

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 91249 / March 3, 2021

Admin. Proc. File No. 3-19775

In the Matter of

LEE C. SCHLESINGER

ORDER DISCHARGING ORDER TO SHOW CAUSE AND DIRECTING PREHEARING
CONFERENCE

On April 29, 2020, the Securities and Exchange Commission issued an Order Instituting Proceedings (“OIP”) against Lee C. Schlesinger pursuant to Section 15(b) of the Securities Exchange Act of 1934.¹ The OIP directed Schlesinger to file an answer to the OIP’s allegations within 20 days of service and informed him that a failure to do so could result in him being deemed in default and the proceedings being determined against him.² On June 4, 2020, the Division of Enforcement filed a notice appending a process server’s affidavit stating that the OIP was served on May 30, 2020, pursuant to Commission Rule of Practice 141(a)(2)(i).³

On September 29, 2020, nearly four months after service was made, Schlesinger filed an answer. Schlesinger filed no request for an extension of the time in which to file an answer, and the answer did not refer to let alone explain its lateness.⁴ On December 15, 2020, the Commission issued an order to show cause as to why the Commission should accept Schlesinger’s answer and not find him in default due to his failure to file it timely.

Schlesinger responded through counsel on January 14, 2021. He began by arguing that the Commission’s Rules of Practice do not allow a respondent to be held in default based solely on an untimely answer. He then stated that his initial delay in filing an answer was due to “mental and financial stress,” attributable in part of the COVID-19 pandemic, at the time he was served with the OIP. He stated further that, from June through August 2020, his counsel and

¹ *Lee C. Schlesinger*, Exchange Act Release No. 88773 (April 29, 2020), <https://www.sec.gov/litigation/admin/2020/34-88773.pdf> (“OIP”); *see* 15 U.S.C. § 78o(b).

² OIP at 3; Rules of Practice 151(a), 160(b), 220(b), 17 C.F.R. §§ 201.151(a), .160(b), .220(b).

³ 17 C.F.R. § 201.141(a)(2)(i).

⁴ *See* Rule of Practice 161, 17 C.F.R. §§ 201.161 (outlining procedures for requesting extensions and factors weighed in considering such requests).

Division staff communicated about his answer “and the possibility of resolving this matter without further litigation.” Schlesinger stated that Division staff advised that they “did not intend to seek a default at that time based on the timeliness of Respondent’s answer.” It was only once an agreement was not reached and communication slowed that Schlesinger’s counsel “believed it prudent to get an answer on file while also attempting to restart negotiations with the staff.” Schlesinger stated that the parties have resumed communication, and that Division staff has stated that it does not oppose having the answer accepted.

We find that Schlesinger has provided sufficient justification for accepting his answer. Extenuating circumstances explain his initial lateness. And he appears to have delayed his filing further because of ongoing conversations with Division staff conducted in good faith, and his understanding that he would not be penalized for filing an untimely answer.⁵

Nonetheless, we emphasize that contrary to Schlesinger’s arguments an untimely answer may be grounds for a default if good cause is not shown for accepting it. The plain text of Rule of Practice 220(f) is unambiguous: “If a respondent fails to file an answer required by this rule within the time provided, such respondent may be deemed in default pursuant to Rule 155(a).”⁶ The OIP directed that the answer be filed within 20 days of service, and warned Schlesinger that failure “to file the directed Answer” may be grounds to “be deemed in default.”⁷

Schlesinger cites Rule of Practice 155(a), which states in relevant part: “A party to a proceeding may be deemed to be in default . . . if that party fails . . . (2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding[.]”⁸ According to Schlesinger, the phrase “within the time provided” attaches only to “to respond to a dispositive motion,” and so only a failure to file an answer entirely could allow for a default finding. But such a conclusion would contradict the unambiguous phrasing of Rule 220(f), and so create internal inconsistency and render Rule 220(f) almost entirely void. Traditional principles of statutory construction dictate that such interpretations should be avoided, and we believe the same reasoning applies to the Rules of Practice.⁹ We thus reject this argument.

⁵ Cf. Rule of Practice 161(a), (b), 17 C.F.R. § 201.161(a), (b) (allowing Commission to extend time limits “for good cause shown” and to consider “such matters as justice might require”).

⁶ 17 C.F.R. § 201.220(f).

⁷ OIP at 3.

⁸ 17 C.F.R. § 201.155(a).

⁹ See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting that “a cardinal principle of statutory construction [is] that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant” (internal quotations marks and citation removed)); *Williams v. Taylor*, 529 U.S. 362, 364 (2000) (noting “the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute”); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 116 (1879)

The parties are also reminded that, any agreements between them notwithstanding, the Commission may make a default finding on its own initiative. The Rules of Practice make no mention of a motion for default being a prerequisite for such a finding.¹⁰ It is therefore advised that parties keep the Commission informed of any ongoing negotiations, and request deadline extensions where appropriate, so that any miscommunication may be avoided.¹¹

We grant Schlesinger's request that his answer be accepted and the proceedings continue. The show cause order is discharged. Schlesinger and the Division are directed to conduct a prehearing conference by March 31, 2021.¹² Following the conference, the parties shall file a statement with the Office of the Secretary advising the Commission of any agreements reached at the conference. If a prehearing conference was not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer. In either case, the statement shall be filed no later than April 28, 2021.

The parties' attention is called to the Commission's March 18, 2020 order regarding the filing and service of papers, which provides that, pending further order of the Commission, parties to the extent possible shall submit all filings electronically at apfilings@sec.gov.¹³ Also, the Commission's Rules of Practice were recently amended to include new e-filing requirements, which take effect on April 12, 2021.¹⁴

Accordingly, IT IS ORDERED that the parties hold a prehearing conference and file a statement with the Office of the Secretary following that conference as directed in this order.

("Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.")

¹⁰ See Rules of Practice 151(a), 160(b), 220(b), 17 C.F.R. §§ 201.151(a), .160(b), .220(b).

¹¹ See, e.g., *Schulman Lobel Zand Katzen Williams and Blackman, LLP*, Exchange Act Release No., 87471, 2019 WL 5722077 (Nov. 5, 2019) (granting extension to file answer where Division did not object and informed Commission of agreements reached).

¹² Rule of Practice 221, 17 C.F.R. § 201.221; see also *Jason Dwayne Watson*, Exchange Act Release No. 86555, 2019 WL 3537239, at *2 (Aug. 2, 2019) (providing that the parties shall conduct a prehearing conference after service of respondent's answer).

¹³ See *Pending Administrative Proceedings*, Exchange Act Release No. 88415, 2020 WL 1322001 (Mar. 18, 2020), <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf>.

¹⁴ *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. 86,464, 86,474 (Dec. 30, 2020); see also *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 2020 WL 7013370 (Nov. 17, 2020); *Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, <https://www.sec.gov/efapdocs/instructions.pdf>. The amendments also impose other obligations on parties to administrative proceedings such as a new redaction and omission of sensitive personal information requirement. *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. at 86,465–81.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary