SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 71666 / March 7, 2014

Admin. Proc. File No. 3-14700

In the Matter of

GREGORY BARTKO

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

Ground for Remedial Action

Former associated person of a registered broker-dealer was criminally convicted of conspiracy, mail fraud, and illegal sales of unregistered securities. *Held*, it is in the public interest to bar him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

APPEARANCES:

Gregory Bartko, pro se.

Robert K. Gordon, for the Division of Enforcement.

Appeal filed: September 6, 2012
Last brief received: July 3, 2013

I.

Gregory Bartko was chief executive officer and chief compliance officer of Capstone Partners, L.C., a registered broker-dealer. On November 18, 2010, the United States District Court for the Eastern District of North Carolina (Western Division) entered a judgment of conviction against Bartko for conspiracy, mail fraud, and unregistered securities sales. On January 18, 2012, the Commission instituted a follow-on administrative proceeding to determine whether Bartko's conviction was a statutory basis for an administrative remedy and, if so, the appropriate remedial response.

On August 21, 2012, the administrative law judge found that the case presented no genuine issue as to any material fact and that the Division of Enforcement was entitled to summary disposition as a matter of law. He barred Bartko from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, but declined to bar him from association with a municipal advisor or nationally recognized statistical rating organization (NRSRO). The law judge noted that those two forms of relief were authorized by Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act,[1] and that Bartko engaged in the relevant misconduct before Dodd-Frank was enacted in 2010. The law judge found that, at that time, Bartko had a right to associate with a municipal advisor or NRSRO "approximating an 'immediate fixed right of present or future enjoyment'" and that such bars would be impermissibly retroactive.[2]

This appeal followed. We base our findings on an independent review of the record, except for those law judge findings that are not challenged in this appeal.

II.

Bartko specialized in securities law for approximately fifteen years and received his LL.M. in securities regulation from the Georgetown University Law Center in 1989.[3] He also held securities licenses and was chief executive officer and chief compliance officer of Capstone Partners, L.C. ("Capstone BD").[4] Bartko held himself out to investors as an investment banker

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1 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2 Quoting *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 n.10 (2006).

3 The evidence for this administrative proceeding includes documents adduced from the criminal case, including a superseding indictment returned by a federal grand jury on January 6, 2010 (the "Superseding Indictment") and a January 17, 2012 district court order describing the trial and evidence (the "January 17 Order").

4 We take official notice of the registration information regarding Bartko in the Central Registration Depository ("CRD"), an electronic database maintained by FINRA and available at https://crd.finra.org. Rule of Practice 323, 17 C.F.R. § 201.323.

for Capstone BD, which was registered as a broker-dealer from 1995 through 2011 and as an investment adviser from 2008 through 2010.

A. Bartko began planning for the Caledonian Fund in January 2004.

Bartko's involvement in the conspiracy that ultimately became the basis for the criminal charges against him began in early 2004. At that time, Bartko began discussions with a business partner, Darryl Laws, about creating Caledonian Partners LLC (Caledonian Fund). Bartko also began speaking with John Colvin about strategies for recruiting investors for the Caledonian Fund through two entities with which Colvin was associated: The Webb Group Financial Services, Inc. and Franklin Asset Exchange, LLC. Colvin explained to Bartko that these two funds operated in tandem; Webb Group performed administrative functions while Franklin Asset Exchange owned and managed Webb Group's investments and capital assets. Colvin also told Bartko about Scott Hollenbeck, Colvin's business partner and salesman for both entities. Hollenbeck was founder and president of Webb Group and founder and co-managing general partner of Franklin Asset Exchange.[5]

On January 19, 2004, Bartko faxed Laws to explain "what John [Colvin and I are] doing to raise this dough." As part of this explanation, Bartko sent Laws promotional documents for Webb Group that promised 12 percent guaranteed investment returns and stated that "investments are secured by [a] surety bond program registered with AIG Insurance Company."[6] In addition, before formalizing this arrangement with Colvin, Bartko gained access to Colvin's and Hollenbeck's disciplinary records with NASD.[7] In order to access these records, Bartko indicated that he was considering Colvin and Hollenbeck for employment. The records showed that Colvin had a history of fraud in the securities industry and that Hollenbeck had been sanctioned for securities sales related misconduct during the previous year and for forgery in 1999.

After Bartko learned this information, he entered into agreements with Colvin committing Webb Group and Franklin Asset Exchange to raising $3 million for the Caledonian Fund. Hollenbeck began promoting the Caledonian Fund during financial seminars he

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5 We take official notice pursuant to Rule of Practice 323 that Colvin was separately convicted of mail fraud, aiding and abetting, and conspiracy relating to his association with Hollenbeck and their fraudulent promotion of investments through Franklin Asset Exchange, Webb Financial Services, and other entities. Colvin was sentenced to a prison term of 25 years and ordered to pay approximately $5.2 million in restitution. *USA v. Colvin*, 4:09cr72 (E.D.N.C. June 11, 2010 & Jan. 18, 2011).

