

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 10035 / February 5, 2016

SECURITIES EXCHANGE ACT OF 1934

Release No. 77068 / February 5, 2016

INVESTMENT ADVISERS ACT OF 1940

Release No. 4329 / February 5, 2016

INVESTMENT COMPANY ACT OF 1940

Release No. 31985 / February 5, 2016

Admin. Proc. File No. 3-15842

In the Matter of

JACOB KEITH COOPER

Appeal filed: November 17, 2015

Last brief received: December 15, 2015

ORDER DISMISSING UNTIMELY PETITION FOR REVIEW

On November 17, 2015, Jacob Keith Cooper filed a petition for review of an Initial Decision finding that he violated the anti-fraud provisions of the federal securities laws and imposing sanctions. Because Cooper filed his petition more than two months after his appeal period had expired, we dismiss it as untimely.

**I. Facts**

On August 17, 2015, an administrative law judge issued an Initial Decision as to Cooper, which ordered, among other things, that any petition for review be filed “within twenty-one days after service of the Initial Decision.”<sup>1</sup> The following day, the SEC’s Office of the Secretary

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<sup>1</sup> *Jacob Keith Cooper*, Initial Decision Release No. 860, 2015 WL 4881991, at \*46 (Aug. 17, 2015). *See also* Rule 410(b), 17 C.F.R. § 201.410(b) (“The petition for review of an initial decision shall be filed with the Commission within such time after service of the initial decision as prescribed by the hearing officer . . . .”); Rule 360(b), 17 C.F.R. § 201.360(b) (“The initial

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served the Initial Decision by certified mail to three addresses on record for Cooper: (i) the office of his attorney of record, Vincent J. Brown, Esq.; (ii) Cooper's address in Washington, Utah; and (iii) Cooper's address in San Diego, California. All three mailings were returned to the Commission. The mailings to Cooper's attorney and Cooper's Utah address were returned as unclaimed, despite the fact that the U.S. Postal Service left notice of the mailing at each location (as reflected by tracking information obtained from the Postal Service's website). The Postal Service returned the mailing to Cooper's California address as undeliverable. In any event, in his brief in support of his petition, Cooper stated that he received the Initial Decision from his attorney on August 24, 2015.

On October 13, 2015, we issued an order titled "Notice that Initial Decision Has Become Final" ("Finality Notice").<sup>2</sup> The Finality Notice stated that the "time for filing a petition for review in this proceeding has expired" and that "[n]o such petition has been filed by Jacob Keith Cooper and the Commission has not chosen to review the decision on its own initiative." The Finality Notice stated that the Initial Decision had "become the final decision of the Commission."

On October 14, 2015, the SEC's Office of the Secretary served the Finality Notice by certified mail to Cooper at the same three addresses, and obtained a signed return receipt confirming that the Finality Notice was received at Cooper's Utah address on October 19, 2015. On November 17, Cooper filed this petition for review of the Initial Decision.

After receiving Cooper's petition, we issued an order directing Cooper and the Division of Enforcement to submit briefs addressing "whether Cooper's appeal should be dismissed as untimely pursuant to Commission Rule of Practice 410(b)."<sup>3</sup> The parties submitted simultaneous briefs. The Division argued that we should dismiss Cooper's petition as untimely while Cooper argued that we should allow his petition because his attorney was to blame for its untimeliness. In its reply brief, "based on the representations in Cooper's December 18, 2015 brief," the Division withdrew its opposition to Cooper's untimely petition. As we explain below, notwithstanding the Division's position, we conclude it is appropriate to dismiss Cooper's petition.

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decision shall also state the time period, not to exceed 21 days after service of the decision, except for good cause shown, within which a petition for review of the initial decision may be filed.").

<sup>2</sup> *Jacob Keith Cooper*, Exchange Act Release No. 76133, 2015 WL 5935346 (Oct. 13, 2015).

<sup>3</sup> *Jacob Keith Cooper*, Exchange Act Release No. 76502, 2015 WL 7348241, at \*1 (Nov. 20, 2015).

## II. Discussion

Rule 410(b) requires that a petition for review of an initial decision be filed “within such time after service of the initial decision as prescribed by the hearing officer.”<sup>4</sup> Here, the law judge ordered that any petition be filed within 21 days after service of the Initial Decision.<sup>5</sup>

Under Rule 141(b), the SEC’s Office of the Secretary may serve orders or decisions of a hearing officer by any method provided by Rule 141(a) or Rule 150(c)(1)-(3).<sup>6</sup> Rule 150(c)(2) provides for service by “[m]ailing the papers through the U.S. Postal Service by first class, registered, or certified mail or Express Mail delivery addressed to the person.”<sup>7</sup> The Office of the Secretary served the Initial Decision by certified mail on August 18, 2015, to three addresses of record for Cooper, as detailed above. Under Rule 150(d), “[s]ervice by mail is complete upon mailing.”<sup>8</sup> Thus, service was complete on August 18, 2015.<sup>9</sup> Because the Initial Decision was served by certified mail, we follow Rule 160(b) and add three days to the time provided in the Initial Decision to file an appeal.<sup>10</sup> Cooper, therefore, had 24 days from August 18, 2015 (the 21 days provided in the Initial Decision, plus the additional three days) to file a timely petition for review, *i.e.*, until September 11, 2015.<sup>11</sup>

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<sup>4</sup> Rule 410(b), 17 C.F.R. § 201.410(b).

