UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4482 / August 12, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32211 / August 12, 2016

Admin. Proc. File No. 3-16590

In the Matter of

BRIAN J. OURAND

Appeal filed: May 16, 2016
Last brief received: June 13, 2016

ORDER DISMISSING UNTIMELY PETITION FOR REVIEW

Brian J. Ourand has filed a petition for review of an Initial Decision finding that he violated antifraud provisions of the federal securities laws and imposing sanctions. Because Ourand filed his petition 24 days after the deadline for filing such a petition, we dismiss it as untimely.

I. Facts

On March 29, 2016, an administrative law judge ("ALJ") issued an Initial Decision finding that Ourand misappropriated funds from three investment advisory clients using checks made payable to cash, wire transfers, forged checks, and credit card charges.[1] In so doing, the ALJ found that Ourand violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940.[2] For Ourand's violations, the ALJ barred him from working in the securities industry, required him to cease and desist from committing violations of Advisers Act Sections 206(1) and (2), ordered disgorgement of $671,367, plus prejudgment interest, and imposed a third-tier civil money penalty of $300,000.[3]

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1 *See Brian J. Ourand*, Initial Decision Release No. 987, 2016 WL 1213262, at *5-6 (Mar. 29, 2016).

2 *See id.* at *6-7; *see generally* 15 U.S.C. §§ 80b-6(1), 80b-6(2).

3 *See Ourand*, 2016 WL 1213262, at *10-11.

The ALJ also ordered that any petition for review be filed "within twenty-one days after service of the Initial Decision."[4] On March 29, 2016, the same day that the initial decision was issued, the Commission's Office of the Secretary served it on Ourand by sending the initial decision via certified U.S. mail to Ourand's Chicago and Miami addresses.

According to a return receipt delivered to the Commission on April 11, 2016, the Initial Decision was delivered to Ourand's Chicago address. The name on the return receipt appears to be different from Ourand's. According to the U.S. Postal Service's online tracking information, the Initial Decision sent to Ourand's Miami address was found to be undeliverable after an April 2 attempt, and the mail was returned to the Commission on April 15, 2016.

The Commission received Ourand's petition for review on May 16, 2016. The petition for review did not specify when Ourand received the Initial Decision. Rather, it stated: "[T]he Respondent did not receive the Initial Decision by the Honorable Carol Fox Foelak until very recently as the Respondent has relocated from Chicago, IL to West Palm Beach, FL."

On May 19, 2016, we issued an order directing Ourand and the Division of Enforcement to submit briefs addressing "the views of the parties as to whether Ourand's appeal should be dismissed as untimely pursuant to Commission Rule of Practice 410(b)."[5]

Ourand's opening brief asserted that because "he [had] relocated to Florida and . . . had not received the Initial Decision until the end of April, 2016 when his mail was forwarded to him," his petition for review properly "falls within the 21 day time limit." Ourand's brief also argued that the Commission should grant his petition because "the Commission's Initial Decision in this matter could substantially prejudice the Respondent's criminal case."

The Division's opening brief contended that we should dismiss Ourand's petition as untimely, because Ourand's relocation to Florida does not give him a legitimate legal justification for failing to file his petition for review within the 21-day time period. In addition, the Division asserted that the Initial Decision will not prejudice Ourand in his pending criminal case. Ourand's response brief reiterated that "circumstances (Respondent's relocation) dictate that the Respondent's request should not be summarily denied." The Division did not file a response brief.

As we explain below, we conclude that it is appropriate to dismiss Ourand's petition.

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[4] *Id.* at *11; *see also* Rule 360(b), 17 C.F.R. § 201.360(b) ("The initial 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.").

[5] *Brian J. Ourand*, Advisers Act Release No. 4391, 2016 WL 2910090, at *1 (May 19, 2016); *see also* Rule of Practice 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 . . . .").