6 Superseding Indictment at 7; January 17 Order at 6−7.

7 FINRA was formed on July 26, 2007, as a result of the merger of the member firm regulatory functions of NASD and NYSE Regulation, Inc. Securities Exchange Act Rel. No. 56148 (July 26, 2007), 72 Fed. Reg. 42146.

conducted at rural Baptist churches throughout the country. Hollenbeck and Franklin Asset Exchange sent Bartko three wire transfers totaling $501,000 in February and March 2004 for the Caledonian Fund. But because Bartko and Laws had not yet formally created the Caledonian Fund or opened a bank account for it, these transfers were wired into a Capstone BD account. They officially formed the Caledonian Fund as an Isle of Man limited liability company and opened a bank account for the fund in April.

By the end of April, Bartko was responding to questions from securities regulators about his own and Hollenbeck's activities. Late that month, NASD audited Capstone BD. During the audit, NASD asked Bartko about the wire transfers to the Capstone BD account. In faxes to Colvin and Laws, Bartko later described the NASD questions as a "snafu" and complained about having "to openly disclose the [Caledonian Fund] investment" to NASD in order "to explain why we had $500,000 come [through] our bank account."[8] To avoid further questions from NASD, Bartko transferred the balance of the money sent by Hollenbeck and Franklin Asset Exchange from the Capstone BD account into his lawyer trust account and asked Colvin to wire future funds for the Caledonian Fund into this trust account.[9] Franklin Asset Exchange accordingly wired an additional $200,000 into Bartko's lawyer trust account in May 2004. The $701,000 in deposits were the only funds raised for the Caledonian Fund. None of this money was actually invested. By November 2004, nearly all of it was depleted and Bartko had received and spent $331,042 from these funds.[10]

On April 26, 2004, the North Carolina Secretary of State Securities Division issued a temporary cease-and-desist order against Hollenbeck based on its investigation of Mobile Billboards of America, Inc., another investment Hollenbeck had promoted by promising a high fixed rate of return. The order charged Hollenbeck, who raised over $10 million for Mobile Billboards, with unregistered securities sales, securities fraud, and sales as an unregistered representative. By May 6, Bartko had agreed to serve as co-counsel representing Hollenbeck in the North Carolina investigation and any other matters arising from that investigation. In connection with this ongoing Mobile Billboards investigation, Bartko received documents from Hollenbeck showing that Hollenbeck was promoting Franklin Asset Exchange by promising guaranteed returns and insured principal.

On September 3, 2004, Bartko met with Hollenbeck and others to discuss whether Hollenbeck should continue selling the Caledonian Fund. During this meeting, Hollenbeck claimed that he had raised approximately 90% of the funds raised through Franklin Asset Exchange in 2003 and 2004, described how he told investors that their principal would be

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[8] January 17 Order at 14.

[9] Bartko and Laws had already each withdrawn $50,000 from the $501,000.

[10] The record does not document all of the withdrawals of the principal, but it indicates that portions were withdrawn by Laws or used for Caledonian Fund expenses that, as noted, did not yield any returns for the investors.

insured and returns were guaranteed, and claimed that he was acting as a "finder" to circumvent broker-dealer registration requirements.

On September 21, 2004, the Commission filed a civil complaint against Mobile Billboards and other entities, charging that they were involved in a Ponzi scheme; these defendants simultaneously consented to orders that, among other things, permanently enjoined future violations, froze assets, and appointed a receiver.[11] In connection with the Commission's ongoing Mobile Billboards investigation, Bartko represented Hollenbeck at a deposition by Commission staff where Hollenbeck admitted to fraudulently using a surety bond to sell Mobile Billboards securities and said that he was then leading church seminars on "biblical principles of money management."[12]

Hollenbeck consented to a final North Carolina Securities Division cease-and-desist order on October 19, 2004. The order found that, among other things, he was not registered as a "salesman or dealer" and that he offered and sold Mobile Billboards securities while omitting material facts necessary to make his statements to investors, in light of the circumstances, not misleading.[13] The order also found that he had been discharged from a registered broker-dealer in May 2002 after it reviewed his Mobile Billboards sales and concluded that they were unauthorized. The order directed Hollenbeck and "any and all persons in active concert and participation with" him to cease and desist from any unregistered securities sales, any securities sales as an unregistered dealer or salesman, and any fraudulent securities sales.[14]

The day after Hollenbeck signed the final cease-and-desist order, Bartko e-mailed Laws that the Commission was investigating Hollenbeck's sales for Mobile Billboards and that, given his legal problems, Hollenbeck had asked if he should turn to Bartko and the Caledonian Fund "as the alternative deployment vehicle for [Hollenbeck's] funds."[15] Bartko sent Laws a second e-mail that day about "[g]et[ting] [Hollenbeck] to commit to raise at least $1.0 million each month for us religiously (no pun intended)."[16] Laws replied, "I would prefer to see one or two

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11 *SEC v. Mobile Billboards of Am., Inc.*, 1:04-cv-02763 (N.D. Ga. filed Sept. 21, 2004); *see also SEC v. Mobile Billboards of Am.*, Litigation Rel. No. 18893, 2004 SEC LEXIS 2159 (Sept. 23, 2004).

12 January 17 Order at 33.

13 *Id.* at 24.

14 *Id.* at 25−26.

