SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62937 / September 20, 2010

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3085 / September 20, 2010

Admin. Proc. File No. 3-13481

In the Matter of

DAVID G. GHYSELS
and
KENNETH E. MAHAFFY, Jr.

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Criminal Conviction

Former associated persons of registered broker-dealers and investment advisers were criminally convicted for participating in a conspiracy to commit securities fraud. *Held*, it is in the public interest to bar Respondents from association with any broker, dealer, or investment adviser.

APPEARANCES:

Susan C. Wolfe of Hoffman & Pollok LLP, for David G. Ghysels and *Andrew J. Frisch* for Kenneth E. Mahaffy, Jr.

Jack Kaufman and *William Finkel* for the Division of Enforcement.

Appeal filed: January 2, 2010
Last brief received: August 3, 2010

I.

David G. Ghysels and Kenneth E. Mahaffy, Jr. (together, "Respondents") appeal from the decision of an administrative law judge barring them from association with any broker, dealer, or investment adviser[1] based on their convictions for participating in a conspiracy to commit securities fraud. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

A. During the period at issue, Respondents were associated with broker-dealers and investment advisers registered with the Commission (the "Firms").[2] On October 16, 2008, Respondents were indicted for participating in a scheme to provide "day traders"[3] with access to confidential and proprietary business information transmitted over the Firms' internal speaker systems, i.e., "squawk boxes," between January 2002 and February 2004. The Firms used the squawk boxes to broadcast large customer orders to their registered representatives on an ongoing basis throughout the day so that the representatives could contact potential counterparties to fill these orders at the best available price. The indictment charged that the Respondents allowed day traders to listen in on these internal Firm communications and, in exchange, received "bribes in the form of cash, commissions and other things of value."

On April 22, 2009, a jury found Respondents guilty of participating in a conspiracy to commit securities fraud under 18 U.S.C. Sections 1348 and 1349.[4] By special verdict, the jury

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[1] *David G. Ghysels*, Initial Decision Rel. No. 391 (Dec. 11, 2009), 97 SEC Docket 23911.

[2] Ghysels was a registered representative of Lehman Brothers, Inc. from approximately March 2001 through March 2003 and a registered representative of Citigroup Global Markets, Inc. from approximately April 2003 through May 2005. Mahaffy was a registered representative of Merrill Lynch, Pierce, Fenner & Smith, Inc. from approximately December 1997 through January 2003 and a registered representative of Citigroup Global Markets, Inc. from approximately February 2003 through 2005.

[3] The indictment defined "day trading" as a "strategy whereby stock traders, through a high volume of trading activity, attempt to profit from slight changes in the prices of securities by buying and selling securities within a very short period of time."

[4] 18 U.S.C. § 1348 (making it a crime to "knowingly execute, or attempt to execute, a scheme or artifice – (1) to defraud any person in connection" with any registered security; or (2) "to obtain, by . . . fraudulent pretenses . . . any money or property in connection with the purchase or sale" of any registered security); 18 U.S.C. § 1349 (criminalizing any "attempt or

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found that Respondents had, "knowingly and with intent to defraud," obtained money or property for their participation in a scheme to misappropriate confidential business information and to deprive the Firms of the honest services of their employees. Before rendering its verdict, the jury was instructed that good faith was a "complete defense" to the charges, and that:

> if a defendant had an honestly held belief none of the information being transmitted to the [day trading] defendants was confidential, you must acquit that defendant of conspiring to defraud the brokerage houses of their property. Similarly, if the defendant had an honestly held belief the transmission of squawk box communications to [the day traders] didn't deprive the brokerage houses of the honest services of their employees, you must acquit that defendant of conspiring to deprive the brokerage firms of the honest services of those employees.

