SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65204 / August 26, 2011

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3262 / August 26, 2011

Admin. Proc. File No. 3-13986

In the Matter of

ERIC S. BUTLER
c/o Paul T. Weinstein, Esq.
Emmet, Marvin & Martin, LLP
120 Broadway, 32nd Floor
New York, NY 10271

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Criminal Convictions

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

APPEARANCES:

Paul T. Weinstein, of Emmet, Marvin & Martin, LLP, for Eric S. Butler.

David S. Stoelting and *Eric M. Schmidt*, for the Division of Enforcement.

Appeal filed: February 9, 2011
Last brief received: June 27, 2011

I.

Eric S. Butler appeals from the decision of an administrative law judge barring him from association with any broker, dealer, or investment adviser based on his criminal convictions for securities fraud, for participating in a conspiracy to commit securities fraud, and for participating in a conspiracy to commit wire fraud.[1] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.[2]

II.

A. Criminal Convictions

During the period at issue, Butler was associated with Credit Suisse Securities (USA) LLC ("Credit Suisse" or the "Firm"), a broker-dealer and investment adviser registered with the Commission. On April 14, 2009, Butler and his partner at Credit Suisse, Julian Tzolov, were indicted in the United States District Court for the Eastern District of New York for participating in a conspiracy to commit securities fraud and to commit wire fraud, and for committing securities fraud.[3] The indictment charged that Butler and Tzolov made unauthorized purchases of securities for the accounts of their customers, and fraudulently concealed the nature of these purchases. This case focuses on auction rate securities ("ARSs"), defined in the indictment as "debt instruments with long-term maturities for which the interest rates were set at auctions held at regular intervals."[4] The indictment described how Butler and Tzolov "contacted . . .

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[1] *Eric S. Butler*, Initial Decision Rel. No. 413 (Jan. 19, 2011), 100 SEC Docket 37127.

[2] As indicated, we have conducted an independent review of the record in this case after giving the parties the opportunity to fully brief their positions. We note, however, that Commission Rule of Practice 411(e) authorizes "summary affirmance" of an initial decision where "no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument." Although we generally have limited application of this rule in conducting our reviews, we may apply it in the future where, as here, the relevant facts are undisputed and the initial decision does not embody an important question of law or policy warranting further review by the Commission. *See* 17 C.F.R. § 201.411(e).

[3] The indictment charged one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371; one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; and one count of securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff.

[4] *See also* Current Accounting and Disclosure Issues in the Division of Corporation Finance (March 4, 2005), *available at* http://www.sec.gov/divisions/corpfin/acctdis030405.htm#P514_81909 ("Auction rate securities are long-term variable rate bonds tied to short-term

(continued...)

companies to discuss the benefits of investing in" a particular type of asset-backed ARSs "secured by student loans" that were "guaranteed by the U.S. Department of Education" and for which "the risk of default . . . was low" (the "SL-ARSs"). The indictment charged that Butler and Tzolov described the SL-ARSs to the customers as "low-risk products . . . guaranteed by the U.S. government" that "could be easily sold and converted into cash," and that customers agreed to such investments "intend[ing] to use SL-ARSs as a mechanism to manage their monthly short-term cash assets." Rather than purchasing solely SL-ARSs, however, Butler and Tzolov used some of the customers' funds "to purchase other [non-SL-ARS] types of ARSs," including mortgaged backed CDO-ARSs. The indictment described a fraudulent scheme by Tzolov and Butler to "conceal[] the true nature of" these purchases from their customers, including by "falsif[ying] the names of the products [in emails to the customers] to make it appear that those products were SL-ARSs when they were, in fact, other types of ARSs."

