SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59403 / February 13, 2009

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2840 / February 13, 2009

Admin. Proc. File No. 3-12716

In the Matter of

GARY M. KORNMAN
c/o Barry S. Pollack, Esq.
Sullivan & Worcester LLP
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and
Janet K. DeCosta, Esq.
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OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING
INVESTMENT ADVISER PROCEEDING

Ground for Remedial Action

Criminal Conviction

Former associated person of a registered broker-dealer and of an investment adviser was criminally convicted of making a false statement to the Commission. Held, it is in the public interest to bar Respondent from association with any broker, dealer, or investment adviser.

APPEARANCES:

Barry S. Pollack, of Sullivan & Worcester LLP, and Janet K. DeCosta, of the Law Offices of Janet K. DeCosta, P.C., for Gary M. Kornman.

Toby M. Galloway and J. Kevin Edmundson, for the Division of Enforcement.

Appeal filed: October 30, 2007
Last brief received: May 9, 2008
Oral Argument: January 7, 2009

I.

Gary M. Kornman ("Kornman"), former owner and registered representative of Heritage Securities Corporation ("Heritage Securities"), appeals from a decision of an administrative law judge. 1/ The law judge found that on July 11, 2007, the United States District Court for the Northern District of Texas, based on his guilty plea, convicted Kornman of one count of making a false statement to the Commission in violation of 18 U.S.C. § 1001. 2/ The law judge barred Kornman from associating with any broker, dealer, or investment adviser. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 3/

II.

A. Background

From May 1992 to October 2006, Kornman was part owner and a registered representative of Heritage Securities, a registered broker-dealer, which sold variable life insurance and annuities. 4/ Kornman also served as the sole managing member of Heritage Advisory Group, L.L.C. ("Heritage Advisory"), a Delaware limited liability company organized

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1/ Gary M. Kornman, Initial Decision Rel. No. 335 (Oct. 9, 2007), 91 SEC Docket 2687.

2/ In pertinent part, 18 U.S.C. § 1001(a) provides: "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined . . . , imprisoned not more than 5 years . . . , or both."

3/ Commission Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of a proceeding if that member has reviewed the oral argument transcript prior to such participation. Chairman Schapiro and Commissioner Walter conducted the required review.

4/ Heritage Securities was registered as a broker-dealer with the Commission from May 29, 1992, until October 4, 2006.

by Kornman in October 1998. 5/ Heritage Advisory was the general partner of two hedge funds, Heritage Capital Partners I, L.P., and Heritage Capital Opportunities Fund I, L.P. (collectively, the "Hedge Funds"), since their formation in October 1998 and September 1999, respectively. Kornman individually and through Heritage Advisory managed the trades of the Hedge Funds and received administrative fees and a percentage of any extraordinary profits for these services. 6/

On December 20, 2006, a federal grand jury handed down a four-count Superseding Indictment against Kornman before the United States District Court for the Northern District of Texas. The Superseding Indictment charged Kornman with two counts of securities fraud in connection with alleged insider trading of MiniMed, Inc., and Hollywood Casino Corp. stock, one count of providing false statements to the Commission, and one count of obstruction of justice. On April 9, 2007, Kornman pleaded guilty to making a false statement to the Commission in violation of 18 U.S.C. § 1001. Based on his plea agreement, the district court entered a judgment of conviction on July 13, 2007. 7/ The court dismissed the remaining three charges of the Superseding Indictment.

According to the Factual Resume accompanying his plea agreement, on October 29, 2003, Kornman participated "in a voluntary telephone interview with investigators" from the Commission (the "October interview"). During the October interview, Kornman "stated he did not know who possessed trading authority over the brokerage account for a hedge fund through which [Kornman] conducted trading activity in publicly traded stock." 8/ Kornman admitted to the district court that this statement was false and that he knew "he personally possessed trading authority over the brokerage account for the fund through which he conducted the trading activity that was under investigation by the [Commission]." Kornman further admitted that he made "the statement intentionally, knowing it was false[,] . . . [t]hat the statement was material," and that he made it "for the purpose of misleading the [Commission] in its investigation into his trading activity."

5/ Heritage Advisory has never been registered with the Commission in any capacity.

6/ At the time, Kornman was also an attorney, licenced in Alabama. Based on his conviction, the Alabama State Bar suspended his license for two years.

7/ United States v. Kornman, 3:05-CR-0298-P (N.D. Tex. July 13, 2007). The law judge used July 11, 2007, the day on which Kornman's sentencing hearing took place, as the date of Kornman's conviction. It appears from the record that the district court did not enter the conviction until July 13, 2007.

8/ Specifically, the investigators asked Kornman: "[W]ho is the person who had trading authority in the brokerage account for Heritage Capital Partners [I, L.P.]?" Kornman responded: "I'm sorry. I just don't know that."

By pleading guilty to 18 U.S.C. § 1001, Kornman faced, among other penalties, a possible sentence of up to five years in prison, a term of supervised release of not more than three years but not less than two, and a fine up to $250,000 or twice any pecuniary gain. At Kornman's sentencing hearing, the district court determined that Kornman's offense level and criminal history were low and that the recommended range under the Federal Sentencing Guidelines for Kornman was zero to six months in prison. Kornman apologized for his actions, stating: "I have strong regrets and wish I could change what has happened. I am focused on making sure that I remain far away from anything problematic in the future." Noting that this was Kornman's first offense, the district court sentenced Kornman to two years' probation, the minimum sentence, but rejected Kornman's request that the probation be unsupervised because of the felony nature of the offense.

In determining whether a financial penalty was appropriate, the district court inquired of Commission counsel, who was assisting the Assistant United States Attorney during the criminal case, whether the Commission would seek a monetary penalty in any civil case against Kornman for the same conduct. Commission counsel responded that it recommended the maximum fine of $250,000 for Kornman in the criminal case and its position "was that [] Kornman unjustly enriched himself by 140 some odd thousand by insider trading," which it then was seeking in settlement discussions in a civil proceeding against Kornman. 9/ Commission counsel informed the district court that the Commission also would likely seek a "permanent bar" in an administrative proceeding. The court concluded: "I think that $143,000 needs to be paid back . . . . [I]t needs to be disgorged. But I don't think we need to do it twice . . . . I don't want to order it here if you continue to seek it as part of your civil proceeding." Commission counsel agreed that "if 140 is awarded in the criminal case, we will not be seeking it in the civil case." Based on this colloquy, the district court ordered Kornman to pay $143,465, in what it characterized as "disgorgement" of unjust enrichment, a "condition of [Kornman's] parole," to distinguish the required payment from a fine.

