UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72080 / May 2, 2014

Admin. Proc. File No. 3-15045

In the Matter of the Application of

DAVID MURA

ORDER REMANDING CASE FOR FURTHER PROCEEDINGS

I.

David Mura appeals from entry of an initial decision finding him liable for violations of the broker registration requirements of Section 15(a)(1) of the Securities Exchange Act of 1934[1] and imposing sanctions following entry of default and the Division's submission of additional evidence.[2] Mura, who is *pro se*, asserts that the default should be set aside because, among other things, he has proposed an adequate defense to the charges asserted against him. For the reasons set forth below, we set aside the default, vacate the initial decision, and remand this case for further proceedings consistent with this order.

II.

PROCEEDINGS BELOW

On September 24, 2012, we issued an Order Instituting Proceedings ("OIP") alleging that Mura willfully violated Exchange Act Section 15(a)(1) by acting as an unregistered broker-dealer in connection with his solicitation of investors in promissory notes issued by several small, related limited liability companies and by aiding, abetting, and causing additional Section 15(a) violations by others.[3] Mura denied these allegations in a timely answer to the OIP.

---

[1] Exchange Act Section 15(a)(1) generally prohibits brokers and dealers from "effect[ing] any transactions in," or inducing "or attempt[ing] to induce the purchase or sale of, any security," "unless such broker or dealer is registered in accordance with" Exchange Act Section 15(b). 15 U.S.C. § 78o(a)(1). Individuals who act outside the scope of their association with a registered broker-dealer may violate Section 15(a). *See Roth v. SEC*, 22 F.3d 1108, 1109-10 (D.C. Cir. 1994); *SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990).

[2] *David Mura*, Initial Decision Release No. 491, 2013 WL 2898034 (June 14, 2013).

[3] *David Mura*, Securities Exchange Act Release No. 67920, 2012 WL 4356705, at *1, *4 (Sept. 24, 2012).

Mura and the Division appeared telephonically at an initial pre-hearing conference. The law judge later issued a scheduling order setting the hearing in the proceeding to commence on March 4, 2013. On January 21, 2013, asserting that he had a "serious case" of bacterial pneumonia, Mura requested that the hearing be adjourned. The same day, the Division requested that a telephonic status conference be scheduled to address the request. On January 23, 2013, the law judge ordered that such a conference be held on January 29. Mura received a courtesy copy of that order by email.[4] The Division also asked Mura by email if he was "available for a telephonic status conference" at that date and time, and he responded that it was "fine."

There is no evidence in the record of additional conversations between Mura and the Division regarding scheduling. The day before the conference, the Division sent the law judge a three-page letter opposing Mura's request, but neither that letter nor Mura's email response to it later that day mentioned the upcoming conference. There is also no evidence in the record that Mura was sent or received the call-in number arranged for the conference.

Mura did not appear at the conference, although the Division tried to reach him by telephone and email immediately before and during it. Hours after the conference ended, Mura responded to the Division's email, copying the law judge, and asserted that he "was not notified of any phone call for today," but rather that the Division had "asked if [he] was available," he "responded yes," and "that was the last [he] heard."

The next day, January 30, 2013, the law judge ordered Mura to show cause why he should not be deemed in default. On February 11, 2013, after Mura failed to respond to the show cause order, the law judge issued an order deeming Mura in default based on his failure to attend the conference and determining the proceeding against him, pursuant to Commission Rule of Practice 155(a).[5] The order stated that "[n]o sanctions will be imposed until after the Division of Enforcement files a motion requesting relief" supported by sufficient evidence to provide a basis for the requested sanctions.

Subsequently, the Division submitted such a motion and, later, a supplemental brief supported by additional evidence. Meanwhile, on February 21, 2013, Mura moved to set aside the default, asserting that he had not properly been apprised of the conference because he had not received a hard copy of the order setting the conference date until after it had concluded. Mura stated that the order had been sent to an address from which he had been evicted and that he received the order only after it was forwarded to his new address.[6] He also asserted, as a

---

[4] On December 13, 2012, Mura agreed to the Division's request that he accept papers served by the Division by email delivery alone. The record, however, contains no evidence establishing that Mura agreed to accept such electronic service from the law judge.

[5] 17 C.F.R. § 201.155(a) (authorizing law judge to deem a party in default and determine the proceeding against it, assuming the allegations of the OIP to be true, on occurrence of specified events, such as the party's failure to attend any scheduled conference).