On December 29, 2009, Mahaffy was sentenced in the United States District Court for the Eastern District of New York to two years of incarceration, forfeiture of $98,328, and ordered to "notify any potential future employers who would be entrusting [him] to access and/or manage financial accounts of the instant conviction." Ghysels was sentenced to three years of probation, including six months of home detention, and forfeiture of $36,680. Respondents have appealed the convictions, and the judgment was stayed by the United States Court of Appeals for the Second Circuit on May 24, 2010 pending disposition of the appeal.[5]

B. Based on these criminal convictions, we authorized administrative proceedings against Respondents on May 21, 2009 pursuant to Section 15(b) of the Securities Exchange Act of 1934

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[4] (...continued)
conspiracy" to commit an offense); *see also* 18 U.S.C. § 1346 (defining "scheme or artifice to defraud" to "include a scheme or artifice to deprive another of the intangible right of honest services").

[5] Respondents also moved for dismissal of the indictment or for a new trial (the "Motion for Dismissal"), which was denied by the district court judge in a memorandum and order dated July 21, 2010 (the "July 21 Order"). On August 3, 2010, the Division of Enforcement (the "Division") filed a motion requesting that the Commission take notice of the July 21 Order, and noting that Respondents have filed a notice of appeal for the July 21 Order. We take official notice of the July 21 Order pursuant to Rule of Practice 323, 17 C.F.R. § 201.323.

Mahaffy's reply brief also includes exhibits that were not introduced during the proceedings below – including excerpts of investigative testimony and e-mails from a Division attorney – that Respondents apparently submitted to the district court in connection with their Motion for Dismissal. We admit these exhibits pursuant to Rule of Practice 452, 17 C.F.R. § 201.452.

and Section 203(f) of the Investment Advisers Act of 1940.[6] On December 11, 2009, a law judge issued an initial decision by summary disposition.[7] The law judge found the convictions collaterally estopped relitigation of the underlying facts. Concluding that there were no extraordinary mitigating circumstances, the law judge barred Respondents from associating with any broker, dealer, or investment adviser.

III.

Exchange Act Section 15(b) and Advisers Act Section 203(f) authorize administrative proceedings based on a conviction for certain enumerated offenses, including any felony or misdemeanor "aris[ing] out of the conduct of the business of a broker [or] dealer" or that "involves the purchase or sale of any security."[8] Upon such a conviction, the Exchange Act and the Advisers Act authorize discipline if such person was associated with a broker-dealer or an investment adviser, in each case, "at the time of the alleged misconduct."[9]

Respondents do not dispute the law judge's findings, supported by the record, that their convictions met these statutory benchmarks, and that each Respondent was associated with a firm that was both a broker-dealer and an investment adviser during the alleged misconduct. Mahaffy's answer to the order instituting proceedings (the "OIP") "admit[ted] that he was associated with a broker-dealer and investment advisor registered with the Commission, but object[ed] to the relevance of his employers' registrations as investment advisors." Ghysels' answer did not address or contest this OIP allegation.[10] Accordingly, the requirements for discipline under Exchange Act Section 15(b) and Advisers Act Section 203(f) have been met.[11]

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[6] 15 U.S.C. § 78*o*(b); 15 U.S.C. § 80b-3.

[7] A hearing officer "may grant . . . summary disposition 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." 17 C.F.R. § 201.250(b).

[8] 15 U.S.C. § 78*o*(b)(4)(B) and (6)(A); 15 U.S.C. § 80b-3(e)(2)(B) and (f); *see also Kornman v. SEC*, 592 F.3d 173, 184 (D.C. Cir. 2010) ("Congress has authorized the Commission to discipline persons who have been convicted of crimes that suggest a lack of fitness to remain in the securities industry.").

[9] 15 U.S.C. § 78*o*(6)(A); 15 U.S.C. § 80b-3(f).

[10] *See* Rule of Practice 220(c), 17 C.F.R. § 201.220(c) ("Any allegation [in the OIP] not denied shall be deemed admitted.").

