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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2324/February 18, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16339

In the Matter of JOHN BRINER, ESQ., DIANE DALMY, ESQ., DE JOYA GRIFFITH, LLC, ARTHUR DE JOYA, CPA, JASON GRIFFITH, CPA, CHRIS WHETMAN, CPA, PHILIP ZHANG, CPA, M&K CPAS, PLLC, MATT MANIS, CPA, JON RIDENOUR, CPA, and BEN ORTEGO, CPA	ORDER FOLLOWING PREHEARING CONFERENCE

The Securities and Exchange Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on January 15, 2015. On February 2, 2015, the Division of Enforcement submitted a letter summarizing the results of a telephonic meet-and-confer in which all parties except for Respondent John Briner, Esq. participated. The letter outlined a proposed prehearing schedule and requested that the hearing in this matter begin on June 29, 2015. The letter also stated that all Respondents participating in the meet-and-confer had waived the right to a hearing within sixty days of service of the OIP.

I held a prehearing conference on February 10, 2015. Respondent Briner did not participate in the conference. Counsel for the Division of Enforcement and counsel for all other Respondents participated in the conference. During the conference, I confirmed that all Respondents were served with the OIP by January 21, 2015. All parties agreed during the conference to serve each other electronically.[1]

Having considered the parties' positions and submissions, I set the following schedule in this matter:

March 30, 2015: The parties may file motions for summary disposition.

[1] Some parties indicated they may move for severance. Parties considering this course of action should review Commission Rule of Practice 201(b). *See* 17 C.F.R. § 201.201(b).

April 9, 2015:	The parties may file oppositions to motions for summary disposition.
April 20, 2015:	Parties shall file expert reports.
April 27, 2015:	Parties shall file any requests for official notice, stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents. Parties shall file witness and exhibit lists and exchange, but not file, copies of exhibits.
May 4, 2015:	Parties shall file any motions in limine and objections to exhibits and witnesses.
May 11, 2015:	Parties shall file prehearing briefs and rebuttal expert reports.
May 19, 2015:	Parties shall participate in a telephonic prehearing conference, if necessary, at a time to be determined.
May 26, 2015 through June 3, 2015:	Hearing shall be held in Denver, Colorado, at a venue to be determined.
June 29, 2015:	As needed, the hearing will continue in Denver, Colorado.

The parties are reminded that they must file hard copies of all filings with the Office of the Secretary, but also that they have agreed to send each other—and this Office, when applicable—electronic copies, via e-mail, of materials to be filed and exchanged.

This order also sets forth the following general rules and guidelines I will follow during these proceedings.

1. Settlement. Prior to May 1, 2015, counsel for the Division and counsel for each Respondent shall confer to discuss whether this matter may be resolved through settlement. If the Division and any Respondent jointly notify my Office that they require assistance in facilitating settlement negotiations and are willing to participate in good faith in confidential settlement negotiations, I will issue an appropriate order referring the matter to another Administrative Law Judge (the Settlement ALJ) solely for purposes of settlement. Participation in any settlement negotiation is entirely voluntary. Participation in settlement negotiations with the Settlement ALJ does not stay the schedule listed above. Absent extraordinary circumstances, requests for referral to a Settlement ALJ must be made no later than May 1, 2015.

2. Subpoenas. My general practice is to sign subpoenas the afternoon after the day they are received, absent notice of an objection. Parties should therefore review requests for subpoenas as soon as they are received. A party's motion to quash will be due within

five business days of the filing of the subpoena. Any opposition to the motion to quash will be due within five business days thereafter.

3. Exhibits. The parties shall confer and attempt to stipulate to the admissibility of exhibits. In order to avoid duplication of exhibits, the parties should identify joint exhibits. Because this matter involves multiple respondents, the parties should agree to a consistent nomenclature for identifying exhibits. By way of example, each Respondent's exhibits could be identified using that Respondent's initials. Respondent Briner's first exhibit would thus be designated as JB 1.

   Presenting exhibits by electronic means greatly enhances the parties' presentation. Once the hearing location is announced, counsel for the Division and counsel for Respondents shall confer in order to attempt to facilitate their presentation of exhibits by electronic means.