15 *Id.* at 26. It is not clear from the record when the Division's Mobile Billboards investigation began focusing on Hollenbeck, but the e-mail indicates that Bartko was aware by October 2004 that the investigation could have implications for Hollenbeck. Nevertheless, Bartko assured Laws that "Scott is not in hot water, but let's just say his clients [aren't] too happy that [Mobile Billboards] is no longer making quarterly distributions." *Id.*

16 Superseding Indictment at 8; January 17 Order at 26.

months where a significant amount was raised, say $3 million, then allow him to modulate down."[17]

On November 1, 2004, Bartko and his co-counsel filed a lawsuit against individuals and entities associated with Mobile Billboards for unregistered securities sales and fraud. Although Hollenbeck was the top salesman for Mobile Billboards, Bartko's lawsuit listed Hollenbeck as a plaintiff rather than a defendant in this suit.[18]

B. Bartko enlisted Hollenbeck to raise investments for Capstone Equity.

In the meantime, Bartko and Laws decided to enlist Hollenbeck's help for a second fundraising effort, this time through another fund, the Capstone Private Equity Bridge & Mezzanine Fund, LLC (Capstone Equity). By this point, "Bartko had sent and received countless . . . documents evincing Hollenbeck's fraud in connection with Webb Group, Franklin Asset Exchange, and fundraising for the Caledonian Fund."[19] But on November 16, 2004, Bartko sent Hollenbeck an offering document for Capstone Equity and, recognizing the need to satisfy accredited-investor requirements for investments into the fund, told Hollenbeck that he wanted to speak with him that day about "how to structure the investments to be made by the non-accredited investors" in the new fund.[20]

Bartko officially formed Capstone Equity on November 23, 2004 as a Delaware LLC, and from early December 2004 to early January 2005, the conspirators raised $1,156,125. Of this amount, $447,000 was an investment from an unsophisticated investor whom Hollenbeck met during an investment presentation at her Baptist church in rural Oregon (the "Oregon Investor"). During his presentation, Hollenbeck said that "the investment was insured for up to $1.0 million."[21] After a separate meeting with her pastor and Hollenbeck to discuss the investment, the Oregon Investor made her investment by writing two checks to Capstone Equity.

Although Bartko did not attend this meeting, he reviewed the Oregon Investor's suitability questionnaire showing that she and her husband did not meet the income or net worth thresholds for accredited investors. Bartko nevertheless deposited the Oregon Investor's checks

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17 Superseding Indictment at 8.

18 The record does not make clear the theory for Hollenbeck's relief from the defendants.

19 January 17 Order at 29.

20 *Id.* at 30. An "accredited investor" includes "[a]ny natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000" or with "individual income in excess of $200,000 in each of the two most recent years or joint income . . . in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year . . . " 17 C.F.R. § 230.501(a)(5)−(6).

21 January 17 Order at 35.

and retained the funds. Bartko also corresponded with the Oregon Investor on behalf of the fund, sending the investor quarterly statements dated December 22, 2004 and March 31, 2005. Two days before Bartko sent the first of these statements, the Division notified Bartko that it intended to recommend proceedings against Hollenbeck in connection with his Mobile Billboards sales.[22]

Around January 2005, Bartko sought help from two persons who had been involved in marketing Mobile Billboards, Webb Group, and Franklin Asset Exchange and who, like Hollenbeck, were subject to cease-and-desist orders from the North Carolina Securities Division in connection with its Mobile Billboards investigation. He asked these two persons to run a purported investment club as a vehicle for investments in Capstone Equity by individual non-accredited investors. Meanwhile, in January 2005, Bartko sent refund checks to some of the individual investors in Capstone Equity with letters explaining that they did not qualify as accredited investors under the Securities Act. Hollenbeck, with Bartko's knowledge, then encouraged the investors who received refunds to re-invest their funds into Capstone Equity through the investment club. Ten investors agreed; among those persuaded to reinvest were a seventy-four-year-old retired postal worker who had invested the proceeds of the sale of a family farm to care for her mother;[23] an unemployed widow who invested from the remaining proceeds from a life insurance policy; and a seventy-year-old retired furniture factory worker. For redirecting these funds into the scheme, the investment club received a 6% fee, which its representatives split with Hollenbeck. The Capstone Fund ultimately generated more than $2.6 million in investments from forty investors.

In February 2005, the North Carolina Securities Division alerted our Enforcement Division to evidence of Hollenbeck's fraudulent sales for Capstone Equity and during a meeting in March, Enforcement Division staff asked Bartko about Hollenbeck's connection to Capstone Equity. In September 2005, the Capstone Equity funds were returned to investors, less the investment club's fee.

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[22] On May 13, 2005, the Commission filed a civil complaint against Hollenbeck and other Mobile Billboards salesmen in the United States District Court of the Northern District of Georgia, alleging that Hollenbeck knew or recklessly ignored information showing that Mobile Billboards was a Ponzi scheme, made sales to "older and retired investors" as a "safe, secure investment" and forged a surety bond falsely stating that the individual investors' investments were insured. On July 23, 2008, he was permanently enjoined from future violations of Sections 5 and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act, and Exchange Act Rule 10b-5. He was ordered to pay $3.4 million in disgorgement, representing profits resulting from the conduct alleged in the complaint, and prejudgment interest. *SEC v. Hollenbeck*, 1:05cv1272 (N.D. Ga. May 13, 2005 & July 23, 2008)

[23] Bartko was convicted for the offer and sale of unregistered securities to this investor in January 2005 and for mail fraud in correspondence with this investor between January 19, 2005 and April 18, 2005. Superseding Indictment at 11−12.