II. Discussion

Rule 410(b) requires the filing of a petition for review of an initial decision "within such time after service of the initial decision as prescribed by the hearing officer pursuant to Rule 360(b) . . . ."[6] Rule 360(b) requires that "[t]he initial 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."[7] In this case, the ALJ ordered that "a party may file a petition for review . . . within twenty-one days after service of the Initial Decision."[8]

Under Rule 141(b), the Commission'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).[9] 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."[10] The Office of the Secretary served the Initial Decision by certified mail on March 29, 2016, to the two addresses of record for Ourand, as detailed above. Under Rule 150(d) "service by mail is complete upon mailing."[11] Service was therefore complete on March 29, 2016. 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.[12] Ourand therefore had 24 days from March 29, 2016—the 21 days provided in the Initial Decision, plus the additional three days—to file a timely petition for review, *i.e.*, until April 22, 2016.[13]

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6 Rule 410(b), 17 C.F.R. § 201.410(b).

7 Rule 360(b), 17 C.F.R. § 201.360(b).

8 *Ourand*, 2016 WL 1213262, at *11.

9 *See* Rule 141(b), 17 C.F.R. § 201.141(b).

10 Rule 150(c)(2), 17 C.F.R. § 201.150(c)(2).

11 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 also Rules of Practice*, Exchange Act Release No. 35833, 1995 WL 368865, at *27 (June 9, 1995) (stating that Rule 141 "is derived, in part, from Rules 4 and 5(b) of the Federal Rules of Civil Procedure.").

12 *See* Rule 160(b), 17 C.F.R. § 201.160(b).

13 The Postal Service returned the March 29 certified mailing that was sent to Ourand's Miami address. But the fact that the mailings were returned does not have an effect on whether service was completed. *Cf.* 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 nonacceptance of the papers by the person to be served generally does not affect the validity of service."). In any event, the certified mailing sent to Ourand's Chicago address was properly delivered, and was not returned to the Commission.

Despite the April 22 deadline, Ourand filed his petition on May 16, 2016, or 24 days after the deadline expired. Ourand's petition attributed the delay to his "relocat[ion] from Chicago, IL to West Palm Beach, FL." It is unclear what role his relocation played in the delay, and when specifically he received the Initial Decision. The return receipt for the copy of the Initial Decision sent to Ourand's Chicago address reflected delivery sometime before April 11, 2016. Ourand's petition for review, dated May 13, 2016, stated only that he "did not receive the Initial Decision . . . until very recently." Several weeks later, his opening brief said that "he had not received the Initial Decision until the end of April, 2016 when his mail was forwarded to him."

In any case, Ourand's lack of specificity about when he received the Initial Decision is immaterial. We disagree with his suggestion that his relocation means his petition for review "falls within the 21 day time limit" for filing such a petition. That argument is based on the faulty premise that the time period for filing a petition for review begins on receipt. As we explained above, it begins upon service, which was complete upon mailing.

Nor does Ourand's relocation from Illinois to Florida entitle him to an extension of the time for filing a petition for review. Rule 102(d)(1) states:

> "When an individual first makes any filing or otherwise appears on his or her own behalf before the Commission or a hearing officer in a proceeding . . . he or she shall file with the Commission, or otherwise state on the record, *and keep current*, an address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent . . . ."[14]

Ourand failed to comply with Rule 102(d)(1) because he did not keep his mailing address current with the Commission.[15] The reason for this failure is unclear, because he knew that rulings from the law judge were forthcoming. The OIP stated that the ALJ was to issue an initial decision within 300 days of the OIP, or by April 10, 2016.[16] Ourand's January 29, 2016, post-hearing brief also asked the law judge to suspend its ruling pending the outcome of his criminal proceedings,[17] which suggests that Ourand knew that rulings were forthcoming. He, also presumably, had some idea in April that he was to relocate from Illinois to Florida, and the record does not suggest otherwise. Thus, Ourand, having just completed his hearing, aware that the law judge was planning to issue to its decision, and planning for a relocation, had reason to keep his mailing address current. He did not, and provides no reason for his failure to do so.

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[14] Rule 102(d)(1), 17 C.F.R. § 201.102(d)(1) (emphasis added).