<sup>5</sup> *Cooper*, 2015 WL 4881991, at \*46.

<sup>6</sup> Rule 141(b), 17 C.F.R. § 201.141(b).

<sup>7</sup> Rule 150(c)(2), 17 C.F.R. § 201.150(c)(2).

<sup>8</sup> Rule 150(d), 17 C.F.R. § 201.150(d). The Federal Rules of Civil Procedure similarly permit the clerk of the court to serve notice of the entry of an order or judgment by “mailing [papers] to the person’s last known address”; and provide that “service is complete upon mailing.” Fed. R. Civ. P. 5(b)(2)(C), 77(d); *see* Rules of Practice, Exchange Act Release No. 35833, 1995 WL 368865, at \*27 (June 9, 1995) (Rule 141 “is derived, in part, from Rules 4 and 5(b) of the Federal Rules of Civil Procedure.”).

<sup>9</sup> We have previously stated that “a return receipt or other confirmation of delivery is not required” for the service of orders subsequent to our service of the Order Instituting Proceedings. Rules of Practice, 1995 WL 368865, at \*28. This is because the service of an OIP places the party “on notice that there will be subsequent filings or other papers.” *Id.*

<sup>10</sup> Rule 160(b), 17 C.F.R. § 201.160(b) (“If service is made by mail, three days shall be added to the prescribed period for response unless an order of the Commission or the hearing officer specifies a date certain for filing.”).

<sup>11</sup> The Postal Service returned the August 18 certified mailings that were sent to Cooper and Brown. But the fact that the mailings were returned does not have an effect on whether service was completed. *Cf. Anthony v. Marion Cty. Gen. Hosp.*, 617 F.2d 1164, 1168 n.5 (5th Cir. 1980) (stating that service is complete upon mailing under FRCP 5(b) and that “refusal to accept mail does not vitiate service”); 4B Wright & Miller, Fed. Prac. & Proc. Civ. § 1148 (4th ed.) (“Since [FRCP 5(b)(2)(C)] expressly directs that service is complete upon mailing, nonreceipt or

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Cooper concedes that his petition was untimely. Despite the September 11 deadline to file a petition for review, Cooper did not file his petition until November 17—more than two months after the deadline. But Cooper asks that his failure to file timely be excused, pursuant to Rule 420(b), the doctrine of equitable tolling, or Rule 100(c).

We find no merit in Cooper’s argument. First, Rule 420(b) contemplates an extension of the appeal period upon a showing of “extraordinary circumstances,” but the provision applies only to appeals from decisions by self-regulatory organizations, and Cooper’s appeal is from a law judge’s initial decision.

Second, because Cooper has not shown “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing,”<sup>12</sup> he is not entitled to equitable tolling. We have previously explained that “[e]ven when circumstances beyond the applicant’s control give rise to the [failure to file timely], however, an applicant must also demonstrate that he or she promptly arranged for the filing of the appeal as soon as reasonably practicable thereafter. An applicant whose application is delayed as a result of extraordinary circumstances remains under an obligation to proceed promptly in pursuing appellate recourse.”<sup>13</sup>

We are not persuaded that Cooper has been pursuing his right to appeal diligently or that an extraordinary circumstance prevented him from timely filing an appeal. Cooper admits that he received the Initial Decision from his lawyer on August 24. The Initial Decision stated that Cooper had 21 days to file his petition; yet, the first time he indicated that he was challenging the law judge’s decision was in mid-November, when he filed his petition.

Cooper claims that he was, in fact, trying to communicate with his attorney, who failed to speak to him or return any of his messages.<sup>14</sup> Cooper argues that it was “*only after* the deadline

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nonacceptance of the papers by the person to be served generally does not affect the validity of service.”). In any event, Cooper stated in his brief in support of his petition that he received a copy of the Initial Decision from Brown on August 24, 2015, which establishes that he had actual notice of the Initial Decision by August 24. Even if we were to use that August 24 date as the date of service, a timely petition for review should have been filed by September 14, 2015.

<sup>12</sup> *Holland v. Florida*, 560 US. 631, 649 (2010) (internal quotations omitted).

<sup>13</sup> *Pennmont Secs.*, Exchange Act Release No. 61967, 2010 WL 1638720, at \*4 (April 23, 2010).