B. Administrative Proceeding

On July 30, 2007, we authorized the institution of administrative proceedings against Kornman, pursuant to Section 15(b) of the Securities Exchange Act of the 1934 and Section 203(f) of the Investment Advisers Act of 1940, to determine whether he had been criminally convicted and, if so, whether any remedial action would be appropriate in the public interest. After a prehearing conference, the Division of Enforcement moved for summary disposition

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9/ At the time counsel made these representations, the district court previously had granted the Commission's motion to dismiss the civil action without prejudice on May 31, 2006. SEC v. Kornman, No. 3:04-CV-1803-L, 2006 U.S. Dist. LEXIS 37788 (N.D. Tex. May 31, 2006).

pursuant to Rule 250 of the Commission's Rules of Practice, 10/ based on Kornman's answer; conviction and supporting court documents; and certified copies of documents relating to Heritage Securities, Heritage Advisory, and the Hedge Funds.

Kornman opposed the Division's motion and attached, among other exhibits, an excerpted transcript of the October interview; character letters from various individuals to the district court submitted for consideration in sentencing; and the Certification of Gary Kornman ("Kornman Certification"). The Kornman Certification stated Kornman's educational background included a bachelor's degree and law degree, his remorse for the events leading to his conviction, his acceptance of "full responsibility for his misconduct," and a vow that he "will not repeat anything of the sort in the future." The Division's reply brief supplemented the record with a full version of the transcript to the October interview.

On October 9, 2007, the law judge found there was no genuine issue with regard to any material fact and granted the Division's motion pursuant to Rule 250. The law judge determined that Kornman was associated with a broker-dealer and investment adviser and that his felony conviction "'involves the purchase or sale of any security, the taking of a false oath, . . . conspiracy to commit any such offense, [or] arises out of the conduct of the business of a broker, dealer, [or] investment adviser' within the meaning of Sections 15(b)(4)(B) and 15(b)(6)(A)(ii) of the Exchange Act and Sections 203(e)(2) and 203(f) of the Advisers Act." After consideration of the public interest factors, the law judge concluded it appropriate to bar Kornman from associating with any broker, dealer, or investment adviser.

III.

A. Exchange Act Section 15(b) and Advisers Act Section 203(f)

Exchange Act Section 15(b) and Advisers Act Section 203(f) 11/ authorize the Commission to censure, place limitations on, suspend, or bar a person associated with a broker, dealer, or investment adviser when such sanctions are in the public interest, and such a person has been convicted within the past ten years of certain enumerated offenses. As relevant here, those offenses include any felony that the Commission finds "involves . . . the purchase or sale of any security, the taking of a false oath, [or] the making of a false report, . . . arises out of the conduct of the business of a broker, dealer, . . . [or] investment adviser, . . . [or] involves the violation of . . . chapter . . . 47 of title 18, United States Code . . . . " 12/

10/ 17 C.F.R. § 201.250.

11/ 15 U.S.C. §§ 78*o*(b), 80b-3(f) (referencing offenses enumerated in 15 U.S.C. § 80b-3(e)).

12/ 15 U.S.C. §§ 78*o*(b)(4)(B)(i)-(ii) and (iv), 80b-3(e)(2)(A)-(B) and (D).

We find that Kornman's conviction meets the statutory requirements of Exchange Act Section 15(b) and Advisers Act Section 203(f). The statute under which Kornman was convicted, 18 U.S.C. § 1001, is codified in chapter 47 of title 18 of the United States Code. Moreover, Kornman's conviction arose from a false statement he provided Commission staff during its investigation into possible insider trading in the brokerage account for one of the Hedge Funds, of which, as found below, Heritage Advisory was the investment adviser. Kornman's conduct thus arose "out of the conduct of the business of a broker, dealer, . . . [or] investment adviser." 13/

We also find that Kornman was an associated person of a broker, dealer, and investment adviser during the time relevant to his conviction. Until October 2006, Kornman was a registered representative and part owner of Heritage Securities, a registered broker-dealer, and thus Kornman was an associated person of a broker or dealer within the meaning of the Exchange Act. 14/

At the time of the October interview, Kornman was also associated with Heritage Advisory, which we find was an investment adviser within the meaning of the Advisers Act. Advisers Act Section 202(a)(11) defines an investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15/ As courts have held, hedge fund general partners "are 'investment advisers' within the meaning of the [Advisers Act]." 16/ Although hedge fund advisers are typically exempt from registration under Advisers Act Section 203(b)(3), we may sanction an associated person of an unregistered investment adviser under Advisers Act Section 203(f). 17/ The record, including private offering memoranda from the Hedge Funds, reflects that Heritage Advisory served as the general partner to the Hedge Funds, managing their investment portfolios

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13/ Kornman's conviction meets the requirements of Advisers Act Section 203(e)(3)(A) in that his offense was punishable up to five years. 15 U.S.C. § 80b-3(e)(3)(A).

14/ 15 U.S.C. § 78c(a)(18) (defining person associated with a broker or dealer as "any person directly or indirectly controlling a broker or dealer or any employee of such broker or dealer"). To the extent that Kornman claimed at oral argument that Heritage Securities ceased operating by June 2003, his claim is not supported by the record.

15/ 15 U.S.C. § 80b-2(a)(11).

16/ Abrahamson v. Fleschner, 568 F.2d 862, 869-71 (2d Cir. 1977), overruled, in part, on other grounds by Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); see also Goldstein v. SEC, 451 F.3d 873, 876 (D.C. Cir. 2006) ("Hedge fund general partners meet the definition of an 'investment adviser' in the Advisers Act.")

17/ See Teicher v. SEC, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

and earning fees and other compensation for such services. As sole managing member of Heritage Advisory, therefore, Kornman was an associated person of an investment adviser within the meaning of the Advisers Act. 18/

Kornman challenges our authority to institute this proceeding, asserting his conviction did not involve securities fraud and the false statement underlying it was not made "in connection with the purchase and sale of securities." Kornman contends further that his conviction did not involve obstruction of justice, a false oath, or a false report. Neither Exchange Act Section 15(b) nor Advisers Act Section 203(f), however, require that the underlying conviction involve securities fraud. The statutes use the disjunctive "or," meaning that any one basis in the statute is sufficient to establish our authority to proceed. Kornman cites nothing to suggest otherwise. The statutory bases discussed above provide ample authority for institution of these proceedings.

Kornman also asserts that 18 U.S.C. § 1001 is not among the "specified" offenses in Exchange Act Section 15(b)(4)(B) and Advisers Act Section 203(e)(2)-(3) that Congress intended to incorporate in Exchange Act Section 15(b)(6)(A)(ii) and Advisers Act Section 203(f) for sanctioning associated persons of a broker, dealer, and investment adviser. Rather, Kornman claims that:

> the drafters of Sections 15(b)(4) and (6) obviously intended to employ different standards before imposing sanctions on broker-dealers as opposed to associated persons convicted of criminal activity. As to a broker-dealer, the Commission may impose sanctions under Section 15(b)(4)(B)(iv) simply upon a conviction which "involves" various enumerated sections and Chapters 25 and 47 of the Criminal Code. Section 15(b)(6)(A)(ii), on the other hand, only allows the imposition of sanctions, and, concomitantly, the institution of proceedings, on those who have been convicted of specified offenses, as opposed to a generic group of offenses. 19/

In other words, Kornman contends that the Commission may bring proceedings against associated persons convicted of fraud using a fictitious name or address through the Postal

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18/ 15 U.S.C. § 80b-2(a)(17) (defining a person associated with an investment adviser as "any partner, officer, or director of such investment adviser (or any person performing similar functions)").