[6] Although Mura notified the Division of his eviction when he agreed to accept email service of papers it filed, he appears not to have notified the Commission's Office of the Secretary.

substantive defense to the OIP's allegations, that he would discredit the testimony of nearly all of the Division's witnesses because they were claimants in a FINRA arbitration proceeding against him and that the evidence would show that he did not conduct an offering of promissory notes or direct anyone to solicit investors. The Division and Mura each opposed the other party's motion.[7]

On June 14, 2013, the law judge issued an initial decision finding liability and imposing sanctions, which also denied Mura's motion to set aside the default.[8] The law judge determined that Mura had failed to show the good cause required under Rule of Practice 155(b) because he articulated "neither a sufficient reason for [his] failure to appear, nor a sufficient proposed defense."[9] Specifically, the law judge found that Mura had received adequate notice by email of the pre-hearing conference and that the delay in his receipt of notice by regular mail arose from his failure to update his address with the Office of the Secretary following his eviction. The law judge further found that, although Mura had asserted at least one "realistic proposed defense"—that he could discredit the testimony of Division witnesses because they were pursuing claims against him in a FINRA arbitration proceeding—it was "unlikely" to succeed.[10]

Based on the allegations of the OIP and the additional evidence submitted by the Division with its motion and supplemental brief, the law judge found that Mura had violated Exchange Act Section 15(a)(1) by acting as an unregistered broker and by aiding, abetting, and causing additional related violations of the statute, and imposed sanctions.

---

[7] Although the law judge first suggested that, "[b]ecause of his default, Mura normally would not be permitted to participate in the resolution" of the Division's motion for initial decision, the law judge properly considered Mura's opposition and supporting evidence, *Mura*, 2013 WL 2898034, at *2, as contemplated by Rule 154(b) of our Rules of Practice. 17 C.F.R. § 201.154(b) (providing for submission of briefs opposing motions).

[8] We recently interpreted the Rules of Practice as generally requiring that, going forward, law judges issue initial decisions as to respondents who are in default. *Alchemy Ventures, Inc.*, Exchange Act Release No. 70708, 2013 WL 6173809, at *2 (Oct. 17, 2013). Nonetheless, "existing default orders are valid and judicially enforceable, regardless of whether the law judge ever issued an initial decision in those cases." *Id.*

[9] *Mura*, 2013 WL 2898034, at *3; *see also* Rule of Practice 155(b), 17 C.F.R. § 201.155(b) ("A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding."). The law judge did not address whether Mura's motion to set aside was made within a reasonable time.

[10] The law judge did not consider any defenses that would require affirmative testimony from Mura because, after the date of the event giving rise to the default (the missed teleconference), he did not timely file witness and exhibit lists. Although Mura's name appeared on the Division's witness list, the Initial Decision did not analyze whether Mura would be permitted to testify.

III.

Mura challenges the entry of default by appealing the initial decision based on it. As explained below, we find that the default should be set aside under Rule of Practice 155(b) and the case remanded.

A. The Rules of Practice govern our consideration of defaults.

Our Rules of Practice authorize us or a hearing officer to deem a party in default if, among other things, that party fails "to appear, in person or through a representative, at a hearing or conference of which that party has been notified."[11] But our Rules of Practice do not compel entry of default in such circumstances. Instead, "we generally consider it a prudent practice for a law judge who is considering the issuance of a default order against a respondent to first order that respondent show cause why a default is not warranted."[12] If a respondent fails to show cause, the consequences are serious. Upon a finding of default, the Commission or hearing officer "may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings," and may deem the allegations of the OIP to be true.[13]

"[T]o prevent injustice and on such conditions as may be appropriate," Rule of Practice 155(b) allows the Commission, at any time, or a hearing officer, at any time prior to the filing of the initial decision, to set aside a default "for good cause shown."[14] As noted, a motion to set

---

[11] Rule of Practice 155(a)(1), 17 C.F.R. § 201.155(a)(1); *see also* Rules of Practice 221(f) (failure to appear at pre-hearing conference) and 310 (failure to appear at hearing), 17 C.F.R. §§ 201.221(f) and 310. The failure "to answer, respond to a dispositive motion within the time provided, or otherwise defend a proceeding" may also give rise to a default. Rule of Practice 155(a)(2), 17 C.F.R. § 201.155(a)(2); *see also* Rule of Practice 220(f), 17 C.F.R. § 201.220(f) (failure to file answer). And if a person fails to make a required filing or timely cure a deficient filing, the Commission or hearing officer "may enter a default," "dismiss the case, decide the particular matter at issue against that person, or prohibit the introduction of evidence or exclude testimony concerning that matter." Rule of Practice 180(c)(1) and (2), 17 C.F.R. § 201.180(c)(1) and (2); *see also* Rule of Practice 155(a)(3), 17 C.F.R. § 201.155(a)(3) (authorizing default for failure to cure deficient filing).