C. Bartko was indicted and convicted in 2010.

On January 6, 2010, a federal grand jury returned a Superseding Indictment charging Bartko with one count of conspiracy to commit mail fraud, money laundering, and unregistered securities sales (18 U.S.C. § 371), four counts of mail fraud (18 U.S.C. §§ 1341 and 1342), and one count of selling unregistered securities (15 U.S.C. §§ 77e, 77x and 18 U.S.C. § 2).[24] The indictment charged that Bartko led a criminal scheme to generate purported investments from members of rural Baptist churches and others. It alleged that, between January 2004 and April 2005, he knowingly conspired to conceal the true source and nature of the funds and the fraud by which they had been obtained, and to convert the funds to the personal use of Bartko and the other conspirators. The indictment also alleged that Bartko formed Caledonian Fund and Capstone Equity to create a false impression of legitimacy to further the scheme.

After a thirteen-day trial, a jury found Bartko guilty of one count of conspiracy, four counts of mail fraud, and one count of selling unregistered securities.[25] On November 18, 2010, the district court entered judgment against Bartko. Bartko moved for a new trial, claiming that the government failed to disclose evidence as required under *Brady v. Maryland*, 373 U.S. 83 (1963), and knowingly permitted government witnesses to give false testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972). The court denied Bartko's motions for a new trial in the January 17 Order. The January 17 Order summarized the evidence, concluded that the trial comported with due process, and found that the jury verdict "is worthy of confidence" because the "case was not a close one. The trial record reveals overwhelming evidence of Bartko's guilt."[26] On April 4, 2012, Bartko was sentenced to 23 years of imprisonment and three years of supervised release, and was ordered to pay joint and several restitution of $885,946.89 to about 200 investors. Bartko appealed to the United States Court of Appeals for the Fourth Circuit.

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[24] The Superseding Indictment originally charged that Bartko also made false statements to FBI agents on January 2009 and October 2009 and that he conspired to make false statements to an executive agency and obstruct SEC proceedings. On October 29, 2010, on the government's motion, the court dismissed these charges from the indictment.

[25] The jury verdict did not specify the objects of the conspiracy.

[26] January 17 Order at 2 & 118.

III.

A. The Commission instituted administrative proceedings in 2012.

On January 18, 2012, we initiated an administrative follow-on proceeding against Bartko pursuant to Exchange Act Section 15(b) and Advisors Act Section 203(f) to determine whether he had been convicted and whether any administrative response is in the public interest.[27]

During a pre-hearing conference on March 8, 2012, the law judge addressed the Division's obligation under Rule of Practice 230 to make available to Bartko the documents it obtained "in connection with the investigation leading to [its] recommendation to institute proceedings."[28] The Division stated that it did not have documents to produce to Bartko under the rule because the follow-on proceeding was based on public filings from the criminal case. Bartko then said "[i]f there's no investigative file, I sort of understand that . . . that doesn't surprise me" and that he had access to the public criminal record.[29] Bartko subsequently filed a motion seeking a subpoena under Rule of Practice 232 to compel the Commission staff to produce all documents relating to, among other things, Capstone Equity, Caledonian Fund, and other communications related to the investigation giving rise to the criminal charges. The law judge denied Bartko's subpoena request on March 30, 2012, finding it "unreasonable and excessive in scope" and noting that "[i]t does not appear that the requested documents would provide Respondent with any information, not already in his possession, that would be relevant to the public interest factors."[30]

On August 21, 2012, the administrative law judge granted a motion for summary disposition by the Division. The law judge found that the first two conditions for jurisdiction under both Advisers Act Section 203 and Exchange Act Section 15(b) had been satisfied—that Bartko's criminal offenses were covered under each statute and he was associated with both a broker-dealer and a registered investment adviser during the relevant period. But finding that Bartko's jury verdict was entered on November 18, 2010 and he was not sentenced until April

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27 On January 18, 2012, we also issued an order suspending Bartko from appearing or practicing before the Commission pursuant to Rule of Practice 102(e)(2) based on his November 18, 2010 felony conviction. *See Gregory Bartko, Esq.*, Exchange Act Rel. No. 66182, 2012 SEC LEXIS 170 (Jan. 18, 2012).

28 17 C.F.R. § 201.230.

29 Pre-Hearing Conf. Tr. at 7 & 8.

30 *Gregory Bartko*, Admin. Proc. Rulings Rel. No. 700, 2012 SEC LEXIS 1038, at *2 & 3 (Mar. 30, 2012). On April 20, 2012, Bartko also filed a motion for a stay pending his criminal appeal. Although Bartko asserts in his brief that the motion was not addressed, the record confirms that the law judge denied it on April 23, 2012.

