

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-10933

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
February 20, 2003

SECURITIES & EXCHANGE COMMISSION  
MAILED FOR SERVICE

FEB 21 2003

In the Matter of	:	CTFD. NO. <u>FIRST CLASS</u>
	:	REPORT FOLLOWING
	:	PREHEARING CONFERENCE
ERNST & YOUNG, LLP	:	AND RULING ON SUBPOENA
	:	

On February 18, 2003, I held a prehearing conference by telephone to deal with matters raised in Respondent's letter of February 10, 2003, and the Division of Enforcement's ("Division") response of February 14, 2003. A court reporter was not present because of weather conditions. The following issues were considered.

Identity and Schedule for Division Witnesses

On January 7 and 15, 2003, respectively, the Division identified twenty possible witnesses and 598 documentary exhibits, and circulated the testimony of two experts. The Division has given notice that each prospective witness should be available in Washington, D.C., during a two week-period beginning March 18, 2003. Respondent contends that the Division's notice is unfair, and that the Division should tell each witness what day he or she will be called to testify because the hearing begins on March 18, 2003, in less than four weeks.

All the fact witnesses appear to be either present or former employees of Respondent, and Respondent is offering to provide them with legal representation. Several persons have refused the Division's requests for interviews after learning that Respondent was providing legal representation. Respondent will inform the Division as to whether the remaining prospective witnesses are willing to be interviewed.

At the prehearing conference, the Division identified five persons it will almost certainly call and agreed to inform Respondent as soon as it has decided on its other witnesses and the order of presentation. I found Respondent's objections that the Division's two experts covered the same topic to be unpersuasive.

Request for any Division Memoranda to Commission Concerning a Settled Proceeding

The Order Instituting Proceeding refers to a complaint, SEC v. Ernst & Young, No. 91-1443 (D.D.C.), Litigation Rel. No. 12885, AAER No. 301 (June 13, 1991).

that resulted in a Final Order entered by the U.S. District Court for the Northern District of Texas on March 13, 1995. Respondent requests that the Division give it any memoranda it sent to the Commission concerning this prior proceeding so that it can show that: (1) the matters involved primarily a predecessor firm; (2) the factual issues have nothing to do with the subject matter of this proceeding; and (3) in 1995, when it entered the settlement the Commission believed Respondent had satisfactorily resolved the independence issues involved in that proceeding. Respondent cites the Commission's Rules of Practice as authority for its request. See 17 C.F.R. §§ 201.230(a)(2), (b)(2).

The Division refuses to provide the material. It cites the attorney-client, work product, and deliberative process privileges, and case law.<sup>1</sup> The Division maintains the material that Respondent seeks is neither relevant, nor exculpatory.

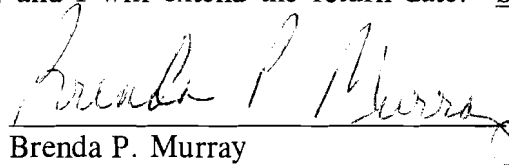
Counsel agreed to confer on whether the Division would agree to the points Respondent wants to establish. If the parties do not resolve the issue, I will honor Respondent's request that we address this issue at a recorded conference.

#### Records of Non-public Advice Given by Office of Chief Accountant ("OCA")

The Division convinced Respondent that a diligent search of the OCA computerized record revealed only two incidences in 1994 through 2000 where OCA gave informal independence advice concerning business relations.

#### Division's Subpoena Request

I deny the Division's subpoena request insofar it requests all Respondent's partnership agreements as excessive in scope and unduly burdensome. For the same reasons, I will limit the subpoena to annual reports to partners and compensation materials to the years 1994 through 2000, and I will extend the return date. See 17 C.F.R. § 201.232.

  
Brenda P. Murray  
Chief Administrative Law Judge

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<sup>1</sup> See, e.g. Feshbach v. SEC, 5 F. Supp. 2d 774, 781-84 (N.D. Cal. 1997) (SEC action memorandum protected by attorney-client privilege and work-product doctrine); SEC v. World-Wide Coin Invs. Ltd., 92 F.R.D. 65, 66-67 (N.D. Ga. 1981) (same); New Mexico v. EPA, 114 F.3d 290, 295 (D.C. Cir. 1997) (EPA action memorandum protected by deliberative process privilege); National Courier Ass'n v. Board of Governors of the Fed. Reserve Sys., 516 F.2d 1229, 1241-42 (D.C. Cir. 1975) (summarizing lines of authority establishing deliberative process privilege).