[12] *Vladislav Zubkis*, Exchange Act Release No. 51364, 2005 WL 597022, at *2 (Feb. 15, 2005); *see also Richard S. Kern*, Exchange Act Release No. 51115, 2005 WL 711681, at *2 (Feb. 1, 2005) ("[I]t is a long-standing and helpful—although not explicitly required—practice in cases where a Respondent is apparently in default for the law judge to order a respondent to show cause within a brief period why he or she should not be found in default.").

[13] Rule of Practice 155(a), 17 C.F.R. § 201.155(a).

[14] 17 C.F.R. § 201.155(b). We have stated that "unless there are unusual circumstances, the Commission generally should rule only after a ruling by the law judge." *Zubkis*, 2005 WL 597022, at *3 n.11.

aside a default must (1) "be made within a reasonable time," (2) "state the reasons for the failure to appear or defend" the proceeding in which the default has been entered, and (3) "specify the nature of the proposed defense in the proceeding."[15]

Although Rule 155(b) specifies the three factors listed above, it does not expressly explain how they should be applied with respect to determining whether "good cause" has been shown under the rule or set forth the showing required to satisfy each element. In the past, we have interpreted Rule 155 through adjudication. For example, in *Dan Rapoport*, we addressed a motion to set aside a default that was entered after a respondent did not timely answer the OIP.[16] In denying the motion, we examined the first two Rule 155 factors and determined that the defaulting respondent had failed to establish both (1) that "his reasons for the failure to defend the proceeding supported setting aside" the default and (2) that the motion to set aside the default was filed "within a reasonable time."[17] Because the respondent failed to establish each of the first two elements identified in Rule 155(b), we declined to "consider whether his proposed defenses had potential merit."[18] To do so, we explained, "would in effect grant [the respondent] the hearing that he chose to forgo by failing to defend the proceeding" and undermine his incentives to participate in our administrative process.[19]

On Rapoport's petition, however, the Court of Appeals for the District of Columbia Circuit vacated our order denying his motion to set aside the default.[20] The D.C. Circuit found that precedent did not support our statement that when a respondent "fail[s] to meet any one of the three [Rule 155(b)] requirements, the Commission customarily has declined to consider whether the petitioner has met the other two."[21] But the court did "not suggest" that we were prohibited from interpreting Rule 155(b) to require a respondent to make a showing on all three factors.[22] Rather, the D.C. Circuit found that the Commission had "not provided a consistent

---

15 *See supra* note 9.

16 *Dan Rapoport*, Exchange Act Release No. 63744, 2011 WL 194504 (Jan. 20, 2011), *vacated*, 682 F.3d 98 (D.C. Cir. 2012).

17 *Id.*, 2011 WL 194504, at *6.

18 *Id.*

19 *Id.* We further observed that "[t]he prospect that a default order could be entered based on the allegations in an OIP should motivate respondents who have meritorious defenses to engage in the proceeding." *Id.*

20 *Rapoport v. SEC*, 682 F.3d at 108.

21 *Id.* at 106.

22 *Id.*

interpretation of the Rule" in its case law, "nor justified" what the court characterized as "the apparent inconsistency of its application."[23]

B. A respondent must make a sufficient showing on all three elements specified in Rule of Practice 155(b) to justify setting aside a default.

In light of the concerns expressed by the court in *Rapoport*, we clarify our interpretation of Rule 155(b) with regard to the way in which we consider the three elements identified in that rule in determining whether there is good cause to set aside a default. In doing so, we reaffirm our prior view that if a defaulting respondent fails to make a sufficient showing on any one of the three identified elements, we will not consider whether the other two elements are established. To the extent that this could be construed as a departure from our prior precedent, we explain the basis for our interpretation of Rule 155 as follows.