2012, the law judge found that the jury verdict was a conviction as defined in the Advisers Act but suggested—without deciding—that it would not be a conviction under the Exchange Act.[31]

The law judge then rejected Bartko's claims that his conviction was the result of prosecutorial misconduct and that such misconduct should be considered as a mitigating factor in the follow-on proceeding. The law judge barred Bartko from association with any investment adviser, broker, dealer, municipal securities dealer, or transfer agent but declined to bar Bartko from associating with a municipal advisor or NRSRO. This appeal followed.[32]

B. The court of appeals affirmed Bartko's conviction in 2013.

On August 28, 2013, while this appeal was pending, the United States Court of Appeals for the Fourth Circuit affirmed Bartko's conviction and deemed the January 17 Order "comprehensive and well-reasoned."[33] The Fourth Circuit conducted its own "exhaustive review of the record" in light of Bartko's procedural claims and approvingly quoted the district court's conclusions that "Bartko's case was not a close one [because the] trial record reveals overwhelming evidence of Bartko's guilt" and "[t]he mountain of evidence marshaled against Bartko demonstrated his guilt beyond any shadow of a doubt."[34] Although it found that certain evidence was not timely disclosed to the defense, it ultimately concluded that there was "no reasonable probability" that earlier disclosure of this evidence "could have produced a different result" at the trial.[35] The court stated that its "confidence in the jury's conviction of Bartko was not undermined by the government's misconduct in this case," but expressed serious concerns about the frequency of similar discovery errors in the district and urged improvements to discovery procedures to prevent future errors.[36]

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31 Citing Advisers Act Section 202(a)(6), 15 U.S.C. § 80b-2(a) (defining "convicted" to "include a verdict, judgment, or plea of guilty . . . whether or not sentence has been imposed"). The law judge equated the terms "conviction" and "sentencing" but did not cite any authority or analysis indicating that a conviction under the Exchange Act is contingent on sentencing.

32 In granting Bartko's petition for review, we advised the parties of our decision to review what sanctions, if any, were appropriate. Order Granting Pet. For Review and Scheduling Briefs, Sept. 20, 2012, at 1. *See* 17 C.F.R. § 201.411(d).

33 Pursuant to Rule of Practice 323, 17 C.F.R. § 201.323, we take official notice of the Fourth Circuit opinion. *United States v. Bartko*, No. 12-4298, 2013 U.S. App. LEXIS 17914, at *9 (4th Cir. Aug. 23, 2013).

34 *Id*. at *28.

35 2013 U.S. App. LEXIS 17914, at *28.

36 *Id.* at *32.

IV.

As relevant here, Exchange Act Section 15(b) and Advisers Act Section 203 each authorizes administrative proceedings against any person who (i) has been convicted of certain enumerated offenses, including any felony or misdemeanor involving the purchase or sale of any security, any conspiracy to commit such an offense, or mail fraud; (ii) within ten years of the commencement of the proceedings; (iii) if such person was associated "at the time of the alleged misconduct," with a broker or dealer or investment adviser, as the case may be.[37] On January 10, 2013, we sought additional briefing from the parties to clarify the legal and factual basis for proceeding under each statute.[38]

The parties' additional briefing clarifies that, although Bartko challenges the Commission's jurisdiction under both statutes, the parties do not dispute the following facts: The misconduct giving rise to Bartko's convictions took place from 2004 to April 2005 (the "relevant period"). During the relevant period, Bartko was associated with Capstone BD and Capstone BD was registered with the Commission as a broker-dealer but, contrary to the charge in the OIP, it was not registered as an investment adviser. On November 10, 2010, a jury found Bartko guilty of conspiracy, mail fraud, and unregistered securities sales, and the court entered these verdicts.

We find that Advisers Act Section 203(f) is not an appropriate basis for remedies in this case. The public record does not indicate that Bartko was associated with a registered investment adviser during the relevant period as charged in the OIP. As the Division conceded in its response to the additional briefing order, there is not sufficient evidence in the record to conclude that Bartko was then associated with an investment adviser.[39]

We further find, based on our independent review of the undisputed facts, that the requirements for discipline under Exchange Act Section 15(b) have been satisfied. Each jury

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[37] 15 U.S.C. § 78*o*(b)(6)(A)(ii), (b)(4)(B); 15 U.S.C. § 80b-3(e)(4), (f). The phrase "at the time of the alleged misconduct" means the time of the wrongful activity, not the time of the conviction. *Kornman v. SEC*, 592 F.3d 173, 183−84 (D.C. Cir. 2010).

[38] Rule 411(d) authorizes us "at any time prior to issuance of [our] decision, [to] raise and determine any other matters that [we] deem[] material, with opportunity for oral or written argument thereon by the parties." 17 C.F.R. § 201.411(d).

[39] We do not reach the question of whether Bartko was an unregistered investment adviser or was associated with an unregistered investment adviser during the relevant period because the OIP did not allege this as a statutory basis and the parties have not directly addressed it. *Cf. Gary M. Kornman*, Exchange Act Rel. No. 59403, 2009 SEC LEXIS 367, at *13 (Feb. 13, 2009), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010) (finding Advisers Act applied to person associated with an unregistered investment adviser); *see also* Resp't Br. at 4 (stating that "Capstone Partners, L.C.'s business model was limited to investment advisory services, private placement agent services and related investment banking functions").

verdict entered in the criminal case is an independent basis for remedies under Section 15(b), and Bartko was associated with a broker-dealer during the relevant period. Moreover, although the law judge found it unnecessary to reach the issue, Bartko was convicted within the meaning of the Exchange Act when the verdict was returned on November 18, 2010, and the OIP was issued within ten years of this conviction.