Tzolov pleaded guilty to securities fraud and conspiracy to commit securities fraud, and testified at Butler's trial.[5] Tzolov testified that Butler and Tzolov invested funds of customers who authorized purchases of SL-ARSs in non-SL-ARS without authorization to do so; made these unauthorized purchases in order to earn higher commissions than were available for SL-ARS; and misled customers by falsely telling them that these securities were SL-ARSs. Butler's trial also included testimony from representatives of Butler and Tzolov's customers.[6] Consistent with Tzolov's testimony, the customer representatives testified that Butler and Tzolov had not been authorized to purchase non-SL-ARSs, and misled them regarding these purchases.[7]

On August 17, 2009, after a sixteen-day jury trial in the Eastern District of New York, the jury found Butler guilty on all counts of the indictment. Before rendering its verdict, the jury was instructed that conspiracy convictions required findings that Butler acted "voluntarily," "deliberately" and "purposefully," i.e., that he "intentionally join[ed] the conspiracy with the

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[4] (...continued)
interest rates that are reset through a "dutch auction" process which occurs every 7 - 35 days. The holder can participate in the auction and liquidate the auction rate securities to prospective buyers through their broker/dealer.").

[5] On July 22, 2009, Tzolov pleaded guilty to the conspiracy to commit securities fraud and the securities fraud charges in the indictment, and also consented to the entry of a Commission order barring him from association with any broker, dealer, or investment adviser. *Julian T. Tzolov*, Securities Exchange Act Rel. No. 62351 (June 22, 2010), 98 SEC Docket 29406.

[6] Their customers included Randgold Resources Ltd., Potash Corporation, Copa Airlines, Roche International Ltd., and GlaxoSmithKline Holdings (Americas) Inc.

[7] Evidence at the trial also included customer account records; promotional materials; and e-mails among Butler, Tzolov, and the customers.

purpose of helping to achieve an unlawful object."[8] Based on the convictions, Butler was sentenced to five years imprisonment and a $5 million fine.[9] Butler appealed the criminal case to the United States Court of Appeals for the Second Circuit.

B. Institution of Administrative Proceedings and Initial Decision

We issued an order instituting these administrative proceedings against Butler on July 30, 2010 pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940.[10] On January 19, 2011, a law judge issued an initial decision by summary disposition,[11] finding that the jury verdict established the statutory basis for sanctions and that Butler was estopped from collaterally attacking his convictions. Concluding that the conduct underlying Butler's convictions was egregious, recurrent, and involved a high degree of scienter, and that there were no extraordinary mitigating circumstances in this case, the

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[8] On September 29, 2009, finding that the "jury could have found the evidence overwhelming as to guilt," the district court denied Butler's motion for a post-verdict judgment of acquittal or for a new trial.

[9] Butler was fined $500,000 for each of the conspiracy to commit securities fraud and the conspiracy to commit wire fraud counts, and $5,000,000 for the securities fraud count. The fines were imposed concurrently for a total of $5,000,000. The five-year prison terms for each conviction were also imposed concurrently. Butler was also sentenced to three years of supervised release for each count to run concurrently, and ordered to forfeit $250,000, the estimated gain from his misconduct. The judgment and sentence were entered by the district court on February 9, 2010. On June 25, 2010, the district court ordered continuation of Butler's bail pending resolution of the appeal finding, among other things, that "the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process" (citing 18 U.S.C. § 3143(b)(1)).

[10] 15 U.S.C. §§ 78*o*(b), 80b-3(f).

[11] 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." Rule of Practice 250(b), 17 C.F.R. § 201.250(b).

law judge barred him from associating with any broker, dealer, or investment adviser.[12] This appeal followed.