We begin with the text of Rule 155(b), which states that a motion to set aside a default "shall" comply with each of three requirements joined by the word "and."[24] In our view, Rule 155(b)'s conjunctive structure is best read to require that a respondent file its motion to vacate "within a reasonable time" *and* that such a motion *both* "state the reasons for the failure to appear or defend" and "specify the nature of the [respondent's] proposed defense in the proceeding." Under this interpretation of the rule's language, the Commission or law judge may deny relief if the respondent fails to seek it in a reasonable time *or* if the respondent fails to specify either a reason for its failure to appear or defend or the nature of its proposed defense in its motion.[25] And because "good cause" must be shown to set aside a default, we believe it appropriate also to require a party seeking to set aside a default to satisfy the substantive standards identified in Section C below; in other words, the requirements of the rule are substantive, as well as procedural.

In addition to the language of the rule, we believe there are strong policy reasons for our interpretation, including those we previously identified in *Rapoport*.[26] Each of the three elements serves an important purpose, such that the lack of a sufficient showing on any one element provides an independent basis to deny a motion to set aside.

---

[23] *Id.* The D.C. Circuit explained that "[a]lthough the Commission is not bound to follow its precedent, it may not depart from its precedent without offering a reasoned explanation." *Id.* at 106 (citing *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304-05 (D.C. Cir. 2009)).

[24] *Cf.* Fed. R. Civ. P. 55(c) (providing that a "court may set aside an entry of default for good cause" but setting forth no specific required submissions).

[25] *See Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 609 n.10 (1st Cir. 1994) ("Absent a contrary indication in the regulation itself—and none exists here—we think it is fair to assume that a party must satisfy every element of a provision written in the conjunctive.").

[26] *See supra* note 19 and accompanying text.

First, it is critical that a motion to vacate a default be filed "within a reasonable time" as Rule 155(b) requires.[27] The reasonable time requirement serves the same function as a statute of limitations,[28] and thus helps to alleviate concerns regarding fading recollections and loss of evidence that are raised by the litigation of stale claims. The requirement also tempers concerns regarding prejudice to parties that are prevented from timely litigating their claims on the merits as a result of an opposing party's default.[29] Enforcing the requirement that motions be filed within a reasonable time also promotes finality and certainty in administrative adjudications.[30] Inherent in the concept of a statute of limitations and similar filing deadlines, such as the reasonable time requirement in Rule 155(b), is that an untimely filing cuts off a litigant's right to substantive review of its assertions.[31]

Accordingly, for these reasons, where a party fails to challenge a default within a reasonable time, it is appropriate to decline to set aside the default on this basis alone.[32] Indeed,

---

[27] 17 C.F.R. § 201.155(b).

[28] *Cf. Wells v. N.Y.C. Transit Auth.*, No. 13 Civ. 4965(RPP), 2013 WL 6409457, at *3 (S.D.N.Y. Dec. 9, 2013) (characterizing timing requirement applicable when a party moves for relief from judgment under Fed. R. Civ. P. 60(b)(6) catch-all provision as a "statute of limitations of 'a reasonable time'"). While we find precedent interpreting Federal Rules of Civil Procedure 55 and 60(b) relevant, we are "not bound to interpret [our] own rule in the same way federal courts interpret their rule, even if the two rules are worded similarly." *Rapoport*, 682 F.3d at 104.

[29] *See Melvin Lloyd Richards*, Exchange Act Release No. 34612, 1994 WL 478785, at *3 n.10 (Aug. 29, 1994) (denying request to set aside order where, among other things, "reopening this proceeding would work a substantial hardship on this Commission, which would be forced . . . to attempt to reconstruct its case against Richards, find its evidence, and refresh witnesses' recollection").

[30] *See Pennmont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *4 & n.21 (Apr. 23, 2010) ("Strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief.").

[31] *See Carter v. Wash. Metro Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985) ("[F]inality of outcome, regardless of the merits of the claim, is exactly the purpose of the statute of limitations that the legislature has enacted.").

