

SECURITIES & EXCHANGE COMMISSION  
MAILED FOR SERVICE

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-10611

APR 11 2002

UNITED STATES OF AMERICA  
Before the

CTFD. NO. \_\_\_\_\_  
SECURITIES AND EXCHANGE COMMISSION  
April 11, 2002

In the Matter of :  
: ORDER  
: ROBERT BRUCE LOHMANN :  
:

On April 5, 2002, the Division of Enforcement (Division) filed a list of the exhibits it proposes to introduce at the upcoming hearing. The list describes proposed Division Exhibit 8 as the transcript of a telephone interview of Respondent by two Division attorneys on March 31, 1998. There is no indication that the interview was taken under oath.

The Division also provided me with a copy of the proposed exhibit. The transcript itself raises certain questions. First, the transcript recites that Diversified Reporting Services, Inc., prepared it. However, the date of preparation is omitted and the reporter's certification of accuracy is also missing. The Division should explain the circumstances under which the transcript was prepared, inasmuch as Division counsel advised Respondent on page 3: "We are not taping this conversation." Second, pages 12 through 15 of the transcript generally repeat the same questions and answers that appear on pages 8 through 11 of the transcript.<sup>1</sup>

If the Division intends to use proposed Exhibit 8 solely to refresh Respondent's recollection or to impeach him, it should so state. However, if the Division intends to use the transcript for some broader purpose, it should articulate that purpose in advance of the hearing. The Division has attempted to introduce the investigative testimony of witnesses in other cases in the past, often invoking a sweeping argument that the entire transcript constitutes "the admission of a party opponent." The issue usually arises late in the hearing, and its resolution is typically contested. At least two Administrative Law Judges (ALJs) have rebuffed the Division's efforts to deposit investigative transcripts in their entirety into the record. See, e.g., Del Mar Fin. Servs., Inc., 75 SEC Docket 1905, 1910-11 (Initial Decision) (Aug. 14, 2001), review granted; Angelo P. Danna, CPA, and Mark P. Dentinger,

<sup>1</sup> There are some discrepancies. For example, page 9, line 1 is not identical to page 12, line 24; and page 9, line 19, is not identical to page 13, line 17. The parties should be prepared to discuss whether such discrepancies are material or not.

CPA, 56 SEC Docket 2166 (May 11, 1994). Although the Securities and Exchange Commission (Commission) has not yet ruled on the propriety of depositing an entire investigative transcript into the record, another federal regulatory agency has come to the same conclusion as the Commission's ALJs did in Del Mar and Danna and Dentinger: namely, that the practice is inappropriate. See Shahrokh Nikkhan, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,883-84 (May 12, 2000).

In Nikkhan, the Division of Enforcement of the Commodity Futures Trading Commission (CFTC) appealed an initial decision of an ALJ, arguing that the ALJ placed undue restrictions on its use of admissions that Nikkhan made in an investigative deposition and in a customer's reparation case. The CFTC rejected the argument of its Division of Enforcement, stating:

At the time it raised its motion before the ALJ, however, the Division did not specify the portions of the two transcripts it viewed as admissions relevant to the disputed issues of material fact in this case. Presiding officers are not required to evaluate these types of transcripts on an all or nothing basis. Indeed, the ALJ would have been within his discretion both in requiring the Division to specify the admissions it was relying on and in excluding "unduly repetitious evidence" in accordance with [the CFTC's rules of practice].

At the telephonic prehearing conference on April 15, 2002, the Division should explain how it intends to use its proposed Exhibit 8. If it intends to use the exhibit for some broader purpose than impeachment and/or refreshing Respondent's recollection, it must show cause why I should not apply the reasoning of Del Mar, Danna and Dentinger, and Nikkhan in this case. The Division should also obtain a reporter's certificate of accuracy or explain its absence, correct all discrepancies on pages 8 through 15, provide the date of transcription, and eliminate immaterial passages, as it did with its proposed Exhibit 7 and as it has proposed to do with other investigative transcripts.<sup>2</sup>



James T. Kelly  
Administrative Law Judge

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<sup>2</sup> I postponed a prehearing conference scheduled for February 27, 2002, based on the Division's representation that the type of discrepancies discussed in this Order had already been resolved. As to proposed Division Exhibit 8, they have not yet been resolved. The Division stated in its submission of April 5, 2002, that it reserved the right "to offer into evidence excerpts of investigative testimony of witnesses called to testify in the event testimony they deliver at the hearing contradicts investigative testimony on a point deemed material by the Division" (emphasis added). This, of course, is the sort of particularity that Del Mar, Danna and Dentinger, and Nikkhan envision. Unlike the investigative transcripts, however, it is not at all clear that the Division intends to confine itself to introducing only excerpts from proposed Division Exhibit 8.