4. Exhibit Lists. A comprehensive exhibit list prevents other parties from being surprised in the middle of the hearing. Given this fact, exhibit lists shall be exchanged among the parties and should include all documents that a party expects to use in the hearing for any purpose. This includes documents that are relevant only for impeachment purposes or which are presumptively inadmissible. The parties should serve their opponents with any amendments to their individual exhibit lists. Because I rely on the parties' exhibit lists, the parties should provide me with a paper copy of their final exhibit lists at the beginning of the hearing. There is no need in the interim to submit amended exhibit lists to my office. Following the hearing, I will issue a separate order directing the parties to file a list of all exhibits, admitted and offered but not admitted, together with citations to the record indicating when each exhibit was admitted or not admitted.

5. Expert reports and testimony. Expert witness disclosures must, at minimum, comply with Rule 222(a)(4) and (b), including the provision of a "brief summary" of an expert's expected testimony. 17 C.F.R. § 201.222(a)(4), (b). Expert reports must be as specific and detailed as those presented under Federal Rule of Civil Procedure 26(a)(2). Failure to comply with these requirements may result in the striking of an expert's report. The filing of the expert's report according to the prehearing schedule constitutes the filing of the expert's direct testimony. During the hearing, the expert will not be subject to direct examination, and will simply be sworn in and proffered for cross examination. As needed, I will entertain requests for brief direct examination of a party's expert.

6. Hearing schedule. Unless circumstances require a different schedule, we will begin each day of the hearing at 9:00 a.m. Each day of the proceeding should last until at least 5:20 p.m. I generally take one break in the morning, lasting about 15 minutes, and at least one break in the afternoon. I generally break for lunch between noon and 12:30 p.m., for about one hour and 10 minutes.

7. Hearsay. Evidence that is irrelevant, immaterial, or unduly repetitious is inadmissible; all other evidence is presumptively admissible. 17 C.F.R. § 201.320. As a result, the fact

that evidence constitutes hearsay goes to weight, not admissibility, and is thus a proper subject for cross-examination or post-hearing briefing.

8. Hearing issues.

A. Examination.

1) In general, the Division of Enforcement presents its case first, because it has the burden of proof. The Respondents then present their cases. If necessary, the parties may agree to proceed in some other order and may take witnesses out of order.

2) If the Division calls a non-party witness that a Respondent also wishes to call as a witness, the Respondent should cross-examine the witness as if he or she were calling the witness in his or her own case. This means that cross-examination may exceed the scope of direct examination. This will avoid the need to recall a witness just so the witness can testify for the Respondent's case.

3) I am flexible regarding the manner of presenting the Respondents' testimony, so long as the parties agree on it. By way of example, if the Division calls a Respondent as its last witness, the parties may agree that the Respondent's counsel will conduct the direct examination, followed by the Division's cross-examination, which may exceed the scope of direct. In the absence of any agreement, the Respondent's testimony will proceed in the usual manner, i.e., the Respondent will be called as a witness and examined potentially multiple times. If the Division calls the Respondent as a witness and the Respondent later testifies as part of his or her own case, the Division's cross-examination during the Respondent's case will be limited to the scope of the direct examination.

4) In general, cross-examination may be conducted by leading questions, even as to Division witnesses that the Respondent wishes to call in his or her own case. Counsel may not lead his or her client, however. Thus, if a Respondent is called as a witness in the Division's case, that Respondent's counsel may not ask leading questions on cross-examination. Similarly, if a Commission employee is called as a witness for the Respondent, the Division may not ask leading questions on cross-examination.

B. Other hearing issues.

1) Avoid leading questions on direct examination. Leading questions during direct examination of a non-hostile witness are objectionable. Repeatedly having to rephrase leading questions slows down the hearing.

2) Hit the high points on cross-examination. It is a waste of time to wade into every bit of minutiae that is related to your case. It is not necessary to make a point on cross-examination that another Respondent's counsel has already made. Cross-examination is more effective and less stultifying if you emphasize strong, unaddressed points and address tangential points quickly, if at all.

9. Pleadings. Prehearing and post-hearing briefs are limited to 14,000 words. *Cf.* 17 C.F.R. § 201.450(c) (imposing a word-limit for briefs filed before the Commission). Parties may seek leave to exceed this limit through a motion filed seven days in advance of the relevant briefing deadline. To enhance the readability of pleadings, I urge counsel to limit the use of acronyms to those that are widely known. *See* Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 120-22 (2008); *Nat'l Ass'n of Regulatory Util. Com'rs v. U.S. Dept. of Energy*, 680 F.3d 819, 820 n.1 (D.C. Cir. 2012). For the same reason, counsel should use the same font size in footnotes as that used in the body of a pleading.

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James E. Grimes
Administrative Law Judge