UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	CFTC Docket No. 02-05
PATRICK P. LIGAMMARI	ORDER PURSUANT TO DELEGATED AUTHORITY

On October 27, 2003, Patrick P. Ligammari ("Ligammari") filed an untimely *pro se* notice of appeal from an Administrative Law Judge's ("ALJ") September 26, 2003 Initial Decision. *In re Ligammari*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,589 at 55,544 (ALJ Sept. 26, 2003). After the Division of Enforcement ("Division") filed a motion to dismiss the appeal as untimely, Commission staff issued an Order Pursuant to Delegated Authority on December 17, 2003, granting the Division's motion and noting that Ligammari had neither responded to the motion to dismiss nor submitted the brief necessary to perfect his late-filed appeal. *In re Ligammari*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,648 at 55,800 (CFTC Dec. 17, 2003).

On December 30, 2003, the Commission's Office of Proceedings received a letter from Ligammari asserting that he had filed a response to the Division's motion to dismiss. Review of the official record disclosed that a response had, in fact, been received on November 12, 2003. In light of this error, the December 17, 2003 Delegated Authority Order is vacated. *See* 17 C.F.R. § 10.109(a)(1).

Ligammari's arguments that his late appeal should be accepted are properly before the Commission. In his November response to the Division's motion to dismiss, Ligammari stated that his attorney had refused to represent him on appeal, and improperly advised him that he had

30 days to appeal the decision. *See* Commission Rule 10.102(a) (a party may initiate an appeal of an initial decision "by filing a notice of appeal with the Hearing Clerk within 15 days after service of the initial decision."). In its response to Ligammari's position, the Division contends that Ligammari's reliance on counsel's error as a basis for seeking relief is misplaced. According to the Division, the applicable standard is excusable neglect and the Commission has held that inadvertence or mistake by counsel does not constitute excusable neglect. In addition, the Division noted that Ligammari had yet to file the brief necessary to perfect his appeal. *See* Division filing of January 4, 2004.

Because no specific rule governs motions to consider late-filed appeals, the Commission has developed the applicable standard through its precedent, relying on federal cases.[1] Late filed appeals frequently involve errors by counsel. This implicates the Commission's policy of following the general rule that a party "bears ultimate responsibility for the questionable acts of his legal representative." *In re Ferragamo*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,982 at 37,597 (CFTC Jan. 14, 1991). The Commission has applied this policy strictly in the context of late-filed appeals, relying on federal cases holding that inadvertence or mistake by counsel does not constitute excusable neglect. *See also Chabala v. First Commodity Corporation of Boston*, CFTC Docket No. R81-19-82-234, 1986 WL 66207 (CFTC May 15, 1986) (citing to extensive federal authority holding that the excusable neglect standard was to be strictly construed so that exceptions would be limited to extraordinary cases). Otherwise, as the

[1] Initially, the pertinent decisions were in the reparations context. *See Bowen v. Ketchum*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,400, at 29,818 (CFTC Oct. 11, 1984) ("[b]y analogy to the federal courts, we hold that the filing of a timely notice of appeal is mandatory and jurisdictional. . . . Like the federal courts, we are empowered to extend this time period in a case of excusable neglect."). The Commission has adopted a similar approach in the enforcement area. *See In re Brenner*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,194 at 38,525 (CFTC Dec. 13, 1991) (failure to provide timely notice of change of address is not excusable neglect); *In re First Commercial Financial Group, Inc.* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,239 at 45,980(CFTC Dec. 30, 1998) (counsel's belief that appeal by the Division obviated respondent's need to file its own timely notice is not excusable neglect).