[11] *See* 15 U.S.C. § 80b-2(a)(17) (defining "person associated with an investment adviser"); 15 U.S.C. § 78c(a)(18) (defining "person associated with a broker or dealer");

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A. The Exchange Act and the Advisers Act authorize us to censure, place limitations on, suspend, or bar an associated person based on these findings if we find that such sanction is in the public interest.[12] In analyzing the public interest we consider, among other things: 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.[13] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[14]

Based on our consideration of these factors, we believe that the bars imposed by the law judge were amply warranted.[15] Respondents were criminally convicted for conduct that was egregious. Mahaffy asserts that his actions were "not done clandestinely and did not implicate any other part of his work as a registered representative." However, Respondents exchanged

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[11] (...continued)
Kornman, 592 F.3d at 183 (citing "Congress['s] . . . original intent that misconduct during a past association . . . subjects a person to administrative proceedings and sanctions under the Exchange and Advisers Acts"); *Ira William Scott*, 53 S.E.C. 862, 866 (1998) (finding that respondent who "registered as an investment adviser . . . submitted himself to our jurisdiction pursuant to the Advisers Act"). Moreover, the Advisers Act is triggered by Respondents' association with investment advisers during the criminal scheme – not the scope of the scheme itself. We have rejected claims that Section 203 is limited "to only those persons who commit the specified felonies in their capacity as an investment adviser." *Scott*, 53 S.E.C. at 867.

[12] 15 U.S.C. § 78*o*(b)(6)(A); 15 U.S.C. § 80b-3(f).

[13] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[14] *David Henry Disraeli*, Securities Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875, *petition denied*, 33 Fed. Appx. 334 (D.C. Cir. 2008) (per curiam).

[15] The indictment and jury instructions establish the factual framework for our analysis of the convictions. *See United States v. Fabric Garment Co.*, 366 F.2d 530, 534 (2d Cir. 1966) ("[A] prior criminal conviction will work an estoppel in favor of the Government in a subsequent civil proceeding with respect to questions distinctly put in issue and directly determined in the criminal prosecution . . . . In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." (internal punctuation omitted) (citing *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951))); *see also Alexander V. Stein*, 52 S.E.C. 296, 301 (1995); *William F. Lincoln*, 53 S.E.C. 452, 453 & n.3 (1998); *Robert Berkson*, 47 S.E.C. 280, 281-82 & n.6 (1980).

bribes for confidential trading information, conduct that "was an egregious abuse of . . . the trust placed in [them as] securities professional[s]."[16]

Their conduct was not limited to a brief, isolated incident, but rather reflected extended participation in an ongoing scheme. During the criminal proceedings, Ghysels himself characterized his conduct as "last[ing] a total of forty days," and covering squawk box transmissions daily from "9:30 to 4." Mahaffy acknowledged before the law judge that his "relationship with the relevant clients" occurred "over about eighteen months."

The convictions were based on an elevated level of scienter. The jury found that Respondents acted "knowingly and with intent to defraud," i.e., with "knowledge of at least some of the purposes of objectives of the conspiracy and with the intention of aiding in the accomplishment of its unlawful goals."[17]

Moreover, Respondents have consistently failed to recognize the wrongfulness of their actions, raising serious concerns about the likelihood that they will commit future violations.[18] Mahaffy argues here, as he has argued in the federal court proceedings, that the squawk transmissions were not confidential and that he acted in the good faith belief that it was "acceptable for a broker to provide a client with squawk broadcasts." He also argues that the

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[16] *John S. Brownson*, 55 S.E.C. 1021, 1029 (2002), *petition denied*, 66 Fed. Appx. 687 (9th Cir. 2003) (unpublished).

[17] In *Skilling v. United States*, 130 S.Ct. 2896 (June 24, 2010), the Supreme Court held that honest services prosecutions under 18 U.S.C. § 1346 are properly limited to cases involving bribes and kickbacks. Skilling's conduct, the Court found, was not violative based on a proper construction of the statute because he had not been charged with "solicit[ing] or accept[ing] side payments from a third party." *Id.* at 2934. Here, by contrast, the special jury verdict found that Respondents committed both "money or property" fraud and "honest services fraud," and each of these findings are independent bases for the convictions. If both bases for the convictions are vacated on appeal, Respondents may pursue relief from the sanctions imposed in these proceedings. *See infra* text accompanying note 33.