19/ According to Kornman, the Commission is limited to sanctioning associated persons only for "four specific violations of the criminal code." Kornman does not specifically identify which four, but consistent with his argument, they appear to be violations of "section[s] 152, 1341, 1342, or 1343" of title 18 of the United States Code. 15 U.S.C. §§ 78*o*(b)(4)(B)(iv); 80b-3(e)(2)(D); see also 18 U.S.C. §§ 152 (concealment of assets; false oaths and claims; bribery), 1341 (frauds and swindles), 1342 (fictitious name or address), 1343 (fraud by wire, radio, or television).

Service, because 18 U.S.C. § 1342 is referenced by its specific United States Code section in Exchange Act Section 15(b)(4)(B)(iv) and Advisers Act Section 203(e)(2)(D), but the Commission may not bring proceedings against associated persons based on a felony conviction that "involves the purchase or sale of a security, the taking of a false oath, the making of a false report, bribery, perjury" because such offenses lack a United States Code citation in Section 15(b)(4)(B) and Section 203(e)(2).

Kornman cites no Commission or judicial authority construing Exchange Act Section 15(b)(6)(A)(ii) or Advisers Act Section 203(f) in the way that he does. Indeed, there is nothing in the use of the term "specified" -- meaning to mention "definitely" or "fully" or "in detail" -- that suggests that Congress intended to limit sanctioning associated persons to only those felonies identified by a particular United States Code section in Sections 15(b)(4)(B) and 203(e)(2)-(3). 20/ Kornman's argument also is not supported by the legislative history of the Exchange Act or Advisers Act or by relevant case law. 21/ Contrary to Kornman's position, both Exchange Act Section 15(b)(6)(A)(ii) and Advisers Act Section 203(f) incorporate the entirety of Sections 15(b)(4)(B) and 203(e)(2)-(3), authorizing proceedings against associated persons for a conviction of any offense enumerated in those sections, including violations involved in title 18, chapter 47 and not merely the four violations suggested by Kornman. Kornman's narrow interpretation of the authorizing statutes would render nearly all of the criminal conduct set forth in Sections 15(b)(4)(B) and 203(e)(2)-(3), including the multitude of securities laws violations,

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20/ See Grapevine Imps., Ltd. v. United States, 71 Fed. Cl. 324, 339-40 & n.23 (2006) (rejecting notion that Congress's use of term "specified" limited provision's applicability to only direct references to IRS Code, in stating that "there is nothing about the use of the term 'specified' that suggests that Congress could not-and did not-intend the reference in section 6229(d) to refer back to section 6501 . . . 'specified' means to mention 'definitely' or 'fully' or 'in detail' and thus does not require that there be an explicit reference to a particular Code section") (citing XVI The Oxford English Dictionary 159-60 (2d ed. 1998) and Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119, 125 (2005)).

21/ See Securities Acts Amendments of 1964, Pub. L. No. 88-467, 78 Stat. 565 (1964); S. Rep. No. 88-379, at 44-45 (1963) (adopting Commission's recommendation to broaden disqualifying offenses for broker-dealers and their employees in Exchange Act Section 15(b) and to reflect a similar change to the Advisers Act); Report of Special Study of Securities Markets of the Securities and Exchange Commission H.R. Doc. No. 88-95, at 159 (1963) ("These statutory disqualifications should be combined and made applicable to all broker-dealer and investment adviser firms and certain categories of individuals in the securities business, such as principals, supervisors, and salesman."); see also Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) (applying Exchange Act Section 15(6)(A)(ii) to an associated person's conviction for both mail fraud and securities fraud, stating both are among the "specified offenses," and affirming Commission's decision to bar an associated person of a broker-dealer).

inapplicable to associated persons of brokers, dealers, and investment advisers, an interpretation that has no support in the law.

Kornman also suggests that the Commission may not sanction him because he is not currently, and was not "at the time of the alleged event, on which the request for relief is based," either associated or seeking to associate with a broker, dealer, or investment adviser. Kornman claims that the "alleged event" is his conviction date, which occurred on July 13, 2007, and by that time he was no longer associated with a broker-dealer nor was he associated with an investment adviser. This is incorrect. Exchange Act Section 15(b)(6)(A) and Advisers Act Section 203(f) do not use the term "alleged event," rather they state that a person must have been associated with a broker, dealer, or investment adviser "at the time of the alleged misconduct." 22/ Thus, the relevant date for purposes of our jurisdiction over Kornman is October 29, 2003, the day on which he provided his false statement to Commission investigators. 23/ As determined above, Kornman was an associated person of the broker-dealer Heritage Securities and the investment adviser Heritage Advisory on that date.

Kornman further argues that there is insufficient evidence that Heritage Advisory was an investment adviser "for compensation" on the date of the October interview, based on his assertion that "Heritage Advisory [] had ceased its trading activities in the market " before October 2003. The private offering memoranda for the Hedge Funds disclose that Heritage Advisory received for its advisory services a quarterly administrative fee equal to "0.25% [to 0.375%] of the balance of limited partner capital accounts" and an annual "extraordinary profit allocation" equal to 20% [to 50%] of each limited partner's share of net profits "in excess of the rate of return of the prior year's final 52 week U.S. Treasury Bill," minus any cumulative net loss. Kornman provides no evidence for his claim that the Hedge Funds ceased operating or receiving these fees by October 2003. 24/ To the contrary, certificates from Delaware's Secretary of State

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22/ 15 U.S.C. §§ 78 *o*(b)(6)(A), 80b-3(f); see also Black's Law Dictionary 1013 (7th ed. 1999) (defining misconduct as "unlawful or improper behavior").

23/ See Securities and Exchange Commission Authorization Act of 1987, Pub. L. No. 100-181, 101 Stat. 1263 (1987); S. Rep. No. 100-105, at 2111 (1987) (amending language to "at the time of alleged misconduct" in Exchange Act Section 15(b)(6) and Advisers Act 203(f) to "make clear Congress' original intent that misconduct during a *past* association . . . as well as during a *present* . . . association, subjects a person to administrative proceedings and sanctions under the [] Exchange Act and [] Advisers Act.") (italics in original); see also John Kilpatrick, 48 S.E.C. 481, 487-88 (1986) (stating that to hold otherwise "would allow persons who violate the law while employed in the securities business to avoid administrative sanctions simply by leaving the business").

24/ We have stated that to survive a motion for summary disposition, the non-moving party must do more than "'simply show that there is some metaphysical doubt as to the material

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show that the Hedge Funds remained active and in good standing in that State through at least June 9, 2005, and that Heritage Advisory remained manager of the Hedge Funds as their general partner.

Accordingly, we find that, pursuant to Exchange Act Section 15(b) and Advisers Act Section 203(f), we have authority to sanction Kornman if we determine that it is in the public interest to do so.