Bartko asserts that the term "conviction" in the Exchange Act is ambiguous and that we should defer to rules of criminal procedure and non-securities statutes to adopt the position alluded to by the law judge that Bartko was not convicted for purposes of the Exchange Act until he was sentenced. To the contrary, we have long held that a person has been convicted for purposes of an Exchange Act follow-on proceeding when a jury reaches a guilty verdict that is entered by the court.[40] Furthermore, we agree with the Division that "there i[s] no reason for ascribing a different meaning to the word 'convicted' in the Exchange Act to the meaning given to that term in the Advisers Act."[41] In fact, Bartko previously conceded that "for every stage of this proceeding, in every filing made by Bartko in opposition to the OIP, [he] admitted the fact that he was . . . convicted on November 18, 2010."[42] Bartko asserts, without any convincing explanation, that he should be deemed convicted on different dates under the Exchange Act and the Advisers Act—although both statutes provide for the same type of administrative proceeding and the same type of remedial inquiry into the convicted person's fitness to associate in the securities industry.

Bartko further argues that Exchange Act Section 15(b) does not apply because Capstone BD "had no factual connection to the events described at Bartko's criminal trial."[43] But each of Bartko's convictions is independently encompassed by Exchange Act Section 15, which covers

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40 *Alexander Smith*, Exchange Act Release No. 37885, 22 SEC 13, 1946 SEC LEXIS 228, at *18 (Feb. 5, 1946) (stating that "it is clear that when there has been a verdict or plea of guilt or a plea of nolo contendere accepted by the Court, there is the 'conviction' contemplated by [Exchange Act Section 15(b)] as the starting point for an inquiry into the fitness of the person involved to engage in the securities business"); *Eric S. Butler*, Exchange Act Rel. No. 65204, 2011 SEC LEXIS 3002, at *12 n.17 (Aug. 26, 2011) (finding that a jury verdict is a conviction under the Exchange Act); *see also Delegation of Authority to the Secretary of the Comm'n*, Exchange Act Rel. No. 45848, 67 Fed. Reg. 30326, 30326 n.5 (May 6, 2002) (indicating that, in follow-on proceedings under both the Exchange Act and the Advisers Act, "a criminal conviction 'includes 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'").

41 Division Supp. Br. at 8. *Cf. Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003) (holding that the scienter standard under Exchange Act Section 10(b) also applies to Advisers Act Section 206(1) because the operative language "is nearly identical").

42 Resp't Br. at 3.

43 *Id.* at 6.

convictions involving the purchase or sale of securities, conspiracy to commit an offense involving securities purchases or sales, and mail fraud.[44] The securities laws authorize follow-on proceedings based on a variety of "crimes that suggest a lack of fitness" for the industry;[45] the predicate misconduct is not limited to one's actions as a broker-dealer.[46]

Bartko also argues that Exchange Act Section 15(b) may not be applied as "an independent jurisdictional basis for an associational bar" and that there was "no subject matter jurisdiction to support the OIP."[47] He claims that any objection to the law judge's interpretation of the Exchange Act has been waived and that this "jurisdictional defect[]" cannot be cured on appeal.[48] Bartko is mistaken. The OIP cited Exchange Act Section 15(b) as a basis for this proceeding. Although the law judge elected not to decide whether Section 15(b) authorized this proceeding, this does not negate the basis for Commission jurisdiction under the statute. And in ordering additional briefing as part of our independent review, we exercised our authority to consider this issue under Rule of Practice 411(d), which authorizes us "at any time prior to the issuance of [our] decision, [to] raise and determine any other matters that [we] deem[] material, with opportunities for oral or written argument thereon by the parties."[49] The OIP and additional briefing order placed Bartko on notice that Exchange Act Section 15(b) was a potential basis for administrative remedies and the briefing order gave him an opportunity to address the issue on appeal.[50] Bartko has taken this opportunity to challenge the application of Exchange Act Section 15(b) on a number of grounds, which we have addressed.

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44 15 U.S.C. §§ 78o(b)(6), 78o(b)(4)(B)(i), (iv).

45 *Kornman*, 592 F.3d at 184.

46 *See* 15 U.S.C. § 78o(b)(4)(B)(i), (iii) (covering, for example, convictions for false oaths, bribery, perjury, burglary, larceny, theft, robbery, forgery, extortion, and counterfeiting). In any case, the record contradicts Bartko's claim that his conduct was unrelated to his broker-dealer. Bartko arranged for $500,000 in investor funds from the investment scheme to be sent into a bank account for Capstone BD.

47 Reply at 10.

48 Resp't Supp. Br. at 6.

49 17 C.F.R. § 201.411(d).

50 *Aloha Airlines, Inc. v. Civil Aeronautics Board*, 598 F.2d 250, 262 (D.C. Cir. 1979) (notice is "sufficient if the respondent 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation'"); *Wendy McNeeley, CPA*, Exchange Act Release No 68431, 2012 SEC LEXIS 3880, at *28 (Dec. 13, 2012) (finding notice sufficient when the relevant allegation was covered in the OIP); *Ira Weiss*, Exchange Act Rel. No. 52875, 2005 SEC LEXIS 3107, at *50−51 (Dec. 2, 2005) (finding that the OIP placed respondent on notice of the charges against him even though it did not specify the subsection of the Securities Act under which he was found liable).