[32] As a leading treatise on federal civil procedure recognizes, "a motion to set aside any entry of default should be brought within a reasonable time, and a court does not abuse its discretion in denying a motion that is unreasonably delayed." 10 James Wm. Moore et al., *Moore's Federal Practice* ¶ 55.70[5] (3d ed. 2013); *see also Days Inn Worldwide, Inc. v. Patel*, 445 F.3d 899, 908 (6th Cir. 2006) (affirming denial of motion for relief from default judgment on the ground that the district court did not abuse its discretion in ruling that the motion was not filed within a reasonable time); *cf. United States v. $284,960.00 in U.S. Currency*, No. 97-2782, 139 F.3d 902 (Table), 1998 WL 75959, at *1 (7th Cir. Feb. 23, 1998) (unpublished) (holding that "district court did not abuse its discretion by concluding that Valona simply waited too long to file his

(continued . . .)

it would be incongruous to allow a party to obtain relief from a default entered for failure to engage in the administrative process, where the party *continued* to disregard the process by delaying longer than a reasonable time before filing its motion to set aside.[33]

Second, a party must establish a sufficient "reason[] for the failure to appear or defend" that led to the default, *i.e.*, that the respondent did not intentionally default[34] or otherwise fail to "make defense of a proceeding a priority."[35] Our Rules of Practice establish timeframes for the completion of administrative proceedings before law judges,[36] and reflect a policy to further the "speedy . . . determination of every proceeding."[37] If we were to excuse a party's decision to disregard a deadline (either deliberately or by failing to accord sufficient respect to the proceedings) by lifting a default based on such conduct, it would undermine this policy.[38] Federal courts have recognized that, standing alone, a party's willful default justifies denying a

---

(. . . continued)
Rule 60(b) motion" where it denied relief from judgment for failure to file within a reasonable time).

[33] *Cf. WCOV, Inc. v. FCC*, 464 F.2d 812, 815 (D.C. Cir. 1972) (stating that where party challenging agency action "chose to sleep on its rights," "it should not be heard to complain about the consequences of its negligence"). In Section C below, we separately clarify how we will calculate a reasonable time and explain that, in doing so, we will consider the particular facts and circumstances, as do many federal appellate courts.

[34] *James W. Bullard, Jr.*, Exchange Act Release No. 36471, 1995 WL 677466, at *2 (Nov. 9, 1995) (concluding that it was "not possible to find that [respondent] ha[d] demonstrated good cause" to set aside default because "he knew of his obligation to file an answer," missed several opportunities to act in a proceeding, each time asserting that he had not been aware of the obligation to answer and needed more time to do so).

[35] *See Rapoport*, 2011 WL 194504, at *5 ("We have previously refused to set aside default orders where respondents failed to make defense of a proceeding a priority." (citing *George T. Hellen*, Exchange Act Release No. 44536, 55 SEC 248, 250-51 (July 11, 2001) (rejecting "participation in a divorce proceeding during the past year" and "inability to retain counsel" as "adequate reasons" for failure to prosecute appeal) and *James M. Russen, Jr.*, Exchange Act Release No. 32895, 51 SEC 675, 1993 WL 365083, at *2 (Sept. 14, 1993) (sustaining NASD finding of default because applicant's "assertions that he d[id] not remember either signing the receipt for or receiving the complaint do not amount to 'good cause'" for failure to participate in hearing))).

[36] *See, e.g.*, Rule of Practice 360(a)(2), 17 C.F.R. § 201.360(a)(2).

[37] Rule of Practice 103(a), 17 C.F.R. § 201.103(a). Our rules further provide that parties' requests to extend case deadlines are "strongly disfavor[ed]." Rule of Practice 161(b)(1), 17 C.F.R. § 201.161(b)(1).

[38] *Cf. Ackermann v. United States*, 340 U.S. 193, 198 (1950) ("There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.").

motion to vacate.[39] This is particularly the case in administrative proceedings, in which courts have recognized agencies' ability to adopt more summary procedures,[40] and where, as our Rules of Practice reflect, parties have an obligation to remain apprised of developments in the proceeding and participate as directed by the presiding official.[41]

Third, it is appropriate to require a party seeking to set aside a default to articulate a meritorious defense to the administrative proceeding.[42] Below we explain that such a defense

---

[39] *See, e.g.*, *Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d 114, 120 (5th Cir. 2008) (holding that "if a district court finds a defendant's default to be willful, then the district court need not make any other finding" to deny a motion to vacate a default); *Action S.A. v. Marc Rich Co.*, 951 F.2d 504, 507 (2d Cir. 1991) (holding that a "default should not be set aside when it is found to be willful"); Moore et al., *supra* note 32, ¶ 55.70[2][b] ("A court is within its discretion denying relief when the default involved deliberate conduct, such as when a party knows of the proceedings and could respond, but decides not to as part of a deliberate strategy."). More generally, courts have declined to consider defaulting parties' proposed defenses where they cannot establish a sufficient reason under Rule 60(b) to vacate a default judgment. *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 293 (6th Cir. 1992) (where "defendants could not establish that their conduct was the result of mistake, inadvertence, surprise, or excusable neglect," the court concluded that "demonstration of the existence of a meritorious defense . . . could not assist [their] cause"); *see also United States v. 3,888 Lbs. Atlantic Sea Scallops*, 857 F.2d 46, 49 (1st Cir. 1988) ("Because we conclude that the district court did not abuse its discretion in failing to find excusable neglect, we need not decide whether claimant's defense is meritorious.").