B. Public Interest Factors

When considering whether an administrative sanction serves the public interest, we consider the factors identified in Steadman v. SEC: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. 25/ "'[T]he Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive.'" 26/

The conduct underlying Kornman's conviction was egregious. His conviction was for making a material false statement to a federal official, and he admitted he did so intentionally and for the purpose of misleading our investigation. As we have stated: "The securities industry presents a great many opportunities for abuse and overreaching, and depends very heavily on the

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24/ (...continued)
facts.'" Jeffrey L. Gibson, Exchange Act Rel. No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2112 n.26 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)), appeal filed, No. 08-3377 (6th Cir. Apr. 3, 2008); see also Justin Ficken, Exchange Act Release No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 695 (finding on summary disposition that respondent failed to "produce testimony or affidavits to support his assertions of joint action"). At oral argument, Kornman asserted that trading at the Hedge Funds stopped in June 2003, referencing the Division's Declaration of Cory D. Childs, a former employee of Heritage Advisory. However, Childs's Declaration merely stated he left the firm in June of 2003.

25/ 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

26/ David Henry Disraeli, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875 (quoting Conrad P. Seghers, Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293 (collecting cases), petition denied, 548 F.3d 129 (D.C. Cir. 2008)), appeal filed, No. 08-1037 (D.C. Cir. Jan. 29, 2008).

integrity of its participants." 27/ Indeed, the importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business. 28/ Here, the egregiousness of Kornman's dishonest behavior is compounded because he made his false statement to Commission staff during an ongoing investigation into possible insider trading violations. Providing information to investigators is important to the effectiveness of the regulatory system, and the information provided must be truthful. We have consistently held that deliberate deception of regulatory authorities justifies the severest of sanctions. 29/

Kornman's conduct also exhibited a high degree of scienter. He admitted to the district court that he made his false statement "intentionally, knowing it was false . . . and . . . for the purpose of misleading the [] Commission." 30/

27/ Bruce Paul, 48 S.E.C. 126, 128 (1985).

28/ See, e.g., Ahmed Mohamed Soliman, 52 S.E.C. 227, 230-31 (1995) (revoking registration and imposing associational bars for submitting false documents to IRS, a misdemeanor conviction); Paul, 48 S.E.C. at 128-29 (imposing associational bar, with a right to reapply in non-propriety, non-supervisory capacity in two years, for perjury conviction); Benjamin Levy Sec., Inc., 46 S.E.C. 1145, 1146-47 (1978) (barring associated person based on conviction for making false statements in a loan application); cf. Paul K. Grassi, Jr., Exchange Act Rel. No. 52858 (Nov. 30, 2005), 86 SEC Docket 2494 (sustaining NYSE's imposition of a five-year bar on a member who forged his doctor's name on a blank prescription drug form); Boleslaw Wolny, 53 S.E.C. 590 (1998) (sustaining NASD's revocation of an associated person's registration based on his felony conviction for money laundering); see also John F. Yakimczyk, 51 S.E.C. 56, 58 (1992) (discussing a broker's duty of fair dealing with his clients); Joseph P. D'Angelo, 46 S.E.C. 736, 737 (1976) (discussing an investment adviser's fiduciary duty to his advisory clients), aff'd without opinion, 559 F.2d 1202 (2d Cir. 1977).

29/ See, e.g., Peter W. Schellenbach, 50 S.E.C. 798, 803 (1991), aff'd, 989 F.2d 907 (7th Cir. 1993); Rita Delaney, 48 S.E.C. 886, 890 (1987); Walter B. Bull, Jr., 48 S.E.C. 113, 116-17 (1985).

30/ See, e.g., Gibson, 92 SEC Docket at 2109 (stating that respondent's conduct "evince[d] a high degree of scienter" because "he knew [the private placement memorandum]'s representations with respect to the use of proceeds were misleading and that his actions were clearly contrary to those representations"); Phlo Corp., Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1110-11 (stating that respondent's refusal to complete transfer orders exhibited "extremely high" degree of scienter because respondent knew of statutory obligations from repeated discussions with Commission staff and clearing agent).

Kornman asserts his conduct was isolated, that he recognizes the wrongfulness of his conduct, and that he provides assurances against future misconduct. As he explained in the Kornman Certification: "For quite some time now, I have seen this matter much more clearly. I know that, during the call, I hoped to get information to learn what the call was about. Now I recognize that trying to get information did not justify the way I responded to the SEC attorneys." Kornman stated further: "I wish I had provided the full and entirely accurate response to the SEC attorney's question about authority over the brokerage account, or that I had simply terminated the call in order to consult with counsel. Instead, I overestimated my ability . . . to gather information without doing any harm." Kornman stated he "accept[s] full responsibility for the misconduct during the telephone call and will not repeat anything of the sort in the future."

Notwithstanding the lack of recurrence and Kornman's expressions of remorse and assurances against future violations, which for purposes of considering a summary disposition we accept as sincere, 31/ such factors do not outweigh our concern that Kornman will present a threat if we permit him to remain in the securities industry. The securities industry presents continual opportunities for dishonesty and abuse and depends heavily on the integrity of its participants and on investors' confidence. 32/ Kornman's deliberate attempt to deceive Commission investigators during an investigation into insider trading indicates a lack of honesty and integrity, as well as a fundamental unfitness to transact business associated with a broker or dealer and to advise clients as a fiduciary. 33/

Kornman makes multiple arguments that are essentially collateral attacks on his conviction and the admissions he made in his plea agreement and accompanying Factual Resume. Kornman is estopped from such attacks. The doctrine of collateral estoppel prevents relitigating the factual findings or the legal conclusions of an underlying criminal proceeding in a follow-on administrative proceeding. 34/ In any event, his arguments are unpersuasive.

31/ See 17 C.F.R. § 201.250(a) (stating that "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true . . . .").

32/ See Seghers, 91 SEC Docket at 2304 & n.42; Grassi, 86 SEC Docket at 2498; Frank Kufrovich, 55 S.E.C. 616, 627 (2002); Philip S. Wilson, 48 S.E.C. 511, 517 (1986); Walter H.T. Seager, 47 S.E.C. 1040, 1043 (1984).

33/ See Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315 (1985) ("The primary objective of the federal securities laws [is the] protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.'") (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963)).

34/ See, e.g., Jose P. Zollino, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2604-05 & n.20 (stating the basis for a follow-on proceeding "is the action of

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Kornman characterizes his misconduct as "a single 'dilatory I don't know' [answer] to SEC attorneys during one lengthy telephone call" and analogizes this response to "the 'exculpatory no' doctrine" based on the Fifth Amendment. According to Kornman, this doctrine restrains prosecutors "from pursuing false statement charges against parties who have done nothing more than state a false 'exculpatory no.'" 35/ Kornman asserts that a "'dilatory I don't know' is even less culpable than an 'exculpatory no.'" Kornman relies primarily on the concurring opinion in Brogan v. United States 36/ in which Justice Ginsburg discusses the "exculpatory no" doctrine and its implications on Fifth Amendment rights in a challenge to petitioner's conviction under 18 U.S.C. § 1001. Kornman's reliance on this concurrence is inapposite. The validity of Kornman's conviction is not at issue here. Moreover, the majority opinion in Brogan expressly rejected the "exculpatory no" doctrine in 18 U.S.C. § 1001 cases, 37/ and Justice Ginsburg ultimately concurred in upholding Brogan's conviction.

