

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85327 / March 14, 2019

Admin. Proc. File No. 3-18792

In the Matter of
ALLAN MICHAEL ROTH

ORDER DENYING RESPONDENT'S MOTION TO POSTPONE FILING ANSWER
INDEFINITELY

On September 19, 2018, the Commission issued an order instituting administrative proceedings ("OIP") against Allan Michael Roth pursuant to Section 15(b) of the Securities Exchange Act of 1934.¹ The OIP alleged that Roth had pled guilty to felonies involving the purchase or sale of a security and instituted proceedings to determine if the allegations were true and what remedial action should be taken against Roth. Roth, who is pro se and currently resides at a state correctional facility, requested additional time to file an answer. Roth's motion was granted, and Roth was ordered to file his answer no later than January 22, 2019.²

On January 28, 2019, the Commission received Roth's motion to postpone the deadline for filing his answer. Roth's request is based on his filing in state court of a "motion to vacate judgment, pursuant to [Florida Rule of Criminal Procedure] 3.850," which provides for postconviction relief.³ Roth contends that "he will be substantially prejudiced if the Commission pursues any further legal proceedings without a final conclusive order from" state court.

In addition, on March 6, 2019, the Commission received Roth's "motion to dismiss answers to order instituting proceedings." Roth asks the Commission to dismiss the OIP as untimely under the six-year statute of limitations in 18 U.S.C. § 3301(b) for criminal prosecutions of securities fraud. This motion is not, and does not purport to be, an answer under

¹ *Allan Michael Roth*, Exchange Act Release No. 84201, 2018 WL 4488874 (Sep. 19, 2018).

² *Allan Michael Roth*, Exchange Act Release No. 84469, 2018 WL 5262756 (Oct. 22, 2018).

³ *See Fla. R. Crim. P. 3.850; State v. Roth*, Case No. 15-02055-CF (Fla. 6th Cir. Ct.), <https://ccmspa.pinellascounty.org/PublicAccess/CaseDetail.aspx?CaseID=16913159>.

Rule of Practice 220.⁴ We therefore turn to Roth's request to postpone filing an answer indefinitely. Roth's motion to dismiss will be addressed in a separate order.

We consider Roth's request under Commission Rule of Practice 161, which authorizes us to order postponements for "good cause shown."⁵ In deciding whether to grant a postponement, we "adhere to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case."⁶ Roth has failed to make the showing of prejudice required for a postponement of time to answer the OIP.

Roth argues that he would be prejudiced by a denial of a postponement because his pending postconviction motion means his conviction is not "final." But Exchange Act Section 15(b)(6) permits the Commission to impose sanctions in a "follow-on proceeding" on the basis of a qualifying conviction without regard to an appeal or postconviction challenge.⁷ The pendency of challenges to the conviction is generally an insufficient basis upon which to prolong a Commission proceeding.⁸ Such a postponement could delay this proceeding significantly.⁹ As a result, once a conviction has been entered, further "challenges in the criminal case do not bear on" follow-on administrative proceedings unless and until those challenges are successful.¹⁰ Roth likewise cannot collaterally attack the validity of his conviction in this proceeding.¹¹

⁴ Rule of Practice 220, 17 C.F.R. § 201.220.

⁵ Rule of Practice 161(a), 17 C.F.R. § 201.161(a).

⁶ Rule of Practice 161(b), 17 C.F.R. § 201.161(b).

⁷ See 15 U.S.C. § 78o(b)(6); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 WL 258850, at *3 (Sept. 17, 1992) (follow-on proceedings are "concerned with the factual existence of [respondent's] conviction and its public interest implications," and these warranted a bar under Exchange Act Section 15(b)(6) even though respondent's "conviction is currently on appeal"), *aff'd*, 36 F.3d 86, 87 (11th Cir. 1994) ("Nothing in [Section 15(b)(6)'s] language prevents a bar to be entered if a criminal conviction is on appeal.").

⁸ See *Free*, 2012 WL 266986, at *2.

⁹ See *id.*

¹⁰ *David G. Ghysels*, Exchange Act Release No. 62937, 2010 WL 3637005, at *5 n.32 (Sept. 20, 2010), *bars vacated by Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462, 2012 WL 6608201 (Dec. 18, 2012).

¹¹ See, e.g., *Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 WL 1941502, at *3 (Aug. 23, 2002).

The Commission has held repeatedly that a pending postconviction motion is not a basis to postpone an administrative proceeding.¹² In *Jon Edelman*, the Commission denied a petition for an emergency stay of a follow-on proceeding while the respondent pursued postconviction relief from his underlying conviction, observing that “[t]he public interest demands prompt enforcement of the securities laws, even while other government proceedings are under way. Accordingly, indefinite stays for the purposes of pursuing other relief are inappropriate.”¹³ So too here. If Roth’s postconviction motion is successful, he may petition the Commission for reconsideration of any remedial action imposed in this proceeding.¹⁴ Because Roth has not made any showing, let alone a “strong showing,” of the “substantial[] prejudice” required to override the strong public interest in the prompt enforcement of the federal securities laws,¹⁵ we deny his request for a postponement to the extent it is based on his pending postconviction motion.

In light of our denial of Roth’s request to postpone filing his answer indefinitely, and the need to allow time for inbound mail processing at the federal correctional facility where Roth resides, we direct Roth to file his answer within 45 days from the date of this order. Accordingly, it is ORDERED that Roth’s January 28, 2019 motion is denied and that he shall file his answer in accordance with Rule of Practice 220¹⁶ by delivering it to the proper prison authorities no later than April 29, 2019, for forwarding to the Commission’s Office of the

¹² See, e.g., *Ira William Scott*, Advisers Act Release No. 1752, 1998 WL 658791, at *2 n.8 (Sept. 15, 1998) (“We need not await the outcome of any postconviction proceeding in order to proceed.”); *William F. Lincoln*, Exchange Act Release No. 39629, 1998 WL 80228, at *3 (Feb. 9, 1998) (rejecting argument that follow-on proceeding was “premature” and that the “Commission should wait” until the resolution of a pending appeal of a conviction).

¹³ *Jon Edelman*, Exchange Act Release No. 30096, 1996 SEC LEXIS 3560, at *2-3 (May 6, 1996) (order denying petition for review and for emergency stay).

¹⁴ See *id.* at *3.

¹⁵ 17 C.F.R. § 201.161(b); see *Edelman*, 1996 SEC LEXIS 3560, at *3.

¹⁶ 17 C.F.R. § 201.220(c) (specifying the required contents of an answer); see also *Roth*, 2018 WL 4488874, at *2 (stating that if Roth “fails to file the directed answer” he “may be deemed in default and the proceedings may be determined against him”).

Secretary.¹⁷ We remind the parties of their obligation, within fourteen (14) days of service of the Answer, to “conduct a prehearing conference, . . . in person or . . . by telephone or other remote means,” and to file a statement with the Office of the Secretary as set forth in the OIP.¹⁸

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

Vanessa A. Countryman
Acting Secretary

¹⁷ See *Houston v. Lack*, 487 U.S. 266, 266 (1988) (under federal prison mailbox rule, “pro se prisoners’ notice of appeal are ‘filed’ at moment of delivery to prison authorities for forwarding to district court”); *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (noting that this “mailbox rule [applies] to other filings by *pro se* prisoners”).

¹⁸ *Roth*, 2018 WL 4488874, at *2.