[40] *See Dixon v. Love*, 431 U.S. 105, 115 (1977) ("[P]rocedural due process in the administrative setting does not always require application of the judicial model."); *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979) ("[A]gencies need not observe all the rules and formalities applicable to courtroom proceedings.").

[41] Parties may forfeit their rights to proceed if they fail to do so. *See supra* note 11 and accompanying text. The default procedure provides a means of enforcement of this obligation. *See KPS & Assocs. v. Designs by FMC, Inc.*, 318 F.3d 1, 13 (1st Cir. 2003) (noting that default "provide[s] a useful remedy when a litigant is confronted by an obstructionist adversary," "play[s] a constructive role in maintaining the orderly and efficient administration of justice," and "furnishes an invaluable incentive for parties to comply with court orders and rules of procedure").

[42] *See Indigo Am., Inc. v. Big Impressions, L.L.C.*, 597 F.3d 1, 4 (1st Cir. 2010) ("Where no meritorious defense exists, it makes little sense to set aside the entry of default, as doing so would merely delay the inevitable."); Moore et al., *supra* note 32, ¶ 55.70[2][d] ("When the defaulting party lacks a meritorious defense to the claims, relief from default or default judgment is pointless. Consequently, the absence of a defense is a sufficient reason to deny relief."); *see also New York v. Green*, 420 F.3d 99, 109 (2d Cir. 2005) (recognizing that absence of meritorious defense is sufficient to support district court's denial of Fed. R. Civ. P. 60(b) motion

(continued . . .)

must be legally cognizable and, if proven at a hearing, constitute a defense to the claims. It would be illogical and a poor use of limited resources to vacate a default and order a case to proceed to a hearing where a defaulting respondent cannot even identify such a defense.[43]

Accordingly, we believe that the policy concerns discussed above strongly support our interpretation that the absence of a sufficient showing on any one of the elements identified in Rule 155(b) is a sufficient basis to deny relief. Stated differently, there is no "injustice" "to prevent" and no "good cause" to set aside a default, if a defaulting respondent cannot satisfy each of the elements identified in Rule 155(b). Moreover, because we are not frequently called upon to construe and apply Rule 155(b), our three-prong approach (as clarified below) should provide greater predictability and uniformity of results than a balancing test might.

C. We set aside the entry of default against Mura.

We now apply these principles to the case before us and find that Mura has established good cause to vacate the default because he has made a sufficient showing on all three elements discussed above. First, Mura filed his motion to set aside the default within a reasonable time. In making this finding, we focus on the length of time between effective notice to the respondent of the entry of default and the respondent's filing of the first motion or appeal requesting that the default be set aside; *i.e.*, we assess how long it took the respondent to address the default after service of a default order pursuant to Rule of Practice 141,[44] or the point in time when evidence indicates the respondent otherwise became aware of the default's entry.[45]

(. . . continued)
to set aside default judgment); *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000) (same).

[43] *See Hearing Officers; Delegation and Procedures, Notice of Proposed Rulemaking*, Securities Act Release No. 4687, 29 Fed. Reg. 6352, 6353 (May 14, 1964) (explaining that because "[i]n many cases the Commission ha[d] been required to convene a hearing for the sole purpose of introducing evidence on which to base findings and impose sanctions against persons," causing "unnecessary expense in the development of the record of proceedings," the Commission proposed to amend the default rule "to eliminate such unnecessary hearings"); *cf. Kornman v. SEC*, 592 F.3d 173, 186 (D.C. Cir. 2010) (rejecting respondent's contention that "he was entitled to an evidentiary hearing even in the absence of evidence of a material issue of disputed fact [a]s flawed as a matter of statutory interpretation" in case resolved on summary disposition).

[44] 17 C.F.R. § 201.141.