Kornman also challenges the materiality of his answer to Commission investigators, arguing that they "already possessed the information for which they asked," instructed Kornman "he could supplement his answers with documents," and did not ask any "follow-up questions regarding whether [] Kornman had authority over the brokerage account at issue after he stated that he did not know who possessed such authority." Kornman further asserts that he was not required to answer the investigator's questions during the October interview. With respect to his state of mind during the October interview, he asserts that there is nothing in the record that supports the law judge's finding that his scienter rose to a high degree.

In pleading guilty to 18 U.S.C. § 1001, Kornman admitted to each of its elements. In particular, Kornman admitted that he made his false statement "intentionally, knowing it was

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34/ (...continued)
district court -- in convicting and enjoining him -- and its purpose is not to revisit the factual basis for that action"); Robert Sayegh, 54 S.E.C. 46, 51 & n.19 (rejecting factual and legal challenges to underlying district court case); see also Montana v. United States, 440 U.S. 147, 153-54 (1979) (stating that collateral estoppel "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate" and thereby "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions").

35/ See generally United States v. Weiner, 96 F.3d 35, 37 (2d Cir. 1996) ("[T]he doctrine embodies the view that Section 1001 is generally not applicable to false statements that are essentially exculpatory denials of criminal activity.").

36/ 522 U.S. 398, 408 (1998) (Ginsburg, J., concurring).

37/ Id. at 402-05 (majority opinion).

false," that the statement was material, 38/ and that he made the false statement with the express "purpose of misleading" the Commission. Such unequivocal admissions on the gravity of his statement and the culpability involved belie his characterization that his false statement was trivial, "dilatory" in nature, and his mental state less than intentional.

Kornman argues that various factors should mitigate the sanction imposed, citing specifically his age, 39/ that he is winding down his career, that he has no prior criminal or disciplinary history, and that neither the Commission nor the investing public suffered any harm as a result of his conduct. Kornman contends that he has "already suffered substantial losses, including the loss of a once thriving company with a successful team of more than one hundred employees, while enmeshed in more than three years of litigation defending against now-dismissed SEC and criminal fraud charges." Kornman asserts further that a permanent bar would prevent him "from ever returning to his most readily available livelihood, namely, the sale of variable life insurance and annuities, which can require some form of association with a broker-dealer."

We do not view Kornman's age or lack of disciplinary history as mitigation to sanctions. 40/ More important for public interest purposes is whether Kornman's occupation will present opportunities for future violations. It is clear that, if permitted, Kornman intends to remain in the securities industry, further supporting our decision to bar Kornman.

We are unpersuaded by Kornman's claim that neither the investing public nor the Commission was harmed should mitigate the sanction. Although the district court stated in sentencing Kornman that no particular investor was directly harmed by Kornman's conduct, our focus is on the welfare of investors generally and the threat one poses to investors and the

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38/ To ensure against prosecutions for trivial falsifications, Congress amended 18 U.S.C. § 1001 in 1996 to include a materiality element for all of subsection (a). Pub. L. No. 104-292, § 2, 110 Stat. 3459 (1996) (codified as 18 U.S.C. § 1001 (2000)); H.R. Rep. No. 104-680 (1996)).

39/ According to the Central Registration Depository, Kornman was born in 1943.

40/ Morton Bruce Erenstein, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3129 n.37 ("[T]he risk to the investing public posed by an individual who thwarts the regulatory process may be the same regardless of that individual's age."), petition denied, No. 07-15736 (11th Cir. 2008) (unpublished); Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801 ("[T]he lack of disciplinary history is not mitigating for the purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."); see also Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006).

markets in the future. 41/ Moreover, contrary to Kornman's claims, the Commission's processes were harmed by Kornman's false statement to Commission staff. 42/

Our response to Kornman's assertions that he has "already suffered substantial losses" from the several proceedings is that the "[f]inancial loss to a wrongdoer as a result of his wrongdoing" does not mitigate the gravity of his conduct. 43/ The district court, in sentencing Kornman to two years' probation and ordering him to pay $143,465, rather than the maximum $250,000 fine recommended by Commission counsel, took into account that the Commission would likely seek a permanent bar in an administrative proceeding.

Kornman contends that a censure is a more appropriate sanction and cites several cases imposing lighter sanctions for what he perceives as similar misconduct. 44/ The appropriate sanction, however, depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings. 45/ Moreover, the cases upon which Kornman relies are inapposite. In Leo Glassman, 46/ we reduced the sanction imposed by the law judge for respondent's recordkeeping violations to a suspension based on respondent's

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41/ See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2003) (stating that public interest analysis extends beyond interests of a particular group of investors), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975) ("[W]e must weigh the effect of our action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally."), aff'd, 547 F.2d 171 (2d Cir. 1976).

42/ Brogan, 522 U.S. at 402 (stating that "any falsehood" relating to the subject of an investigation into wrongdoing perverts a proper governmental function as "the very *purpose* of an investigation is to uncover the truth") (emphasis in original).

43/ Robert L. Wallace, 53 S.E.C. 989, 996 (1998). Although we may consider respondent's financial losses in assessing one's inability to pay disgorgement, interest, or civil penalties, pursuant to proper motion, these sanctions are not at issue here. Cf. 17 C.F.R. § 201.630.

44/ Kornman charges that the law judge, in fact, failed to consider lesser sanctions as required under Steadman. Our review, however, of the proceeding is de novo, which cures any error that the law judge may have made of this nature. See Rita J. McConville, Exchange Act Rel. No 51950 (June 30, 2005), 85 SEC Docket 3127, 3150 n.61, petition denied, 465 F.3d 780 (7th Cir. 2006), reh'g denied, 2007 U.S. App. LEXIS 926 (7th Cir. 2007), cert. denied, 128 S. Ct. 48 (2007).

45/ See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Geiger v. SEC, 363 F.3d 481, 488 (D.C. Cir. 2004).

46/ 46 S.E.C. 209, 211 (1975).

cooperation with the Division in reconstructing records he had destroyed and our rejection of the law judge's finding of fraud in the transactions at issue. In Raymond L. Dirks, 47/ we reduced respondent's sanction to a censure because of respondent's role "in bringing [a] massive [insider trading] fraud to light." No such mitigating circumstances are present here. Further, J.H. Goddard & Co. 48/ was a settled proceeding. It is well established that "respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as avoidance of time-and-manpower-consuming adversary proceedings." 49/ Kornman's citation to a Pennsylvania Disciplinary Board decision, 50/ for an attorney's violation of Pennsylvania's Rules of Disciplinary Enforcement and Professional Conduct, is not relevant here. Our determination to sanction an individual based on a criminal conviction is guided by the public interest factors set forth above, which are designed to protect investors and uphold the integrity of our financial markets.

