Association of Securities Dealers,

Inc., panel where the respondent did not object and “was accorded a full and fair opportunity to cross-examine” the witness—though NASD hearings are less formal than Commission administrative proceedings), *pet. denied*, 902 F.2d 1580 (9th Cir. 1990) (table). Because Respondents have not objected to the Division’s motion, however, there is no need to decide this issue. *Accord, e.g., Wilson*, 1989 WL 992510, at \*4 (noting that that Wilson failed to object during his hearing to telephonic testimony).

I GRANT the Division’s motion to allow Wallman to testify telephonically during the hearing, if necessary. Wallman will be placed under oath, and Respondents will be allowed to cross-examine him as if he were physically present.

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James E. Grimes  
Administrative Law Judge