[45] *See, e.g.*, *Bullard*, 1995 WL 677466, at *1 (finding that request to set aside default submitted within week of default order was "clearly timely filed"); *Robert E. Ainbinder*, Exchange Act Release No. 39177, 1997 WL 600608, at *1 (Oct. 1, 1997) (concluding that respondent did not "act[] within a reasonable time" in seeking to set aside default order when he waited years after receiving default order and having it confirmed in person by Commission staff).

Because this inquiry is likely to be fact intensive, we consider the various circumstances surrounding the default and the respondent's request to set it aside to determine if the request was made within a reasonable period.[46] We find additional support for a facts-and-circumstances standard in a number of federal court decisions applying such a standard to motions for relief from judgment, which also must be filed within a reasonable time.[47]

The law judge entered the default on February 11, 2013, and the order was sent to Mura by regular mail and email the same day. On February 21 and 28, 2013, Mura sent two emails challenging the default, which the law judge found could be construed as motions to set it aside. Under the circumstances, it is apparent that Mura moved within a reasonable time under Rule 155(b).[48]

Second, we find that, on balance, Mura has provided a sufficient reason for missing the teleconference in that he did not intentionally fail to appear at the conference or otherwise fail to make defense of the proceeding a priority.[49] In making this determination, we note that the phrasing of the email the Division sent to confirm Mura's availability for the teleconference suggested that no definitive date for the conference had been established, and that after that email exchange, there were no further discussions between the parties regarding the scheduling of the conference. Moreover, the record indicates that Mura never received a call-in number for the teleconference and that the Division never explained to Mura how he would be able to join the call. Indeed, the day before the conference, the Division emailed a three-page letter to the law judge, copying Mura, which did not mention that the conference had been scheduled for the following day, and Mura promptly responded with his own email to the law judge, also without mentioning the conference. Combined with his submission of an answer and previous attendance at a pre-hearing conference, this exchange shows that Mura was actively participating

---

[46] In doing so, we seek to address the D.C. Circuit's concern that "[t]he Commission has left 'vague and indecisive' the date that starts the 'reasonable time' clock, as well as the amount of time considered reasonable." *See Rapoport*, 682 F.3d 98 at 107.

[47] *See Travelers Ins. Co. v. Liljeberg Enter., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994) (holding that what constitutes a reasonable time under Federal Rule of Civil Procedure 60(b) "depends upon the particular facts and circumstances of the case"); *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (holding that "[w]hat constitutes 'reasonable time' depends on the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties"); *see also* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2866 (3d ed. 2013) ("What constitutes reasonable time necessarily depends on the facts in each individual case."); 12 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60.65[1] (3d ed. 2013) ("What is or is not a 'reasonable time' under Rule 60(c)(1) is not a fixed concept. It depends on the facts and circumstances of each case.").

[48] *See Kern*, 2005 WL 711681, at *1 (finding that "Respondents promptly requested that the default be set aside," where they filed a motion to set aside within fourteen days of default).

[49] *See supra* notes 34 and 35 and accompanying text.

in the hearing process, at least as of the day immediately prior to the conference, circumstances we previously have considered significant where a respondent has moved to set aside a default.[50] The evidence thus supports Mura's assertion that his non-participation was inadvertent. We accordingly find this element satisfied.[51]

Third, Mura articulated a sufficient proposed defense. Rule 155(b) requires a defaulting respondent to "specify the nature of [his] proposed defense in the proceeding."[52] A defaulting respondent thus must do more than generally deny he has committed the violation,[53] or that he intends to put the Division to its proof.[54] But simply identifying a defense is not enough to establish good cause, even if a respondent makes a sufficient showing on the other two elements specified in Rule 155(b).[55] Instead, a litigant must articulate a defense that is legally cognizable

---

[50] *Cf. Zubkis*, 2005 WL 597022, at *2 (remanding request to set aside default where, "[a]lthough Respondent expressed an unwillingness to attend the hearing based on his jurisdictional objection, he participated in both prehearing conferences and submitted numerous written filings in defense of his position"); *see also supra* note 35 and accompanying text.