Bartko also contends that this proceeding is time barred under the five-year statute of limitations in 28 U.S.C. § 2462. We find this claim without merit, both because § 2462's five-year limitations period does not apply to this proceeding and because, in any event, this proceeding was instituted on January 18, 2012, which was only 14 months after Bartko's November 18, 2010 conviction—the event triggering this cause of action under Exchange Act Section 15(b)(6).

Section 2462 does not apply to this proceeding for two independent reasons. First, § 2462 expressly provides that it does not apply when the period for commencing proceedings has been "otherwise provided by Act of Congress" in the operative statute.[51] Exchange Act Section 15(b)(6) expressly authorizes the Commission to commence a proceeding up to ten years from the date of a covered conviction.[52] Second, the five-year statute of limitations does not apply because this proceeding is not "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" within the meaning of § 2462. Bartko argues that the associational bars at issue in this proceeding are punitive sanctions covered by § 2462.[53] But as we held in *Lawton*, the remedies analysis is not driven by the need to punish respondents; rather the analysis is prospective and focuses on Bartko's "current competence" and the "degree of risk" he poses to public investors and the securities markets in each of the areas covered by the remedies.[54]

Bartko has filed a motion for leave to file supplemental authority, arguing that the Supreme Court's decision in *Gabelli v. SEC* supports his statute of limitations claim.[55] *Gabelli* held that the § 2462 limitations period begins when the underlying cause of action comes into effect and that the common law fraud "discovery rule" does not apply in Commission

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[51] *William F. Lincoln*, Exchange Act Rel. No. 39629, 1998 SEC LEXIS 193, at *10 (Feb. 12, 1998).

[52] 15 U.S.C. § 78o(b)(6)(A)(ii); *see Johnson v. SEC*, 87 F.3d 484, 492 & n.15 (D.C. Cir. 1996) (stating that the "as otherwise provided by Act of Congress" exception applies to Exchange Act Section 15 follow-on proceedings against a broker "who has been convicted by a foreign court of a securities violation within the past ten years").

[53] Mem. of Supp. Authority at 6.

[54] *Lawton*, 2012 SEC LEXIS 3855, at 28 n.34, citing *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996); *see also id*, at *26 & nn. 32−33 *et seq.* (stating that Commission bars are not based on a need to "to punish the respondent for past misconduct or to remedy past harms suffered by victims of that misconduct" but rather "to protect the investing public from the respondent's possible future actions by restricting access to other areas of the securities industry where a demonstrated propensity to engage in violative conduct may cause further investor harm"); *SEC v. Quinlan*, 373 F. App'x 581, 588 (6th Cir. 2010) (finding that an officer and director bar was not punitive for purposes of the § 2462 limitations period when "the district court concluded that there was a risk of recurrence [and] that the risk to the investing public outweighed the severe collateral consequences of the equitable relief").

[55] 133 S. Ct. 1216 (2013).

enforcement actions.[56] As a discretionary matter, we grant his motion but conclude that *Gabelli* is not on point.

Bartko correctly concedes that *Gabelli* is not "controlling precedent in this proceeding . . . . "[57] *Gabelli* did not address whether § 2462 or another statutory timeframe applied to the underlying cause of action or whether the remedy was a penalty covered by § 2462—the two independent bases for our conclusion that § 2462 does not apply here. Instead, *Gabelli* addressed the applicability of the "discovery rule" in an action with a claim for civil penalties that was indisputably subject to § 2462's five-year limitations period. Moreover, *Gabelli* confirmed that even if the five-year statute of limitations applied, it would be satisfied here, explaining that a claim accrues within the meaning of § 2462 "when the plaintiff has a complete and present cause of action" and when the underlying claim "comes into existence."[58] Exchange Act Section 15(b)(6) was not triggered, and the cause of action was not complete, until Bartko was convicted.[59] And contrary to Bartko's attempt to circumvent the language of the Exchange Act, nothing in what Bartko describes as *Gabelli*'s discussion of "policy considerations" or the "remedial versus punitive dichotomy" indicates that the underlying statute should be disregarded to determine when the claim accrues. Bartko argues that *Gabelli* stands for the proposition that respondents "should not be exposed to government enforcement action . . . for an additional uncertain period of time into the future," but the ten-year post-

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[56] We have considered *Gabelli* as part of our independent review, but decline to consider new arguments Bartko raised in his Memorandum of Supplemental Authority and Reply to the Division of Enforcement's Brief in Opposition to Respondent's Motion for Leave to File Supplemental Authority (focusing for instance, on *Rotella v. Wood*, 528 U.S. 549 (2000), the statute of limitations for a cause of action under the Racketeer Influenced and Corrupt Practices Act, and the statute of limitations for different provisions of the securities laws and monetary penalties). *See* Rule of Practice 450, 15 U.S.C. § 201.450 ("No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission").

[57] Rep. to Division Br. Opp. Resp't Mot. for Leave to File Supp. Authority at 3.

[58] 133 S. Ct. at 1220.

