

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3224 / October 14, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16155

In the Matter of

NICHOLAS ROWE

ORDER FOLLOWING PREHEARING
CONFERENCE AND SETTING PROCEDURAL
SCHEDULE

The Commission remanded this matter for further proceedings on September 24, 2015. On October 9, the Division of Enforcement submitted its statement as to how it intends to establish its case. The Division also included a proposed procedural schedule.

Today, I held a prehearing conference and addressed the procedure for how this case will be resolved in light of the Commission's remand.

First, it is not possible to resolve this matter on the papers and therefore I set this case for a live hearing. Rule of Practice 250 provides that on summary disposition, "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted" 17 C.F.R. § 201.250(a). Rowe's Answer has denied all allegations and wrongdoing, except for the existence of the New Hampshire Bureau of Securities Regulation's consent order entered on March 12, 2013. It bears to reason that Rowe will contest documentary evidence submitted by the Division in any renewed motion for summary disposition; and in light of the Commission's remand, I cannot rely on the allegations in the consent order as a party admission or as facts of which official notice can be taken.

Second, the parties will be permitted to argue and put on evidence regarding whether a sanction is in the public interest and the extent to which sanctions would have a deterrent effect. The Commission's public interest analysis is guided by the *Steadman* factors: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). The application of these factors is discussed in Commission opinions. *See, e.g., Daniel Imperato*, Exchange Act Release No. 74596, 2015 SEC LEXIS 1377 (Mar. 27, 2015), *available at* <http://www.sec.gov/litigation/opinions/2015/34-74596.pdf>.

Third, Rowe will be permitted to put on a full defense related to such public interest determination. This may include contesting the factual allegations and legal conclusions (including any purported violations) in the New Hampshire consent order, as well as the credibility of any alleged victims. These issues are within the scope of the Commission's remand. *See Nicholas Rowe*, Exchange Act Release No. 75982, 2015 SEC LEXIS 3928, at *16-17 (Sept. 24, 2015) ("Rowe's consent agreement specifically reserved his right 'to take contrary legal or factual positions in litigation or other legal proceedings in which the State of New Hampshire is not a party.'").

However, as the Commission has ruled that this proceeding is not the appropriate forum for Rowe to argue that the New Hampshire consent order is invalid because it was entered under duress, he will not be permitted to re-litigate that issue. *See id.* at *10. Nor will Rowe be permitted to re-litigate whether the statutory basis for this administrative proceeding under Section 203(f) of the Investment Advisers Act of 1940 is satisfied, as the Commission has ruled that it is. *See id.* at *7-12.

Fourth, prior sworn statements are generally inadmissible at a live hearing. If a party proposes to submit declarations or depositions in lieu of testimony, that party must comply with the Rules of Practice governing depositions upon oral examination and the introduction of prior sworn statements of witnesses into the record. *See* 17 C.F.R. §§ 201.233, .235.

Fifth, I order the following procedural schedule:

November 13, 2015: Subpoenas for the production of documentary evidence are due. Parties are responsible for requesting and serving their own subpoenas. Subpoena forms are available online at <http://www.sec.gov/alj>.

December 4, 2015: The Division shall file its exhibit and witness lists and testimony designations.

The Division shall file expert reports, if any.

The Division shall furnish Rowe with, but not file, its pre-marked exhibits.

The Division shall provide my Office with electronic courtesy copies of its exhibits.

December 18, 2015: Rowe shall file his exhibit and witness lists and testimony designations.

Rowe shall file expert reports, if any.

Rowe shall furnish the Division with, but not file, his pre-marked exhibits.

Rowe shall provide my Office with electronic courtesy copies of his exhibits.

Motions to take depositions upon oral examination or to introduce prior sworn statements of witnesses into the record are due.

January 8, 2016:

Subpoenas requiring the attendance of witnesses at the hearing are due. Parties are responsible for requesting and serving their own subpoenas. Subpoena forms are available online at <http://www.sec.gov/alj>.

The parties may file objections to exhibits and witnesses, if any.

Motions in limine are due.

Rebuttal expert reports are due.

The parties shall file stipulations, if any. This deadline is without prejudice to the parties' right to reach subsequent stipulations pursuant to Rule of Practice 324, 17 C.F.R. § 201.324.

January 29, 2016:

Final telephonic prehearing conference at 10:00 a.m. EST.

February 1, 2016:

Hearing shall commence in the New Hampshire or Boston area, at a location to be determined.

After the close of the parties' evidentiary presentation, I will establish a post-hearing schedule for the filings of exhibits and briefs.

Witness lists shall include witnesses' names, occupations, addresses, and a brief summary of their expected testimony. 17 C.F.R. § 201.222(a)(4). Each party who intends to call an expert witness shall submit, in addition to the information required by Rule of Practice 222(a)(4), a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert. 17 C.F.R. § 201.222(b).

Exhibit lists shall be emailed to my Office at alj@sec.gov in Microsoft Excel or Word format and include exhibit numbers, a description of each exhibit, and Bates-stamp numbers, if any. Exhibits shall not be filed with the Office of the Secretary until after the hearing concludes.

All filings shall be made with the Commission's Office of the Secretary, pursuant to Rules of Practice 151 and 152. See 17 C.F.R. §§ 201.151, .152. Further instructions about

filings are located online at <http://www.sec.gov/alj/alj-instructions-for-respondents.pdf>. The Rules of Practice are located online at <http://www.sec.gov/about/rulesprac2006.pdf>.

In addition to the required filing with the Office of the Secretary, electronic courtesy copies of filings should be emailed to alj@sec.gov in both PDF text-searchable format and, when possible, Microsoft Word format. Electronic copies of exhibits should not be combined into a single PDF file, but submitted as separate attachments.

Jason S. Patil
Administrative Law Judge