Based on our consideration of the factors above, we do not believe a censure, temporary or lesser sanction to be appropriate in the public interest for Kornman's serious misconduct. 51/ The imposition of a bar serves as a deterrent to others in the securities industry against attempts to mislead investigators during the course of their investigations. 52/

47/ 47 S.E.C. 434, 448-49 (1981), aff'd, 681 F.2d 824 (D.C. Cir. 1982), rev'd on other grounds, 463 U.S. 646 (1983).

48/ 42 S.E.C. 638, 642 (1965).

49/ Stonegate Sec., Inc., 55 S.E.C. 346, 355 (2001) (internal quotation marks omitted) (citing Butz, 411 U.S. at 187).

50/ See Office of Disciplinary Counsel v. Obod, 817 A.2d 448 (Pa. 2003) (imposing a retroactive one-year suspension on an attorney for his prior conviction under 18 U.S.C. § 1001).

51/ During oral argument, Kornman attempted to minimize his conduct by arguing that the district court only sentenced him to two years' probation and fined him $143,465 and that he was only suspended, rather than disbarred, as a lawyer from the Alabama State Bar. We view his felony conviction and other sanctions, in addition to the factors considered above, as underscoring the seriousness of his misconduct.

52/ In making this determination, we are mindful that although "'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'" PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

IV.

Kornman raises several procedural and other matters on appeal of the law judge's initial decision. He argues that the law judge erred by deciding this matter pursuant to a Rule 250 motion for summary disposition rather than holding an in-person hearing and by denying his request for discovery of materials from the Commission. He also contends that the imposition of a bar based solely on his criminal conviction violates the Double Jeopardy Clause of the Fifth Amendment and that this administrative proceeding is barred by the doctrine of res judicata.

A. Rule 250 of the Commission's Rules of Practice

Rule 250 of our Rules of Practice permits a hearing officer to consider and rule on a motion for summary disposition at any time after a respondent files an answer and the Division has made its documents available to that respondent for inspection and copying. 53/ Kornman asserts that this process violates "the plain language of Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act," which authorizes sanctions only after the Commission "finds, on the record after notice and opportunity for hearing," that such sanctions are in the public interest. 54/ Kornman further asserts that summary disposition was inappropriate because "multiple disputed issues" existed at the time the law judge granted summary disposition and that the law judge failed "to take as true all 'facts of the pleadings of the party against whom the motion [wa]s made,'" as required by Rule 250.

Neither Exchange Act Section 15(b)(4) nor Advisers Act Section 203(f) require holding a trial-like, in-person evidentiary hearing in every administrative proceeding brought under these provisions. The requirement that adjudicatory proceedings be "on the record after notice and opportunity for hearing" does not necessitate an in-person hearing. 55/ Numerous courts have upheld an administrative agency's decision to grant summary disposition, without holding an in-person hearing, when no material fact is in dispute. 56/ In addition, courts have sustained

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53/ 17 C.F.R. § 201.250(a).

54/ 15 U.S.C. § 78*o*(b)(4); 15 U.S.C. § 80b-3(f).

55/ See, e.g., Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743, 747-50 (6th Cir. 2004) (affirming the validity of the Department of Health and Human Services' internal procedure for summary judgment in a sanction proceeding, required by statute to be "on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person").

56/ E.g., Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 606-11 (1st Cir. 1994) (listing agencies that provide for summary disposition and affirming generally the validity of the procedure in administrative proceedings when there is no genuine issue of material

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Commission findings that sanctions were in the public interest following administrative hearings based on summary disposition. 57/ We have repeatedly upheld the use of summary disposition by a law judge in cases such as this one where the respondent has been enjoined or convicted of an offense listed in Exchange Act Section 15(b) and Advisers Act Section 203, the sole determination is the proper sanction, and no material fact is genuinely disputed. 58/

Rule 250 provides that a motion for summary disposition may be granted without the need for holding an in-person hearing if "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 59/ Rule 250(a) gives an advantage to the party opposing summary disposition: "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true . . . ." 60/ Once the Division showed that it had satisfied the criteria for summary disposition, Kornman had the opportunity to produce documents, affidavits, or some other evidence to demonstrate that there was a genuine and material factual dispute that the law judge could not resolve without a hearing. Under Rule 250(b), the hearing officer was required to deny or defer the motion if Kornman had established good cause why he could not present facts by affidavit essential to justify his opposition to the Division's motion. 61/

56/ (...continued)
fact); La. Land and Exploration Co. v. FERC, 788 F.2d 1132, 1137-38 (5th Cir. 1986) ("Where there are no issues of material fact presented which would require an evidentiary hearing, such a hearing is simply not required."); see also Crestview Parke, 373 F.3d at 750 ("[I]t would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact.").

57/ See Seghers v. SEC, 548 F.3d 129, 134-35 (D.C. Cir. 2008) (upholding use of summary disposition in follow-on proceeding); Brownson v. SEC, 66 F. App'x. 687, 688 (9th Cir. 2003) (upholding use of summary disposition during sanctioning) (unpublished); Michael Batterman, 57 S.E.C. 1031 (2004), aff'd, No. 05-0404 (2d Cir. 2005) (unpublished).

58/ See, e.g., Gibson, 92 SEC Docket 2104 (injunction); Seghers, 91 SEC Docket 2293 (injunction); Zollino, 89 SEC Docket 2598 (conviction and injunction); Batterman, 57 S.E.C. 1031 (injunction); Charles Trento, 57 S.E.C. 341 (2004) (conviction); Joseph P. Galluzzi, 55 S.E.C. 1110 (2002) (conviction and injunction); John S. Brownson, 55 S.E.C. 1023 (2002) (conviction), petition denied, 66 F. App'x. 687 (unpublished).

59/ 17 C.F.R. § 201.250.

60/ See Gibson, 92 SEC Docket at 2112 & n.25 (quoting 17 C.F.R. § 201.250(a)).

61/ 17 C.F.R. § 201.250(b).

Kornman's submission of materials before the law judge did not create a genuine issue necessitating an in-person hearing. Kornman attached no exhibits or other materials in his opposition to the Division's motion for summary disposition refuting the Division's exhibits that establish the statutory basis for this proceeding. Rather, Kornman's exhibits consisted solely of materials "relate[d] to the appropriateness of the sanction," which we considered fully above, "not the existence of a genuine issue of material fact." 62/

Kornman argues that, inconsistent with the requirements of Rule 250(a), the law judge failed to accept as true his claims of remorse and assurances against future misconduct. We disagree that the law judge did not accept his claims of remorse, and in any event, any error by the law judge in this regard is cured by our de novo review. 63/ As noted above, we accept these claims as sincere.