[51] Although we are troubled by Mura's failure to give proper notice of his change of address to the Office of the Secretary, as required by Rule of Practice 102(d)(1), we note that Mura did inform the Division in December 2012 that he had been evicted from the physical address to which the order setting the conference was later sent. *See* 17 C.F.R. § 201.102(d)(1) (imposing requirement to update address on *pro se* parties). We are also troubled by the possibility that Mura had actual notice of the conference through the email courtesy copy. But the record does not establish that Mura ever agreed to accept such service from the law judge, and our rules do not currently provide for service by email. *See* Rule of Practice 141(b), 17 C.F.R. § 201.141(b). Considering all the circumstances, including possible ambiguity regarding the application of Rule 155 following *Rapoport*, we have determined that Mura has satisfied this second element. *Cf. SEC v. First Houston Capital Res. Fund, Inc.*, 979 F.2d 380, 382 (5th Cir. 1992) (vacating default judgment where "court clerk sent order to wrong address" and "[a]lthough [defendant] should have checked with the court if he had any confusion as to the correct date, the extreme punishment of a default judgment seem[ed] inappropriate for a first offense blunder by a *pro se* litigant").

[52] 17 C.F.R. § 201.155(b).

[53] *See Bullard*, 1995 WL 677466, at *1 (noting that while defaulting respondent "averred that he was not guilty he did not specify the nature of his proposed defense").

[54] *Cf. Hellen*, 55 SEC at 249, 250 (finding that, where defaulting respondent simply asserted that he wished "to have a fair day of argument," he failed to "state what defense he would advance" at a hearing on the merits) (internal quotation omitted).

[55] To the extent that our precedent might be read to suggest that the Commission will accept *any* proffered defense as sufficient under Rule 155(b) without examination of its merits, we reject that interpretation of our rule. *See Rapoport*, 682 F.3d at 106 (noting that "in *Kern*, the Commission granted the motion and accepted the proposed defenses without explaining what those defenses were").

and, if proven at a hearing, would constitute a defense to the claims.[56] But we do not require the respondent to establish that he is likely to prevail on the proposed defense or to make a detailed evidentiary showing regarding the theory underlying that defense.

Mura has repeatedly denied, in his answer and subsequent filings, the allegations of misconduct made in the OIP. For example, in his motion to set aside the default, Mura referenced this fact and averred that he "did not conduct an offering of the LLC promissory notes" and "did not direct . . . anyone . . . to solicit investors." Before us, Mura specifically denies signing any of the notes at issue or sending any emails or otherwise soliciting any investors,[57] and he seeks to impeach the testimony of anticipated Division witnesses because they previously pursued claims against him in a FINRA arbitration or allegedly are involved in separate proceedings relating to similar alleged misconduct. Mura also challenges the $840,000 civil penalty imposed against him as excessive for various reasons and avers an inability to pay.[58] We find that these averments, which we understand, at a minimum, would be supported by Mura's testimony,[59] collectively are sufficient to identify a potentially meritorious defense.[60]

Accordingly, because we find that Mura has made a sufficient showing on all three elements, we set aside the default against him and vacate the initial decision.[61]

Accordingly, IT IS ORDERED that the default entered against Respondent David Mura be set aside; and it is further

---

[56] *See* Moore et al., *supra* note 32, ¶ 55.70[2][d] ("The test is not whether there is a likelihood that the defaulting party will prevail on the defense, but rather whether a defense is proposed that is legally cognizable and, if proved at trial, would constitute a complete defense to the claims.").

[57] These assertions are consistent with Mura's investigative testimony in which he repeatedly denied involvement in the process of soliciting investors.

[58] Mura also alleges Division staff misconduct, asserting that he was targeted because he challenged their "overzealous attitude and inhumane tactics." In light of our determination that Mura has identified a sufficient defense through the other averments mentioned above, we do not address the sufficiency of these assertions for Rule 155(b) purposes.

[59] Mura asserts that he seeks "the opportunity to tell [his] side of the story."

[60] *SEC v. Breed*, No. 01 Civ. 7798 (CSH), 2004 WL 1824358 (S.D.N.Y. Aug. 13, 2004), cited by the Division, does not compel a different result. In *Breed*, the court concluded that the defaulting defendants' mere denial that they had engaged in insider trading was inherently unbelievable because they conceded that two defendants "discussed the stocks at issue during the time in which defendants are accused of making insider trades" and that one defendant spoke with the tipper regarding them. *Id.* at *12. The Division offers no such argument here, *i.e.*, that Mura's denial is inherently unbelievable.

[61] In doing so, we do not mean to suggest a view as to the ultimate resolution of this proceeding. In light of our decision to remand, we do not address Mura's assertion that the sanctions issued against him are excessive.

ORDERED that the initial decision entered against him be vacated; and it is further

ORDERED that this case be remanded to the administrative law judge for further proceedings consistent with this order.

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Jill M. Peterson
Assistant Secretary