C. Appellate Decision in the Second Circuit

On June 15, 2011, while this appeal of the administrative law judge's decision was pending, the Second Circuit affirmed Butler's convictions for conspiracies to commit securities fraud and wire fraud, but reversed his securities fraud conviction on venue grounds and remanded the conspiracy counts of the indictment for resentencing.[13] Despite the reversal of the securities fraud conviction, however, the Second Circuit did not credit Butler's claims that "none of the government's evidence proved materiality or intent beyond a reasonable doubt," or that the trial court's evidentiary rulings denied him "a fair chance to refute the government's case." Instead, it held that, "[a]t trial, the government proved that Butler and Tzolov made false statements to the investors about the types of securities purchased on their behalf," "falsified the names of the securities [in email confirmations] to make it appear as though they were student-loan-backed ARS," and "falsely stated that he was investing in student-loan-backed ARS." As a result of this conduct, the court found, "many clients were saddled with hundreds of millions of dollars in ARS that were not backed by student loans."[14]

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[12] On January 26, 2011, a district court in the Southern District of New York enjoined Butler from committing future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, based on the verdict in the criminal case. In doing so, the court in the civil proceeding rejected Butler's claim that the criminal trial "deprived him of a full and fair opportunity to litigate" and held that the "presence of appellate issues . . . will not defeat the application of collateral estoppel." *SEC v. Tzolov*, 2011 U.S. Dist. LEXIS 8562, at *14 & 15 (S.D.N.Y. Jan. 26, 2011).

[13] On June 23, 2011, the Division of Enforcement transmitted to us the Second Circuit June 15, 2011 opinion and summary order addressing Butler's arguments on appeal (together, the "Second Circuit Decision"). In its transmittal letter, the Division argued that the Second Circuit Decision further supports the decision to bar Butler. Butler did not respond to the Division's letter or otherwise address the Second Circuit Decision in subsequent pleadings. We take official notice of the Second Circuit Decision pursuant to Rule of Practice 323, 17 C.F.R. § 201.323.

[14] After considering Butler's objections to evidentiary rulings by the district court, the Second Circuit Decision "recognized . . . serious concerns over the propriety of . . . allowing" certain disputed evidence, but deemed any error harmless because the "remaining evidence was more than sufficient to convict [Butler]."

III.

A. Exchange Act Section 15(b) and Advisers Act Section 203(f) authorize administrative proceedings based on convictions 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."[15] 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."[16]

We find that these statutory requirements have been satisfied. Butler does not dispute that his convictions for conspiracy to commit securities fraud and conspiracy to commit wire fraud satisfy the requisite statutory benchmarks for discipline.[17] Moreover, he was associated with a firm that was both a broker-dealer and an investment adviser when he engaged in the

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[15] 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.").

[16] 15 U.S.C. § 78*o*(6)(A); 15 U.S.C. § 80b-3(f).

[17] Given the recent reversal of the securities fraud conviction, this opinion is based solely on the conspiracy convictions. However, the securities fraud jury verdict was a proper basis for both the order instituting proceedings and the initial decision when issued despite the then-pending appeal. Each verdict was a conviction under the relevant statutory provisions. *See* Investment Advisers Act § 202(a)(6) (defining "convicted" to "include[] a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed"); *Alexander Smith*, 22 S.E.C. 13, 20-21 (1946) (stating that "when there has been a verdict . . . there is a 'conviction' contemplated by Section 15(b) of the Exchange Act"). *See also Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) ("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."); Restatement (Second) of Judgments § 13, cmt. g (1982) ("[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.").

misconduct giving rise to these convictions.[18] Accordingly, the Exchange Act Section 15(b) and Advisers Act Section 203(f) requirements have been met.[19]

B. 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.[20] 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.[21] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[22] Based on these factors, we conclude that the bars are amply warranted.[23]

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[18] In his answer to the order instituting proceedings, Butler denied that he was a registered representative of Credit Suisse and denied Credit Suisse's registration as an investment adviser and broker-dealer. In finding that Butler met the statutory requirements for discipline, the law judge cited FINRA records of his employment history attached to the Division's motion for summary disposition and took official notice of Credit Suisse's Form ADV and Form BD filed with the Commission as proof of its relevant registrations. Butler does not dispute these findings in the present appeal.

[19] *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"); *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").

[20] 15 U.S.C. §§ 78*o*(b)(6)(A), 80b-3(f).

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

[22] *David Henry Disraeli*, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875, *petition denied*, 33 F. App'x 334 (D.C. Cir. 2008) (per curiam).

