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December 4, 2015

BY EMAIL

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Amendments to Commission's Rules of Practice – File No. S7-18-15

Dear Mr. Fields:

We are securities defense attorneys active in representing respondents in Commission investigations and proceedings. We co-head the Financial Markets Group of Stern Tannenbaum & Bell, LLP, in New York City, but we write in our individual capacities and from our individual experiences, and not in the name of our firm. We write to oppose the amendments to the extent they permit the Enforcement Division Staff (the "Staff") to take depositions in administrative proceedings beyond what current Rule 232 permits.

When the current Rules were adopted, the Commission reasoned that the Staff would not normally need prehearing discovery because administrative proceedings would almost always be preceded by lengthy and detailed fact-finding investigations. Accordingly, the Commission determined that the "benefits from and the need for oral depositions are therefore different and less important in the context of Commission administrative proceedings than they may be in litigation between parties under the Federal Rules of Civil Procedure." Revision to comment to Rule 232, 59 SEC Docket 1170, 1214-15 (June 9, 1995). Notably, in promulgating Rule 232, the Commission said nothing about the needs of Respondents to have discovery in order to fairly defend cases.

That asymmetrical treatment of the discovery rights of the parties to an administrative proceeding, blatantly favoring the Staff over their adversaries, is part and parcel of the current concerns and challenges to the fairness of such proceedings. *See*, for example, the Comment Letter of Susan E. Brune, Esq., dated November 23, 2015, and references therein. Granting Respondents discovery rights is surely one way to address this imbalance and to give administrative proceedings some semblance of putting the parties on a level playing field. Therefore, we agree with the

proposed Rule to the extent that it provides Respondents access to deposition they do not presently have. However, rather than limit the number of permissible depositions by Rule, it would be fairer to empower the Hearing Officer to allow depositions in the interests of justice upon a proffer of need, even if it results in more than three or five.

But the Staff does not have the same need for post-investigatory depositions. Nothing in the past twenty years has diminished the Staff's investigative authority or powers. If anything, the burgeoning of electronic evidence has been met by the Staff's access to sophisticated tools for collecting and analyzing data that often dwarfs the ability of all but the largest Respondent firms. Accordingly, the Commission's Comment from 1995 is valid still, and so we pose the question: Why does the Staff need to take depositions on top of its investigation?

The Rule Proposal does not say. In examining this question, we researched Commission administrative proceeding records going back twenty years looking for real-world instances where the Staff voiced a need to take depositions. With one sole exception, discussed below, we found only a few instances where depositions were sought, and in those cases the only issue was whether the witness would be available to testify in person. In one case, depositions were denied because the witnesses would be permitted to testify by telephone. *In re IFG Network Securities Inc., et al.*, AP File No. 3-11179 (Prehearing Order, Oct. 22, 2003). In another, depositions were denied because it was determined that the witness could indeed attend in person. *In re Daxor Corp.*, AP File No. 3-14055 (Order, Feb. 24, 2011).

The only case we found where the Staff seemed to *need* substantive depositions is one we are very familiar with, because we represented the Respondents. *In re Clean Energy Capital, LLC, et al.*, AP File No. 3-1576 (Feb. 25, 2014). In that case, Respondents raised advice of counsel as a defense, and the Staff moved to preclude that defense unless it be given the opportunity to depose counsel. We demonstrated to the Hearing Officer that attorney-client privilege had been effectively waived by the production of attorney-client communications and by repeated testimony that actions were taken in reliance on counsel's advice. The Hearing Officer agreed that the answers of witnesses during the investigation put advice of counsel at issue and castigated the Staff for not addressing it during the investigation. That witnesses occasionally invoked attorney-client privilege only "beg[ged] the question of why the Division has waited since March 2013 to do anything about Respondents' invocation of privilege. * * * [G]iven the Division's failure to pursue this issue earlier, it is in no position to now ask that I bar Respondents from presenting an advice-of-counsel defense." The Staff's alternative request for prehearing depositions was, of course, denied as not permitted by the Rules. *Id.* (Order, July 22, 2014).

There is no subtle way to put it: In *Clean Energy Capital*, the trial team sought depositions to correct a lapse committed by the investigatory team. Not only is that the only time we found the Staff needed to take depositions on top of its investigation, one can hardly think of another reason

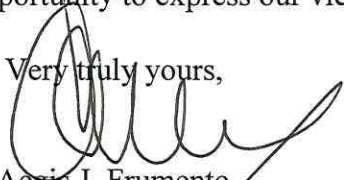
why the Staff *would* need to. But if that is so, then the proposed Rule would give the Staff two bites at the apple—first the investigation, and then depositions to close evidentiary gaps left open in the investigation. Thus, to give the Staff the same right to depositions as Respondents just perpetuates the one-sidedness of the Commission's administrative proceedings, under a false guise of even-handedness.

For that reason, we urge that


1. The Proposed Rule be adopted to the extent of permitting Respondents to take depositions as the proposed Rule contemplates;
2. The proposed Rule be amended to permit Hearing Officers to permit additional depositions upon a showing of need; and
3. The proposed Rule be amended to delete any references to the Staff's ability to take pre-hearing depositions, so that the Staff's powers do not expand beyond what the current rule permits.

We thank the Commission for the opportunity to express our views.

Very truly yours,


Aegis J. Frumento

-and-


Stephanie Korenman