[18] Like the law judge, we treat a refusal to concede wrongdoing as an aggravating factor, a practice that Mahaffy challenges as "unconstitutional and simply wrong." However, the courts have repeatedly recognized the propriety of this analysis in formulating sanctions. *See Seghers v. SEC*, 548 F.3d 129, 137 (D.C. Cir. 2008) (finding that this analysis does not constitute an "unconstitutional[] burden" in federal district court or "deny [respondent] due process before the SEC"); *see also Steadman*, 603 F.2d at 1140; *Scott B. Gann*, Exchange Act Rel. No 59729 (Apr. 8, 2009), 95 SEC Docket 15818, *aff'd*, 361 Fed. Appx. 556, 560 (5th Cir. 2010) (unpublished) (finding that the "Commission could certainly weigh this myopia about his own behavior as a factor against Gann – if he doesn't know right from wrong in this industry, how can he avoid wrongdoing in the future?").

evidence at the trial was not sufficient to establish a finding that the transmissions were confidential.[19]

These claims, which go to the heart of Respondents' convictions, have been considered and rejected in the district court proceedings.[20] Accordingly, Respondents are precluded from relitigating these issues before us. We have long declined to "revisit the factual basis for" or legal

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[19] Mahaffy claims that the non-confidential nature of the squawks is established in excerpts from Division depositions of Firm employees. He received transcripts of these depositions from the Division in connection with these follow-on proceedings under Rule of Practice 230 ("Rule 230 Testimony"). Rule 230 generally requires the Division to allow "inspection and copying [of] documents . . . in connection with the investigation leading to the Division's recommendation to institute proceedings" and to commence making documents available "no later than seven days after service of the order instituting proceedings." It also states that, if "a document required to be made available to a respondent . . . is not made available by the Division . . . , no rehearing or redecision . . . shall be required, unless the respondent shall establish that the failure to make the document available was not harmless error." 17 C.F.R. § 201.230(a), (d) and (h).

Mahaffy points out that summary judgment was issued before Mahaffy finished reviewing the Rule 230 Testimony and that he was not notified of the existence of these depositions in connection with the criminal trials. The law judge found, "While not all documents had been made available at the time of the [i]nitial [d]ecision, Mahaffy has failed to establish that the failure to do so was not harmless error in the instant proceeding, as required by Commission Rule of Practice 230(h)." Mahaffy argues that "Rule 230 would be rendered meaningless if [the Commission] were permitted to sanction a respondent based on disclosure of voluminous files without giving the respondent adequate time for review." However, we believe this was harmless error since collateral estoppel principles preclude consideration of Mahaffy's challenges to the findings of his criminal conviction. In any case, the district court has evaluated the Rule 230 Testimony and concluded that it does not support his claims. *See infra* note 20 and accompanying text.

[20] For instance, consistent with its heightened scienter finding and the jury instructions, the jury declined to find that Respondents had an "honestly held belief" that none of the transmitted information was confidential. In addition, Respondents' Motion for Dismissal in district court, like the present appeal, argued that the Rule 230 Testimony supported their claim that the squawk box transmissions were not confidential. After examining all of the Rule 230 Testimony, however, the district court judge rejected this argument. His July 21 Order concluded, "Though there are snippets of testimony here and there that, viewed in isolation, support the proposition that the squawk box communications were not confidential, each witness's testimony, viewed as a whole, actually supports the government's theory of the case."

defenses to a conviction in follow-on proceedings.[21] While "[w]e recognize that a respondent in a 'follow-on proceeding' may introduce evidence regarding the 'circumstances surrounding' the conduct that forms the basis of the underlying proceeding," our analysis does not extend to assertions that cannot be reconciled with the convictions.[22]

B. Respondents challenge the sanctions as unwarranted.[23] Characterizing the conduct at issue as isolated and "far removed from" his rendering of investment advice, Mahaffy asserts that the adviser bar "has no bearing on the underlying conduct" and that a broker-dealer bar "amply addresses the public interest."[24] He further contends that his conduct "was not sufficiently venal to equate him with others for whom a total bar from the industry would be appropriate."[25] He

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[21] *Jose P. Zollino*, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2605; *see also supra* note 15 and *Joseph P. Galluzzi*, 55 S.E.C. 1110, 1116 nn.20-22 (2002) (collecting cases); *Westerfield*, 54 S.E.C. 25, 32 at n.22 (1999) (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 & n.5 (1979)); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam).