<sup>14</sup> He provides no details about these various attempts to reach his lawyer, including when he tried to contact Brown or about what topics. Importantly, Cooper does not indicate that his attempts to contact Brown took place after he received the Initial Decision.

to file the petition for review was missed that I realized [Brown] was no longer acting as my attorney.” But Cooper’s own statements demonstrate that he knew well *before* the deadline passed that Brown was not acting as his attorney. Brown represented Cooper at the hearing in this proceeding, which ended on April 2, 2015, and Cooper admitted that “[s]ince the hearing, I have had virtually no success communicating with my attorney.” Cooper admitted that “I have tried to reach Mr. Brown repeatedly and regularly following the hearing and following the publication of the Initial Decision, but Mr. Brown has not responded to my requests. I have no idea where he is located currently and have had no way of reaching him for many months.” In other words, Cooper had been unable to communicate with Brown for approximately four and a half months before the Initial Decision was issued on August 18. Cooper therefore was on notice that Brown was no longer acting as his attorney and had time to arrange for other counsel prior to the deadline for filing a petition for review.

After receiving the Initial Decision, which informed him about the deadline to file his petition, Cooper alleges that he continued to reach out to Brown to no avail. Further, Brown failed to appear on his behalf at scheduling conferences in a separate proceeding in the United States District Court for the Southern District of California. Specifically, Brown failed to appear at conferences scheduled for August 28, 2015, September 8 and 10, 2015, and October 13, 2015.<sup>15</sup> Thereafter, on October 19, Cooper received the Finality Notice, which informed him that the appeal period had expired and that the Initial Decision had become the final decision of the Commission. Even after receiving the Finality Notice, Cooper waited 29 days to file his petition—a period that alone exceeds the 21 days in which a party is required to file a petition appealing an initial decision. Cooper fails to explain why he waited until mid-November to file a petition, despite the fact that he failed to reach Brown after receiving the Initial Decision, and received the Finality Notice on October 19. The record does not reflect that at any time prior to the filing of his December 8 brief, Cooper reached out to the Commission to suggest that he was attempting to contact his attorney without success. Cooper only did so in response to the Commission’s order seeking briefing.

This course of events leads us to conclude both that Cooper was not pursuing his appeal rights diligently and that he was not prevented from timely filing by some extraordinary circumstance. Cooper could have, after the multiple instances of non-communication, sought new counsel to represent him on appeal or sought an extension of time to file a petition.<sup>16</sup> Indeed, Cooper had previously hired new counsel in this case *four* separate times.<sup>17</sup> Cooper also,

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<sup>15</sup> Brown was sanctioned by the district court judge for failing to appear. *See* Order Sanctioning Attorney Vincent J. Brown, *SEC v. Total Wealth Management, Inc.*, No. 3:15-cv-226 (S.D. Cal. Nov. 6, 2015).

<sup>16</sup> *See e.g., Choice Hotels Intern., Inc. v. Grover*, 792 F.3d 753, 756 (7th Cir. 2015) (“Litigants who know or strongly suspect that their lawyers are asleep on the job must act to protect their own interests by hiring someone else.”).

<sup>17</sup> Order, *Jacob Keith Cooper*, Administrative Proceedings Rulings Release No. 2444 (March 19, 2015), available at <http://www.sec.gov/alj/aljorders/2015/ap-2444.pdf>.

at any time, could have filed a petition himself within the appeal period (as he ultimately did on November 17, more than two months after the appeal period had run). Cooper therefore is not entitled to equitable tolling.

Third, for the same reasons as to equitable tolling, Cooper's failure to timely file is not excused under Rule 100(c).<sup>18</sup> That Rule allows us to direct the use of alternative procedures or order that compliance with an otherwise applicable rule is unnecessary if it would serve the interests of justice and would not result in prejudice to the parties to the proceeding.<sup>19</sup> We find that it is not in the interests of justice to extend the deadline for filing a petition for review or allow Cooper to file an untimely petition for review given his failure to diligently pursue his appeal.<sup>20</sup>

Finally, our conclusion is informed by the need for finality in agency proceedings. Compliance with filing deadlines "encourages parties to act timely in seeking relief"<sup>21</sup> and permits persons to know "when decisions are final and on which decisions their reliance can be placed."<sup>22</sup>

Accordingly, IT IS ORDERED that the petition for review of Jacob Keith Cooper is dismissed as untimely.

By the Commission.

Brent J. Fields  
Secretary

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<sup>18</sup> Rule 100(c), 17 C.F.R. § 201.100(c).

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g., Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 WL 1826641, at \*2 (May 8, 2014) (rejecting request to permit a late appeal under Rule 100(c) where the petitioner "had several opportunities to appeal the Initial Decision within the various applicable time periods specified by rule and statute, but he failed to do so").

<sup>21</sup> *Id.*

<sup>22</sup> *Pennmont Secs.*, 2010 WL 1638720, at \*4.