With regard to Kornman's assurances against future misconduct, the logic of Kornman's argument appears to be that, if we accept these assurances as true, there can be no risk of future misconduct warranting a bar. We disagree. Although we accept his assurances as sincerely given now, such assurances are not an absolute guarantee against misconduct in the future. As discussed above, we weighed his assurances against the other Steadman factors, particularly the egregiousness of the misconduct and the degree of scienter. We concluded that, notwithstanding the sincerity of his present assurances that he will not commit such misconduct again, the risk that he would not be able to fulfill his commitment is sufficiently great that permanent associational bars are required to protect the public interest.

Kornman fails to explain how an in-person hearing would have produced a fuller and more accurate disclosure of the facts pertinent to his case than the paper hearing process employed by the law judge. 64/ Although Kornman identifies issues that he claims specifically

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62/ Seghers, 548 F.3d at 134. We have stated that, in a follow-on proceeding, summary disposition may be inappropriate in certain rare circumstances when "a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct." See, e.g., Brownson, 55 S.E.C. at 1028 n.12. We do not believe the materials Kornman submitted raise a genuine issue of mitigation that requires holding an in-person hearing. See supra Section II.B.

63/ See supra note 44.

64/ See Sierra Ass'n for Env't v. FERC, 744 F.2d 661, 663 (9th Cir. 1984) (holding that "a trial-type hearing" is not always required because such a hearing was not necessary for a "full and true disclosure of the facts"); see also Cent. Freight Lines v. United States, 669 F.2d 1063, 1068 (5th Cir. 1982).

required an in-person hearing, 65/ he identifies no fact that we did not accept that, if proved, would have been material to the outcome and identifies no witness, document or other evidence that he might have adduced at an in-person hearing to prove these issues. 66/ Nor does Kornman address his failure, under Rule 250(b), to explain to the law judge why he could not present facts by affidavit essential to oppose the Division's motion. His claims, as presented, fail to establish that a genuine issue of material fact exists, but "relate[] to the appropriateness of the sanction, not the necessity of a hearing," as noted above. 67/

B. Kornman's Discovery Request

Kornman asserts that the law judge erred in denying his request for discovery of evidence that he claims will demonstrate his offense is less egregious than other offenses under 18 U.S.C. § 1001. Specifically, Kornman sought materials from the Division allegedly reflecting that Commission attorneys at the time of the October interview knew that Kornman was represented by counsel "in pending civil matters"; that "contrary to their statements during the [interview], the [] attorneys were already working with criminal investigators"; that the "attorneys already had the information they were requesting from [him]"; and "when and how government attorneys became aware that at least one witness on whom the government relied coached any witnesses against [] Kornman." Further, Kornman sought any notes the Commission attorneys made during the October interview. The law judge rejected Kornman's request, stating that "[a]ny challenge to the propriety of the [Commission's] staff's conduct" relating to the October interview should have been directed to the district court handling Kornman's criminal case.

We agree with the law judge that these requests appear to seek information supporting Kornman's allegations as to Commission staff misconduct during the criminal matter. 68/ As

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65/ In particular, Kornman cites the degree of his scienter, his recognition of his wrongful conduct, and his "plans for the future" as genuine issues in dispute.

66/ Kornman states that, if he were given an opportunity to testify, he would address more fully his remorse and plans for the future. However, the Kornman Certification addresses both issues, and he has not explained what else he will add to this submission or why he did not just put it in the certification.

67/ Seghers, 548 F.3d at 135.

68/ Kornman suggests that his "dilatory I don't know" was in some way the fault of improper conduct by Commission investigators. Kornman should have raised these defenses before the district court. See Harold F. Harris, Exchange Act Rel. No. 53122A (Jan. 13, 2006), 87 SEC Docket 362, 371 (rejecting claim of unclean hands by Division in underlying injunctive proceeding); Galluzzi, 55 S.E.C. at 1117 & n.23 (rejecting claim of

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discussed above, Kornman may not collaterally attack the underlying criminal proceeding, and the law judge acted appropriately in rejecting his requests. Moreover, the full transcript of the October interview shows that Commission investigators offered to defer their questions until Kornman consulted with an attorney, but Kornman stated to the investigators that he was not represented by counsel at the time and continued with the interview. Kornman does not explain the relevance of his assertion that Commission staff may have been working with criminal investigators. 69/ He also offers no bases for his other speculations. 70/

C. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." 71/ Kornman contends that imposing a permanent bar based solely on his criminal conviction violates the Double Jeopardy Clause because it represents a "second criminal punishment in a successive proceeding." Kornman asserts that "'jeopardy' attached when the [district] court accepted [his] guilty plea," precluding the imposition of associational bars in this administrative proceeding.

We rejected this argument with respect to a broker-dealer bar in William F. Lincoln. 72/ In Lincoln, we noted that the controlling Supreme Court case on this question, Hudson v. United

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68/ (...continued)
agency bad faith in underlying criminal matter); see also discussion, supra, concerning impermissible collateral attacks.

69/ See United States v. Stringer, 535 F.3d 929, 936-37 (9th Cir. 2008) (holding that, absent bad faith, the government has a right to conduct parallel civil and criminal investigations and to share information among agencies), cert. denied, 129 S. Ct. 662 (2008); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1376-77 (D.C. Cir. 1980) (en banc) (same).

70/ At oral argument, Kornman asserted that our recent decision in Byron S. Rainner, Exchange Act Rel. No. 59040 (Dec. 2, 2008), __ SEC Docket __, requires full discovery of the materials he seeks. However, in Rainner, we remanded the proceeding to the law judge for the Division's admitted failure, under Commission Rule 230(a), to make its entire investigative file available for inspection and copying to an incarcerated respondent. As explained in the text, Kornman's request does not pertain to existing information in the Division's investigative file, but to new discovery he seeks. Thus, Rainner is inapposite.

71/ U.S. Const. amend. V.

72/ 53 S.E.C. at 459-62.

States, 73/ held that the Double Jeopardy Clause does not protect against all additional sanctions "that could, in common parlance, be described as punishment," but "only against . . . multiple criminal punishments for the same offense." We stated in Lincoln that, based on our analysis of Hudson, "there is no indication, let alone 'the clearest proof' required by Hudson," that a broker-dealer bar is a criminal penalty. 74/ The same result applies to an investment adviser bar. As with a broker-dealer bar, no scienter finding is required, the sanction is remedial because it is designed to protect the public, and the sanction is not historically viewed as punishment. Moreover, the fact that Congress confers authority solely on the Commission to institute follow-on administrative proceedings under Exchange Act Section 15(b) and Advisers Act Section 203 is "prima facie evidence that Congress intended to provide for a civil sanction." 75/

Kornman attempts to distinguish Hudson on the basis that "the civil remedy [in Hudson] was imposed *in advance* of the criminal proceeding." 76/ Federal courts applying Hudson, however, have repeatedly upheld the imposition of civil sanctions subsequent to a criminal conviction, in the face of Double Jeopardy challenges. 77/ Kornman's citations to earlier

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73/ 522 U.S. 93, 98-99 (1997) (internal quotation marks omitted).