[23] The indictment and jury instructions, together with the Second Circuit Decision, 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)

(continued...)

Butler's criminal convictions were based on conduct reflecting "an egregious abuse of the trust placed in him as a securities professional."[24] Butler's conduct was not a brief, isolated incident; he was convicted for conspiring to commit securities fraud and wire fraud over an extended period. The evidence at the trial indicated that the conspiracy continued for years, involved multiple customers, and had serious implications for such customers, whom Butler denied complete and accurate information regarding the securities in their accounts. Butler's criminal conduct left customers "saddled with hundreds of millions of dollars" of fraudulently purchased securities, purchases for which Butler had received substantial commissions.

Butler claims that he had "no scienter to defraud or harm any investor." Consistent with his challenges to the criminal convictions, he also downplays his conduct as sales of "a very high quality product viewed universally as safe" to "sophisticated investors," and, in so doing, attempts to shift responsibility to the investors. These assertions belie the jury findings that he acted "knowingly and willfully," i.e., "with knowledge of, and the intent to further," securities fraud and wire fraud. Irrespective of the purported safety of the non-SL-ARSs held in the customer accounts, as the Second Circuit Decision concluded, "the government proved that Butler and Tzolov made false statements to the investors about the types of securities purchased on [the investors'] behalf," both by "falsifying the names" of securities in order to mislead the investors and by mischaracterizing the securities when "investors called Butler to ask questions concerning their investments." This pattern of dishonesty and willingness to abuse his customers' trust reflects either a fundamental misunderstanding of, or an insufficient regard for, his responsibilities toward his customers, and is highly relevant to determining his "fit[ness] to work in an industry where honesty and rectitude concerning financial matters is critical."[25] Moreover, Butler's unwillingness to acknowledge the wrongfulness of the actions he took to mislead his customers raises serious concerns about the likelihood that he will engage in similar misconduct if presented with the opportunity.[26]

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[23] (...continued)
(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 & n.19 (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).

[24] *John S. Brownson*, 55 S.E.C. 1021, 1029 (2002), *petition denied*, 66 F. App'x 687 (9th Cir. 2003) (unpublished).

[25] *Don Warner Reinhard*, Exchange Act Rel No. 63720 (Jan. 14, 2011), 100 SEC Docket 36940, 36948.

[26] Like the law judge, we treat a refusal to concede wrongdoing as an aggravating factor. *See Seghers v. SEC*, 548 F.3d 129, 137 (D.C. Cir. 2008) (finding that this analysis does not constitute an "unconstitutional[] burden" or "deny [respondent] due process").

As we have long held, "[a]bsent extraordinary mitigating circumstances," a person convicted of conspiracy to commit securities fraud "cannot be permitted to remain in the securities industry."[27] Butler offers no evidence of such extraordinary circumstances and, therefore, under all of the circumstances, we believe the bars are amply warranted.[28]

IV.

Butler challenges the law judge's determination to issue the initial decision based on the Division's motion for summary disposition. He claims that the law judge "erred by failing to find that questions of fact existed in the record, rendering summary disposition inappropriate," arguing that he was entitled to a hearing to evaluate the credibility of the witnesses and to weigh other evidence from the criminal trial.[29] Although Butler acknowledges precedent permitting us "to bar relitigation of the fact of a criminal conviction in an administrative proceeding," he argues that collateral estoppel should not be applied in this case because the district court denied him a "full and fair opportunity" to contest the criminal charges. He urges us to evaluate his evidentiary and procedural challenges to his conviction, credit his claim that "fundamental erroneous rulings . . . render[ed] the [criminal] proceeding unfair," and find that the convictions accordingly constitute an inappropriate basis for collateral estoppel.

As the Supreme Court has explained, collateral estoppel "protects . . . from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[30] Accordingly, we have

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[27] *Brownson*, 55 S.E.C. at 1027.