[15] Ourand's opening brief stated that he "informed the Commission that he relocated to Florida." According to the Commission's records, Ourand only did so in his May 16 petition for review; he did not file, and has not filed, a change of address as contemplated in Rule 102(d)(1).

[16] *Brian J. Ourand*, Advisers Act Release No. 4115, 2015 WL 3653813, at *3 (June 15, 2015).

[17] Previously, the ALJ had denied Ourand's motion to stay the proceedings pending the outcome of criminal proceedings against him." *Brian J. Ourand*, Administrative Proceedings Rulings Release No. 3384 (Dec. 9, 2015) (order). The ALJ also denied Ourand's request for a stay in the Initial Decision. *See Brian J. Ourand*, 2016 WL 1213262, at *2.

"Rule 410 provides a bright-line rule for determining the timeliness of an appeal" and an extension of the deadline is not warranted where the failure to file a timely petition for review is due to a respondent's "failure to correctly update" his address with the Commission.[18]

Ourand's status as a *pro se* litigant also does not exempt him from complying with the rule. "'We expect even unrepresented parties to comply with our rules,' and '[p]arties, including those appearing *pro se*, are obligated to familiarize themselves with the Rules of Practice.'"[19] Thus, a respondent's "*pro se* status does not justify an extension of time."[20] Ourand's failure to comply with the 24-day period specified in Rules 410(b) and 160(b) cannot be excused by the fact that Ourand is proceeding without representation.[21]

Finally, Ourand argues that there is "good cause" to consider his petition for review. But Ourand's petition does not address the merits of his case. Indeed, it fails to comply with Rule 410(b) because it does not "set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception."[22] Rather, Ourand's petition only requests that the initial decision be reviewed and incorporates his post-hearing brief. That brief also does not address the merits of his case; it argues instead, as discussed above, that the proceeding should have been stayed pending the outcome of his criminal case. Similarly, Ourand's opening brief contends that the Commission should "delay any ruling in this case" and that the "good cause" for granting his petition is that the law judge's "Initial Decision . . . could substantially prejudice the Respondent's criminal case."

Ourand's arguments do not bear on the timeliness of Ourand's petition, or provide any reason to excuse his failure to timely file. Nor do they justify granting review.

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18 *Luminary Acquisition Corp.*, Exchange Act Release No. 75818, 2015 WL 5139387, at *2 (Sept. 2, 2015) (dismissing petition filed 23 days late) (citing *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 WL 1826641, at *2 & nn.18-19 (May 8, 2014) ("[S]trict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief.") (alteration in original))); *see also PennMont Sec. v. SEC*, 414 F. App'x 465, 467 (3rd Cir. 2011) (affirming the Commission's determination to dismiss an untimely application for review on the grounds that applicants had "failed to show that circumstances beyond their control prevented a timely filing or that their application presented critical issues").

19 *John Vincent Ballard*, Exchange Act Release No. 77452, 2016 WL 1169072, at *3 (Mar. 25, 2016) (quoting *BDO China Dahua CPA Co.*, Exchange Act Release No. 72134, 2014 WL 1871077, at *3 (May 9, 2014) (emphasis in original)).

20 *Id.* at *3 (emphasis added).

21 *Cf. SEC v. Spadaccini*, 256 F. App'x 794, 795 (7th Cir. 2007) ("we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel") (quoting *McNeil v. United States*, 508 U.S. 106, 113 (1993)).

22 Rule 410(b), 17 C.F.R. § 201.410(b).

Ourand is not entitled to a stay simply because this administrative proceeding is occurring at the same time as his criminal prosecution. "It is well established that the government may have both a civil and a criminal cause of action as a result of a single factual situation."[23] There are good public policy reasons to allow for simultaneous civil and criminal proceedings: "It would stultify enforcement of federal law to require a government agency . . . to defer civil proceedings pending the ultimate outcome of a criminal trial."[24]

Furthermore, there is no merit to Ourand's alleged concern that the U.S. Attorney will use a final Commission decision to preclude Ourand from litigating issues and claims in his pending criminal prosecution. In an administrative proceeding, the Commission uses a preponderance of the evidence standard, rather than a proof beyond a reasonable doubt standard.[25] Since the preponderance of the evidence standard is lower than the proof beyond a reasonable doubt standard, a finding of liability in a civil case, such as an administrative proceeding, cannot be used as *res judicata*[26] or collateral estoppel[27] in a criminal case.