[22] *Schield Mgmt. Co.*, 58 S.E.C. 1197, 1213 (2006) (declining to consider denial of misconduct expressly alleged in an injunctive complaint).

[23] Ghysels did not file a separate brief but asked that we consider Mahaffy's arguments to the extent that they applied to him. He adds, "The only additional fact the Commission should consider is that, in the underlying criminal case which is pending on appeal and in the district court on a motion for a new trial, [he] was sentenced to probation and six months home detention."

[24] While not challenging the broker-dealer bar, Mahaffy does not concede that it is appropriate. He explains that, because he does not intend "to seek employment or associate with a broker-dealer . . .[,] it would elevate form over substance to contest [the broker-dealer] bar here." Ghysels challenges both bars.

[25] Mahaffy cites two cases addressing permanent bars from service as an officer or director of any public company under Exchange Act Section 21(d)(2), *SEC v. Patel*, 61 F.3d 137, 142 (2d Cir. 1995) (remanding to consider whether defendant "demonstrate[d] substantial unfitness to serve as an officer or director" of any public company) and *SEC v. Robinson*, 2002 WL 1552049 at *13 (S.D.N.Y. 2002) (imposing permanent Section 21 bar). As the *Patel* court noted, however, bars covering service as an officer or director of any public company are distinguishable from the securities industry bars at issue here. Securities industry bars call for a more limited analysis focused on the Commission's interest in protecting the public from wrongdoing in the securities industry. Thus, while the conduct in *Robinson* was egregious, the *Robinson* court's analysis of the appropriateness of an officer and director bar is not relevant to

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adds that the criminal proceedings adversely affected his family and finances, suggesting that additional administrative sanctions are unnecessary.

We find these challenges unpersuasive. As we have previously held, "[a]bsent extraordinary mitigating circumstances," a person convicted of conspiracy to commit securities fraud "cannot be permitted to remain in the securities industry."[26] Respondents have not presented extraordinary circumstances that would warrant mitigation under these circumstances. We particularly disagree with Mahaffy's claim that the investment adviser bar is not warranted because his conduct has no bearing on his "role in dispensing investment advice." As noted above, Section 203 of the Advisers Act expressly authorizes investment adviser disciplinary sanctions based on a conviction arising out of the business of a broker-dealer if the underlying misconduct took place while the respondent was associated with an investment adviser.[27] Here, Respondents were convicted for participating in a securities fraud conspiracy that took place while they were associated with investment advisers. This conduct demonstrates a troubling lack

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[25] (...continued)
whether Respondents' convictions for conspiracy to commit securities fraud merit broker-dealer or adviser bars.

In any case, our analysis "depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with the action taken in other proceedings." *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5134 (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973)), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *see also Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (declining to "compare this sanction to those imposed in previous cases."); *Hiller v. SEC*, 429 F.2d 856, 858 (2d Cir. 1970) ("[W]e cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding.").

[26] *Brownson*, 55 S.E.C. at 1027. As we have previously explained, a "criminal conviction of a securities offense, rather than being a reason for withholding administrative action, is an express ground for remedial action" in an administrative proceeding. *Richard N. Cea*, 44 S.E.C. 8, 25 (1969) (noting the "several parallel and compatible procedures for the achievement of [the Exchange Act's] objectives"); *see also Hudson v. United States*, 522 U.S. 93, 104 (1997) (noting that "'revocation of a privilege voluntarily granted,' such as a debarment, 'is characteristically free of the punitive criminal element'"); *Frederick W. Wall*, 58 S.E.C. 758, 764 & n.12 (2005) (citing *Lincoln*, 53 S.E.C. at 459).