[28] Although the conspiracy convictions fully justify the bars imposed here, the Southern District of New York district court's decision to impose civil anti-fraud injunctions based on Butler's convictions further demonstrates the public interest in administrative bars. *See supra* note 12; *Reinhard*, 100 SEC Docket at 36946-47 (considering a subsequent criminal conviction as part of the public interest analysis in proceedings originally instituted in connection with a civil injunction); *Robert Bruce Lohmann*, 56 S.E.C. 573, 583 n. 20 (2003) (finding that matters "not charged in the OIP" may nevertheless be considered in assessing sanctions in the public interest).

[29] For instance, he argues that the securities he purchased were "substantially identical" to SL-ARS, that we should reject the credibility of trial witnesses, and that the investors were not actually misled as to the nature of purchases in their accounts.

[30] *Montana v. United States*, 440 U.S. 147, 153-54 (1979). "[A]ffording [litigants] a second opportunity in which to litigate" by introducing evidence that is "historical in nature" and "is not the result of a different factual situation or changed circumstances" "would contravene the very principles upon which collateral estoppel is based and should not be allowed." *Yamaha*

(continued...)

long held that follow-on proceedings based on a criminal conviction are not an appropriate forum to "revisit the factual basis for," or legal defenses to, the conviction.[31] Because these proceedings do not relitigate factual assertions "that cannot be reconciled with the convictions," Butler's claims regarding the propriety of the conduct giving rise to his criminal convictions do not constitute genuine issues of material fact in these follow-on proceedings.[32]

We are not persuaded by Butler's claim that his procedural challenges to the criminal trial require us to undertake a separate "assessment of the underlying facts" independent of the factual, evidentiary, and credibility determinations made during his trial. Butler's challenges to the fairness of his criminal trial "are appropriately reserved for the federal courts,"[33] and he has been

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[30] (...continued)
Corp. of Am. v. United States, 961 F.2d 245, 257 (D.C. Cir. 1992); *see also* Restatement (Second) of Judgments § 27(c) ("[I]f the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact. . . . [S]imilarly if the issue was one of law, new arguments may not be presented to obtain a different determination of that issue.").

[31] *Jose P. Zollino*, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2605; *see also Elliott*, 36 F.3d at 87; *Sherwin Brown*, Investment Advisers Act Rel. No 3217 (June 17, 2011), __ SEC Docket __, __ (rejecting "attempts to relitigate the District Court's findings" in injunctive proceedings); *Joseph P. Galluzzi*, 55 S.E.C. 1110, 1116 nn.20-22 (2002) (collecting cases); *John Edelman*, 52 S.E.C. 789, 790 (1996) (noting that the "public interest demands prompt enforcement" through follow-on proceedings while any appeals of the underlying proceedings "are underway").

[32] *David G. Ghysels*, Exchange Act Rel. No. 62937 (Sept. 20, 2010), 99 SEC Docket 32610, 32616-17, *consolidated with criminal appeal* 09-5349-cr(L) (2d Cir. May 4, 2011); *see also Kornman*, 592 F.3d at 183 ("Because the Commission proceedings against Kornman were based on the record in his criminal case that disposed of the central issue regarding the nature of his 'alleged misconduct' for administrative enforcement purposes, a summary proceeding was appropriate under Commission precedent."); *Schield Mgmt. Co.*, 58 S.E.C. 1197, 1213 (2006) (declining to consider assertions "in conflict with the allegations" in the injunctive complaint).

[33] *Ghysels*, 99 SEC Docket at 32620. Butler argued that the then-pending appeal should preclude collateral estoppel, particularly emphasizing the district court's finding, in connection with the decision to continue bail pending resolution of the appeal, that the appeal raised "a substantial question of law or fact." These claims were rendered moot by the Second Circuit Decision. *See supra* notes 13 & 14 and accompanying text.

