

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 734/November 30, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14944

In the Matter of :
: :
BRIAN M. CAMPBELL : NOTICE

This Notice addresses the Division of Enforcement's (Division) November 26, 2012, Motion for Initial Decision.

The Securities and Exchange Commission (Commission) instituted this proceeding on July 10, 2012, as a follow-on proceeding based on Respondent Brian M. Campbell's (Campbell) conviction for mail fraud in United States v. Campbell, No. 2:10-cr-00372-DRD (D.N.J. Nov. 21, 2011). Campbell did not file an Answer or otherwise defend the proceeding, and the undersigned issued an Order Making Findings and Imposing Sanctions by Default. Brian M. Campbell, Exchange Act Release No. 67770 (A.L.J. Aug. 31, 2012) (Campbell Default Order) (barring Campbell from association with any broker, dealer, or investment adviser).

On September 19, 2012, the Division filed a motion requesting the undersigned to clarify the Campbell Default Order, which the undersigned denied, noting that the Commission's rules do not provide for reconsideration of Default Orders or for reopening a default at the behest of the Division. Brian M. Campbell, Admin. Proc. No. 14944 (A.L.J. Sept. 21, 2012) (unpublished).

Thereafter, the Division filed a petition for review with the Commission, which ordered the filing of briefs addressing various questions raised by the petition for review. Brian M. Campbell, Admin. Proc. No. 14944 (Oct. 11, 2012) (unpublished). Subsequently, at the Division's request, the Commission dismissed the petition for review. Brian M. Campbell, Admin. Proc. No. 14944 (Nov. 6, 2012) (unpublished). In its Order, the Commission recounted the history of the proceeding and the Division's reasons for seeking review. The Commission did not remand the proceeding to the undersigned. Therefore, the undersigned has no authority in the matter.

Additionally, the Division's arguments are not well founded. The Division cites to 17 C.F.R. § 201.360 (Rule 360) for the proposition that an "Initial Decision" must be issued in every administrative proceeding. This interpretation of Rule 360 does not account for the provisions of 17 C.F.R. § 201.155 (Rule 155), pursuant to which hundreds of Default Orders have been issued, as in

the instant proceeding. Rule 155 has been unchanged since the Commission adopted it in 1995 in Rules of Practice, 60 Fed. Reg. 32738 (June 23, 1995), and every year scores of Default Orders are issued, far more than Initial Decisions.¹ For example in Fiscal Year 2012,² there were 140 Default Orders and thirty-five Initial Decisions. See <http://www.sec.gov/litigation/admin.shtml>, <http://sec.gov/alj/aljdec.shtml> (last visited Nov. 29, 2012). It cannot be argued that the Commission is unaware of Rule 155 or the hundreds of Default Orders that have been issued pursuant to it. Not only must it be assumed that the Commission is aware of its own rules and of the hundreds of orders issued in administrative proceedings pursuant to authority it delegated, but precedent shows that the Commission is actively aware, through its own participation, in proceedings in which Default Orders were issued and in which the Commission did not disapprove of the use of Default Orders to resolve proceedings. See Roanoke Tech. Corp., Exchange Act Release No. 57351 (Feb. 19, 2008), 92 SEC Docket 2536 (Commission remanded to the administrative law judge (ALJ) a proceeding in which a Default Order had been issued for consideration of newly discovered information that suggested that the respondent might be able to show cause for its failure to appear and defend the proceeding); Vladislav Steven Zubkis, Exchange Act Release No. 51364 (Feb. 18, 2005), 84 SEC Docket 4074 (Commission remanded to ALJ respondent's request to set aside default). The Commission did not intimate in any way that the use of Default Orders to resolve proceedings was not allowed under its rules.³

Additionally, the Administrative Procedure Act and the Commission's rules do not provide a path to an "Initial Decision" in a case such as this where the respondent is in default because of his failure to answer or otherwise defend the proceeding. There has been no hearing pursuant to 5 U.S.C. §§ 554, 556, 557 and 17 C.F.R. §§ 201.300, .360. Nor can an "Initial Decision" result from a motion for summary disposition, pursuant to 17 C.F.R. §§ 201.250, .360, because Campbell has not filed an answer.

The Division expresses a concern that without a Commission-issued "finality order," it may be unable to seek judicial enforcement of sanctions ordered against a respondent. The Division may wish to consider suggesting rulemaking to amend Rule 155 to enable it to request finality orders from the Commission in appropriate cases.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

¹ Rule 360 has been amended, but the amendments do not relate to the concept of issuing "Initial Decisions" in lieu of Default Orders. Rules of Practice, 68 Fed. Reg. 35789 (June 17, 2003) (adding provisions regarding deadlines for timely resolution of proceedings); 69 Fed. Reg. 13178 (Mar. 19, 2004) (adding provisions regarding motions to correct a manifest error of fact in the Initial Decision).

² October 1, 2011, to September 30, 2012.

³ Indeed, the Commission's ruling in Roanoke Tech. Corp. was titled "Order Remanding for Reconsideration of Default Order" and in Zubkis, "Order Remanding Request to Set Aside Default."