Commission has noted, the policy of promoting the finality of judgments would be thwarted. On the whole, the only circumstances which the Commission has found to constitute excusable neglect are those in which a party is misled, including untimeliness caused by the court's own error.[2]

In recent years, however, the federal courts have adopted a different approach to excusable neglect and applied an equitable test based on the facts and circumstances of each case. In *Pioneer Insurance Service Co. v. Brunswick Association, Ltd.*, 507 U.S. 380, 395 (1993), the Supreme Court concluded that an attorney's inadvertent failure to file timely proof of a bankruptcy claim constituted excusable neglect.[3] The Court held that the word "neglect" encompassed "both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Id.* In determining excusable neglect, the Supreme Court held courts should consider four factors: (1) the risk of prejudice to the nonmoving party; (2) the length of delay and its potential prejudice upon the judicial proceeding; (3) the reasons for the delay, including whether it was in the reasonable control of the movant; and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395. The Court emphasized that the determination of whether the neglect was excusable "is at bottom an equitable one." *Id.* It may encompass at least some "inadvertent or negligent omission[s]," *id.* at 394, at least when the delay is not long, there is no bad faith or prejudice to the opposing party, and movant's excuse has some merit, *id.* at 394-95.

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[2] *See, e.g., Creative Artists Institute v. Smith Barney, Harris Upham & Co,* CFTC Docket No. 83-R36, 1985 WL 55324 (CFTC Oct. 21, 1985) (Order Pursuant to Delegated Authority), in which the Commission found excusable neglect when it improperly served complainant's counsel who had been granted leave to withdraw as counsel.

[3] Although *Pioneer* was decided under federal Bankruptcy Rules, the Supreme Court indicated that it granted *certiorari* in that case in part because of the split in the circuit courts of appeal on how to construe excusable neglect under Fed. R. App. P. 4. *See* 507 U.S. at 387 n.3.

Moreover, the determination of whether the neglect is excusable is not limited strictly to circumstances beyond the movant's control. *Id.* at 392.

Current federal court interpretations of the excusable neglect provision have been guided by *Pioneer*. According to the leading treatise, Fed. R. App. P. 4(a)(5) "must now be read in the light of what *Pioneer Investment* held about 'excusable neglect' and that earlier decisions taking a different view of the concept are no longer authoritative." Wright, Miller & Cooper, *16A Federal Practice & Procedure* § 3950.3 (3d ed. 1999). Nevertheless, the balancing test announced in *Pioneer* has not resulted in appreciably more lenient outcomes in tardy appeals. If neglect is shown, it still must be found to be excusable. In *Pioneer*, the Supreme Court specifically retained the principle that "clients must be held accountable for the acts and omissions of their attorneys," and made clear that if the act of the attorney does not constitute excusable neglect, an innocent client cannot win relief. *Pioneer*, 507 U.S. at 396.[4]

Although some of the *Pioneer* factors tend to weigh in Ligammari's favor, one of them – the reason for the delay – militates against respondent. In this case, the attorney error does not appear facially excusable. The language of Commission Rule 10.102(a) is plain on its face and there is no claim that the attorney was misled by Commission personnel. In the post-*Pioneer* era, most federal circuit courts have held that a mistake or ignorance of plain law does not constitute excusable neglect under Rule 4(a)(5).[5]

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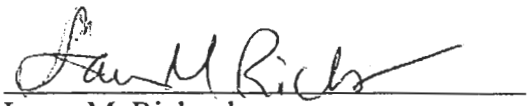
[4] The *Pioneer* majority found that the unusual form of notice of the bar date provided by the bankruptcy court contributed to the tardy filing and that the "upheaval" in the attorney's law practice was irrelevant. *Id.* at 398.

[5] *See* David N. May, *Pioneer's Paradox: Appellate Rule 4(A)(5) and the Rule Against Excusing Ignorance of the Law*, 48 Drake L. Rev. 677, 681 (2000) (in the years since *Pioneer*, seven different circuit courts have held that that a mistake or ignorance of plain law cannot be excusable neglect under Rule 4(a)(5)).

Thus, Ligammari cannot prevail under either *Pioneer* or the Commission's traditional strict approach. Under these circumstances, we dismiss Ligammari's appeal as untimely filed.

IT IS SO ORDERED.[6]



Laura M. Richards
Acting Deputy General Counsel
Commodity Futures Trading Commission

Dated: June 28, 2005

[6] By the Commission pursuant to delegated authority. 17 C.F.R. § 10.109(a)(5). A party may file a petition for Commission reconsideration of this ruling with the Office of Proceedings within seven days after service of this ruling. 17 C.F.R. § 10.109(c).