(continued...)

afforded opportunities to contest the criminal charges fully and vigorously.[34] The jury trial lasted several weeks and involved testimony and cross-examination of his former Credit Suisse partner and customers. Moreover, Butler was afforded an opportunity to pursue his procedural and other objections to his convictions on appeal, and the Second Circuit rejected his claim that the district court's evidentiary rulings denied him a fair trial, concluding that the evidence presented at the trial "was more than sufficient to convict" Butler.[35] Because Butler is precluded from challenging the underlying convictions in these proceedings and does not offer evidence of extraordinary circumstances mitigating the seriousness of his conduct, we find no error in the law judge's decision to bar Butler by summary disposition.

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[33] (...continued)

In any case, we previously rejected these arguments for delay. Order Denying Stay or Postponement of Administrative Proceedings, Admin. Proc. File. No. 3-13986 (Mar. 30, 2011), __ SEC Docket __; *see also* Restatement (Second) of Judgments § 13, cmt. g & reporter's note to cmt. f (noting that, for res judicata purposes, "finality is not affected by . . . a stay [in the first proceedings] . . . pending appeal" and the "best general solution" to the possibility of a successful appeal is to "hold[] that a judgment is final despite pendency of an appeal and is thus available as res judicata in a second action, while recognizing that the court in the second action has discretion in proper circumstances to suspend proceedings").

[34] *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979) (finding collateral estoppel appropriate when the defendant "had every incentive to litigate [the earlier proceeding] fully and vigorously"). The "full and fair adjudication" requirement focuses on whether the party had "an adequate *opportunity or incentive* to obtain a full and fair adjudication in the first proceedings." Restatement (Second) of Judgments § 28(j) (emphasis added). It does not require a reevaluation of the fairness of the outcome or of the kind of procedural trial decisions that are the focus of Butler's claims; in any case, Butler been afforded an opportunity to pursue these claims in his criminal appeal. *See id.* (stating that "a refusal to give the first judgment preclusive effect should not . . . be based simply on a conclusion that the first determination was patently erroneous"); Am. Jur § 574 ("The relevant inquiry is not whether the party adequately defended or prosecuted the prior action, but whether he or she had a full and fair opportunity to do so."); *see also SEC v. Tzolov*, 2011 U.S. Dist. LEXIS, at *15 (finding that Butler had a full and fair opportunity to litigate based on the "jury trial from July 22, 2009 through August 17, 2009, where Butler was represented by a team of capable attorneys").

[35] *See supra* note 14.

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Securities industry bars in this case reflect the importance of "deterrence, both specific and general, as a component in analyzing the remedial efficacy of sanctions"[36] and serve as a "legitimate prophylactic remedy consistent with [our] statutory obligations"[37] to "protect[] investors and the integrity of the markets by preventing those convicted of crimes from acting in the capacity of a securities professional."[38] With respect to specific deterrence, Butler's participation in a criminal conspiracy that fraudulently "saddled [investors] with hundreds of millions of dollars" in securities demonstrated the public interest in preventing Butler's future participation in the "securities industry[, which] presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[39] The bars also serves the public's interest in general deterrence by discouraging other securities

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[36] *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).

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

[38] *Lincoln*, 53 S.E.C. at 461 n.31 (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").

[39] *Seghers*, 91 SEC Docket at 2304; *see also Elliott*, 50 S.E.C. at 1276 (noting the "many opportunities for abuse and overreaching" in the securities industry).

professionals from misleading, or disregarding their responsibilities toward, their customers and clients.

Accordingly, we hold that it is in the public interest to bar Butler from association with any broker, dealer, or investment adviser. An appropriate order will issue.[40]

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

Elizabeth M. Murphy
Secretary

[40] 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

SECURITIES EXCHANGE ACT OF 1934
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INVESTMENT ADVISERS ACT OF 1940
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Admin. Proc. File No. 3-13986

In the Matter of

ERIC S. BUTLER

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Eric S. Butler be barred from association with any broker, dealer, or investment adviser.

By the Commission.

Elizabeth M. Murphy
Secretary