To the extent Ourand is concerned about having invoked his Fifth Amendment right against self-incrimination and having declined to offer evidence during the proceeding before the ALJ,[28] that is not a reason to grant his petition. The ALJ stated in the Initial Decision that "no adverse inference has been drawn from Ourand's failure to testify."[29] Moreover, the trier of fact

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23 *United States v. Brekke*, 97 F.3d 1043, 1047 (8th Cir. 1996).

24 *United States v. Kordel*, 397 U.S. 1, 11 (1970). Additionally, while the U.S. Attorney could request a stay "during the pendency of a criminal investigation or prosecution arising out of the same or similar facts that are at issue in the pending Commission enforcement or disciplinary proceeding," Rule 210(c)(3), 17 C.F.R. § 201.210(c)(3), the U.S. attorney has not made such a request in this case, *see Brian J. Ourand*, 2016 WL 1213262, at *2 n.3.

25 *See Steadman v. SEC*, 450 U.S. 91, 102-04 (1981); *see also Sandra K. Simpson*, Exchange Act Release No. 45923, 2002 WL 987555, at *16 (May 14, 2002).

26 *See Ferrell v. Pierce*, 785 F.2d 1372, 1378 n.2 (7th Cir. 1986) ("[A]n issue of fact already adjudicated in a civil case would not be *res judicata* in a criminal case because of the difference of degree of proof necessary.") (emphasis added); *see generally United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 359 (1984) ("'[T]he difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*.'") (quoting *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938)).

27 *See United States v. Beery*, 678 F.2d 856, 868 n.10 (10th Cir. 1982) ("In view of the different degrees of proof in civil and criminal cases, the adjudication of a fact in a civil proceeding is not binding in a criminal case under principles of collateral estoppel."); *see generally One Assortment of 89 Firearms*, 465 U.S. at 362 ("It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel."); *see also United States v. Meza-Soria*, 935 F.2d 166, 169 (9th Cir. 1991) ("[T]he difference in standards of proof must preclude the use of civil proceeding findings to establish the facts of a criminal case.").

28 *See Brian J. Ourand*, 2016 WL 1213262, at *2, *2 n.2.

29 *Id.* at *2.

in a criminal case is barred from drawing an adverse inference against a defendant because he invoked his Fifth Amendment right against self-incrimination.[30]

Because there is no merit to Ourand's contention that the Initial Decision will prejudice him in his pending criminal case, we find no "good cause" to excuse Ourand's untimely filing.

Accordingly, IT IS ORDERED that the petition for review of Brian J. Ourand is dismissed.

Having considered the initial decision, Ourand's petition for review, and the briefs, we have determined not to order review of the initial decision on our own initiative. Accordingly, we hereby give notice that the initial decision issued on March 29, 2016, by the ALJ has become the final decision of the Commission with respect to Brian J. Ourand.[31] The sanctions imposed in that decision are hereby declared effective.[32]

By the Commission.

Brent J. Fields
Secretary

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30 *See Baxter v. Palmigiano*, 425 U.S. 308,317 (1976) ("The Court has . . . plainly ruled that it is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference of guilt from a defendant's failure to testify about facts relevant to his case.") (citing *Griffin v. California*, 380 U.S. 609 (1965)).

31 *See* Rule 360(d)(2), 17 C.F.R. § 201.360(d)(2) (requiring that if a party "fails to file timely a petition for review . . . and the Commission does not order review on its own initiative, the Commission will issue an order that the decision has become final as to that party").

32 *See OOO CentreInvest Sec.*, Exchange Act Release No. 61448, 2010 WL 2199537, at *2 (Jan. 29, 2010) (dismissing petition for review and declaring initial decision final).