[27] 15 U.S.C. § 80b-3(e)(2)(B); *see supra* Section III. Contrary to Mahaffy's claim, the statute covers "crimes that suggest a lack of fitness to remain in the securities industry," *Kornman*, 592 F.3d at 184, and is not limited to crimes directly connected to investment advisory services. *See* 15 U.S.C. § 80-b(e)(2) & (3) (covering, for example, convictions for "any crime punishable by imprisonment for 1 or more years," for false oaths, bribery, perjury, burglary, larceny, theft robbery, forgery, and counterfeiting).

of integrity and a fundamental misunderstanding of any securities professional's responsibility to safeguard confidential information – regardless of whether they had access to such confidential information pursuant to an association with a broker-dealer or an investment adviser.[28] Respondents' dissemination of confidential information for personal gain demonstrates their unfitness to act as securities professionals, and particularly their unfitness to meet the fiduciary standards that investment advisers owe to their clients.[29] The convictions based on this misconduct are more than sufficient to establish the public interest in preventing their future participation in the securities industry through either broker-dealers or investment advisers.

Mahaffy also argues that, since he will not seek future association with a broker-dealer, his conviction would prevent "access to a firm's confidential information." This claim does not offer meaningful protection for investors. Respondents' experience in the securities industry suggests a likelihood that they would, if permitted, again seek work in the securities industry, presenting further opportunities for misconduct. Nor does Mahaffy offer any reason to credit his claim that his conviction would automatically preclude access to confidential information if he were successful in securing such future association.[30] Securities professionals, particularly investment advisers, routinely have access to confidential information including, among other things, account information, investment strategies, and trading information.

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[28] Mahaffy cites his "unblemished record in the industry beginning in 1981" to argue that "there is no basis to infer the likelihood of future violations." This claim is not mitigating in light of the recurrent nature of the violative conduct. Moreover, we have long held that "securities professionals should not be rewarded for" past compliance with the securities laws. *Guy P. Riordan*, Exchange Act Rel. No. 61153 (Dec. 11, 2009), 97 SEC Docket 23445, 23477 n.104 (citing *Mitchell M. Maynard*, Advisers Act Rel No. 2875 (May 15, 2009), 95 SEC Docket 16844, 16860 & n.39), *appeal filed*, No. 10-1024 (D.C. Cir. Feb. 12, 2010).

[29] As is well recognized, investment advisers owe fiduciary duties to their clients. *SEC v. Capital Gains Research Bureau Inc.*, 375 U.S. 180, 191 (1963) ("The Investment Advisers Act of 1940 thus reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship.'" (internal citation omitted)); *see also Conrad P. Seghers*, Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2304 n.44 (noting that persons associated with investment advisers owe "affirmative dut[ies] of 'utmost good faith, and full and fair disclosure of all material facts,' as well as [the] affirmative obligation to employ reasonable care to avoid misleading clients" (internal citations omitted)), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008); *Ahmed Mohamed Soliman*, 52 S.E.C. 227, 231 (1995) (noting that the investment advisory business "can cause havoc unless engaged in by those with appropriate background and standards").

[30] *Cf. Gann*, 361 Fed. Appx. at 560 n.5 (declining to disturb Commission's finding that "numerous assurances that he [would] not violate the law in the future" were "unpersuasive because of Gann's continuing refusal to admit that he did anything wrong").

C. Mahaffy also challenges the sanctions by pointing to what he claims was prosecutorial misconduct in the criminal proceedings. He argues that the prosecution improperly failed to turn over exculpatory evidence during the criminal trial and suggests that e-mails from a Division attorney to the prosecutors in connection with the criminal case illustrate impropriety in the prosecution's production decisions.

However, as discussed, Respondents are foreclosed from using this proceeding to challenge their criminal convictions, and these collateral estoppel principles extend to Mahaffy's procedural and constitutional claims.[31] Any such challenges are appropriately reserved for the federal courts.[32] If their appeal is successful, Respondents may seek modification of the sanctions imposed here.[33]