74/ Lincoln, 53 S.E.C. at 460. Kornman's references to Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996), and SEC v. Jones, 476 F. Supp. 2d 374 (S.D.N.Y. 2007), to argue that a bar constitutes a "penalty," are inapposite. Both cases pertain to the applicability of the five-year statute of limitations of 28 U.S.C. § 2462, which entails a different analysis from the constitutional question here. See Benjamin G. Sprecher, 52 S.E.C. 1296, 1301 n.25 (1997).

75/ Cox v. CFTC, 138 F.3d 268, 272 (7th Cir. 1998) (quoting Hudson, 522 U.S. at 103). In contrast, jurisdiction to bring criminal proceedings under the securities laws lies exclusively with the U.S. Attorney General, not the Commission. See 15 U.S.C. §§ 77t(b), 78u(d)(1), 80b-9.

76/ Emphasis in original.

77/ E.g., Cox, 138 F.3d at 272-74 (finding lifetime bar from commodities trading not a criminal punishment under Double Jeopardy Clause); SEC v. Palmisano, 135 F.3d 860, 864-65 (2d Cir. 1998) (finding disgorgement and civil penalty in Commission civil enforcement action not criminal punishment under Double Jeopardy Clause); see also Morse v. C.I.R., 419 F.3d 829, 834-35 (8th Cir. 2005); Myrie v. Comm'r, N.J. Dept. of Corr., 267 F.3d 251, 255-60 (3d Cir. 2001); Grossfeld v. CFTC, 137 F.3d 1300, 1302-04 (11th Cir. 1998).

Supreme Court decisions United States v. Halper 78/ and Montana v. Kurth Ranch 79/ are inapposite. The Court in Hudson rejected the Halper decision, describing Halper as "ill considered" because it deviated from traditional Double Jeopardy principles, failing to consider whether: (1) "the successive punishment at issue is a 'criminal punishment,'" and (2) "the 'statute on its face' provided for what amounted to a criminal sanction." 80/ Finding the Halper test "unworkable" for determining whether a particular sanction is punitive, the Court reinstated its earlier test for making this determination. 81/ Similarly, the Kurth Ranch decision, which relied on Halper, has minimal relevance in light of Hudson. 82/

D. Res judicata

The doctrine of res judicata, or claim preclusion, "bars litigation of any claim for relief that was available in a prior suit between the same parties or their privies, whether or not the claim was actually litigated." 83/ Kornman asserts that res judicata applies to this administrative proceeding because "[a]fter the dismissal of its civil action, attorneys for the Commission appeared at Mr. Kornman's [criminal] sentencing, requested disgorgement and, with Mr. Kornman's consent, received the requested amount of monetary relief." Kornman argues that the Commission's appearance in the criminal case precludes the institution of this proceeding.

78/ 490 U.S. 435 (1989).

79/ 511 U.S. 767 (1994).

80/ Hudson, 522 U.S. at 101-02.

81/ Id. at 99-100 (applying Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and United States v. Ward, 448 U.S. 242 (1980)); see also Cutshall v. Sundquist, 193 F.3d 466, 473-74 (6th Cir. 1999) ("In backing away from Halper, the [Hudson] Court voiced a concern about the wide variety of novel double jeopardy claims spawned in the wake of Halper . . . ."); Palmisano, 135 F.3d at 864 ("Even assuming that Palmisano's contentions . . . [are] valid under Halper, they are plainly meritless in light of Hudson . . . in which the Supreme Court largely 'disavow[ed] the method of analysis used in [] Halper.'").

82/ See United States v. Warneke, 199 F.3d 906, 908 (7th Cir. 1999) ("The analytical approach employed in Kurth Ranch, which actually came from []Halper . . . was jettisoned in Hudson . . . ."); see also Hudson, 522 U.S. at 106 (Scalia, J., concurring) (noting "absurdity of trying to force the Halper analysis upon the Montana tax scheme at issue in [] Kurth Ranch").

83/ Transaero, Inc. v. La Fuenza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) (internal quotation marks and citation omitted); see also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 n.5 (1979).

To sustain a res judicata defense, a party must establish: (1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits. 84/ Here, while a final judgment was entered in the criminal matter, the cause of action in the earlier proceeding is not identical to the later one. The basis for the criminal proceeding was Kornman's false answer to investigators, and the basis for this proceeding is the existence of the criminal conviction itself. 85/

The third requirement is not met, either, because there was no privity between the U.S. Attorney and our Enforcement Division during the criminal proceeding to preclude this follow-on proceeding. "Privity is a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." 86/ The Division did not enjoy the same rights as the U.S. Attorney during the criminal matter. The U.S. Attorney has no statutory right to bring an administrative proceeding seeking administrative sanctions or to seek the bars sought here in the context of a criminal proceeding, and the Commission has no right to join the criminal proceeding and seek the remedy we are imposing here. 87/ Moreover, Kornman's plea agreement acknowledged the possibility of future proceedings, including specifically an "administrative proceeding" such as this one: "This agreement is limited to the United States Attorney's Office for the Northern District of Texas and does not bind any other federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against Kornman or any property." Accordingly, for the above reasons, we reject Kornman's res judicata arguments.

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84/ Jones v. SEC, 115 F.3d 1173, 1178 (4th Cir. 1997) (internal quotation marks and citations omitted).

85/ Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 327-28 (1955) (holding that res judicata does not apply where claim advanced in the second suit did not exist at time of first suit); see also Prime Mgmt. Co. v. Steinegger, 904 F.2d 811, 816 (2d Cir. 1990) (same).

86/ Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005) (internal punctuation omitted) (quoting Sw. Airlines Co. v. Tex. Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir. 1977)).

87/ Compare 15 U.S.C. §§ 77t(b), 78u(d)(1), 80b-9(d) (conveying sole jurisdiction to U.S. Attorney General for instituting criminal proceedings under the securities laws), with 15 U.S.C. §§ 78*o*(b), 80b-3(f) (authorizing Commission to bring follow-on administrative proceedings); see also 17 C.F.R. § 205.5(f) ("[N]either the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.").

Kornman's conviction for providing a false statement to Commission staff during an investigation into possible insider trading raises serious doubts about his honesty and fitness to remain in the securities industry. Under the circumstances, we have determined it appropriate in the public interest to bar Kornman from associating with any broker, dealer, or investment adviser.

An appropriate order will issue. 88/

By the Commission (Chairman SCHAPIRO and Commissioners CASEY, WALTER, AGUILAR and PAREDES).

Elizabeth M. Murphy
Secretary

88/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59403 / February 13, 2009

INVESTMENT ADVISES ACT OF 1940
Rel. No. 2840 / February 13, 2009

Admin. Proc. File No. 3-12716

In the Matter of

GARY M. KORNMAN
c/o Barry S. Pollack, Esq.
Sullivan & Worcester LLP
One Post Office Square
Boston, MA 02109
and
Janet K. DeCosta, Esq.
International Square
1825 Eye Street, N.W., Ste. 400
Washington, D.C. 20006

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Gary M. Kornman be barred from association with any broker or dealer; and it is

ORDERED that Gary M. Kornman be barred from association with any investment adviser.

By the Commission.

Elizabeth M. Murphy
Secretary