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[31] In his petition for review, Mahaffy requested a stay pending resolution of Respondents' Motion for Dismissal in federal court or, alternatively, a "fact-finding hearing on the SEC's role in denying Mr. Mahaffy his constitutional rights to due process and fundamental fairness." As previously noted, the Motion for Dismissal was denied by the district court on July 21, 2010. *See supra* notes 5 and 19-20. Although we originally extended the briefing deadlines, *see Ghysels*, Order Granting Extension of Time (Mar. 10, 2010), we decline to extend further relief premised on challenges to the convictions or claims of "SEC[] complicity in obtaining [the] criminal conviction." *See Wall*, 58 S.E.C. at 764-65 (declining to consider, in follow-on proceeding, claims of "evidence obstruction and witness tampering" in the criminal proceedings); *see also James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 92 SEC Docket 2708, 2714 (stating that "this is not the appropriate forum for challenging the propriety of the Division's conduct"), *petition denied*, 285 Fed. Appx. 761 (D.C. Cir. 2008) (unpublished); *Lincoln*, 53 S.E.C. at 455-56 (finding that collateral estoppel "extends to issues relating to the validity of the conviction, including the credibility of the evidence presented at trial and any defenses to the criminal charge" and "the exercise of prosecutorial discretion").

[32] The federal court challenges in the criminal case do not bear on these proceedings. *See Elliott v. SEC*, 36 F.3d at 87 ("Nothing in the statute's language prevents a bar [from being] entered if a criminal conviction is on appeal."); *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983) ("Under well-settled federal law, the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court."); *see also* Restatement (Second) of Judgments § 13, cmt. g (1982) (stating that "for purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect" and "a judgment otherwise final [for purposes of res judicata] remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by . . . the fact that the appellant has actually obtained a stay or supersedeas pending appeal").

[33] *See Jimmy Dale Swink Jr.*, 52 S.E.C. 379 (1995).

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As we have noted, the "securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[34] By participating in a criminal conspiracy to profit from confidential information, Respondents took advantage of such an opportunity for dishonesty and abuse and demonstrated their unfitness to participate in the industry.

The imposition of a bar reflects the importance of "deterrence, both specific and general, as a component in analyzing the remedial efficacy of sanctions."[35] By barring Respondents from associating with broker-dealers and investment advisers, these sanctions address the risks of allowing Respondents to remain in the securities industry, serving as a "legitimate prophylactic remedy consistent with [our] statutory obligations"[36] to "protect[] investors and the integrity of the markets by preventing those convicted of crimes from acting in the capacity of a securities professional."[37] The sanctions also promote general deterrence by discouraging others associated

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[34] *Seghers*, 91 SEC Docket at 2308; *see also Charles Phillip Elliott*, 50 S.E.C. 1273, 1276 (1992) (stating that the securities industry is "a business that presents many opportunities for abuse and overreaching"), *aff'd*, 36 F.3d 86 (11th Cir. 1994) (per curiam).

[35] *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005); *see also Schield Mgmt. Co.*, 58 S.E.C. at 1217-18 & n.46 (citing cases).

[36] *Kornman*, 592 F.3d at 189.

[37] *Lincoln*, 53 S.E.C. at 461 (citing cases noting remedial purpose of bars by FDIC, FDA, CFTC, and HUD); *see also SEC v. Palmisano*, 135 F.3d 860, 866 (2d Cir. 1998) (finding that "deterrence of securities fraud serves other important nonpunitive goals, such as encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry."); *LaCrosse v. CFTC*, 137 F.3d 925, 932 (7th Cir. 1998) (finding that a CFTC trading ban was "intended to ensure market integrity and enhance public confidence").

with broker-dealers and investment advisers from compromising sensitive market, customer, or client information.

Accordingly, we hold that it is in the public interest to bar Respondents from association with any broker, dealer, or investment adviser. An appropriate order will issue.[38]

By the Commission (Chairman SCHAPIRO, and Commissioners CASEY, WALTER, and PAREDES); Commissioner AGUILAR not participating.

Elizabeth M. Murphy
Secretary

[38] We have considered all of the parties' contentions. 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

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Admin. Proc. File No. 3-13481

In the Matter of

DAVID G. GHYSELS

and

KENNETH E. MAHAFFY, Jr.

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that David G. Ghysels be barred from association with any broker, dealer, or investment adviser; and it is further

ORDERED that Kenneth E. Mahaffy be barred from association with any broker, dealer, or investment adviser.

By the Commission.

Elizabeth M. Murphy
Secretary