[59] *See Michael T. Studer*, Exchange Act Rel. No. 50411, 2004 SEC LEXIS 2135, at *10 (Sept. 20, 2004) (stating that the "five-year limit specified in 28 U.S.C. § 2462 does not apply" and that a follow-on cause of action "did not 'accrue' within the meaning of that statute until the injunction . . . was entered"); *Lincoln*, 1998 SEC LEXIS 193, at *11 (stating "for the purposes of [§] 2462, it is the date of . . . conviction, not the conduct underlying the conviction, which is relevant"); *see also Proffitt v. FDIC*, 200 F.3d 855, 864−65 (D.C. Cir. 2000) ("While the FDIC might well have brought an action earlier under [another statutory provision], its failure to do so does not render untimely, and therefore, unauthorized, its action based on the later occurring effect.").

conviction period for instituting follow-on proceedings under the Exchange Act is fixed and does not create the type of uncertainty addressed by the Court in *Gabelli*.[60]

V.

A. Bartko's conduct demonstrates unfitness for the securities industry.

We next turn to assessing what remedies are in the public interest. In so doing, 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.[61] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[62]

1. The record evidence demonstrates the propriety of a broker-dealer bar.

The record demonstrates the egregiousness of Bartko's misconduct, which was neither brief nor isolated. He violated the most basic investor protection principles in the securities laws, orchestrating a conspiracy that defrauded approximately two hundred investors out of hundreds of thousands of dollars over more than a year. This conspiracy relied on repeated false promises of insured and guaranteed investment returns and victimized financially unsophisticated investors.[63]

Bartko acted with a high degree of scienter. With fraudulent intent, he led the scheme to induce investments based on false claims about their legitimacy, safety, and investment returns. After learning about Colvin and Hollenbeck's disciplinary histories and fraudulent sales techniques, Bartko chose to rely on them as the primary source for soliciting investors. Even after learning about the scrutiny that Hollenbeck's sales were drawing from securities regulators,

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60 Mem. of Supp. Authority at 6.

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

62 *David Henry Disraeli*, Exchange Act Rel. No. 57027, 2007 SEC LEXIS 3015, at *61 (Dec. 21, 2007), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

63 *See Epstein v. SEC*, 416 F. App'x 142, 146 (3d Cir. 2010) (affirming bar where the Commission had determined that violations were egregious because they were perpetrated against elderly and unsophisticated clients); *see also Butcher & Singer Inc.*, Exchange Act Rel. No. 23990, 48 SEC 640, 1987 SEC LEXIS 2813, at *21 (Jan. 13, 1987) (describing "fraudulent representations to an unsophisticated customer" as egregious), *aff'd*, 833 F.2d 303 (3d Cir. 1987) (without opinion).

Bartko chose to continue to rely on Hollenbeck's fundraising and even consulted him while structuring investments in Capstone Equity.

The remaining public interest factors confirm the public interest in a bar. Bartko has demonstrated unwillingness to accept any responsibility—or show remorse—for his actions. In the criminal proceedings, he attempted to shift responsibility for his own conduct to Hollenbeck, despite the overwhelming evidence that Bartko knowingly and repeatedly chose to rely on Hollenbeck's fraudulent sales tactics. It is also particularly noteworthy that on appeal Bartko again seeks to shift the focus of the proceeding away from his own violative conduct, this time to the government's investigation and other procedural claims. Contrary to Bartko's assertion that his unwillingness to accept responsibility should not be considered because "he committed no violations to begin with nor was his conduct unlawful," this factor has long been deemed an appropriate measure of fitness for association in the industry.[64] In light of Bartko's conviction for conspiracy, mail fraud, and selling unregistered securities, we find that his assessment of his role in defrauding approximately two hundred investors over more than a year further demonstrates a fundamental lack of commitment to investor protection principles required to "insure honest securities markets and thereby promote investor confidence"[65] throughout the industry and the risk that he would engage in similar conduct if presented with future opportunities.[66]

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64 *See, e.g.*, *Seghers v. SEC*, 548 F.3d 129, 137 (D.C. Cir. 2008) (consideration of this factor "did not unconstitutionally burden [respondent] in the district court. . . nor did it deny him due process before the SEC").

65 *United States v. O'Hagan*, 521 U.S. 642, 658 (1997).

66 *See Scott B. Gann*, Exchange Act Rel. No. 59729, 2009 SEC LEXIS 1163, at *19 (Apr. 8, 2009) (noting that a refusal to recognize wrongful conduct reveals "a fundamental misunderstanding of the duties of a securities industry professional that presents a significant likelihood that he will commit similar violations in the future"); *see also Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) (noting that "the existence of a violation raises an inference that it will be repeated").

2. The January 17 Order is relevant to the analysis of the public interest.

Bartko argues that the January 17 Order should not be considered in conducting the public interest analysis, claiming that the January 17 Order may not be considered without re-assessing the entire criminal record and satisfying each of the requirements for collateral estoppel. Bartko concedes that "in theory issue preclusion or collateral estoppel are doctrines that apply in administrative proceedings following a criminal conviction" but contends that preclusion was unfairly applied in this case, emphasizing that the criminal conviction was based on a general jury verdict and that the January 17 Order addressed issues that arose in "post-conviction proceedings."

Bartko downplays his state of mind when he engaged in the conduct for which he was convicted, but he is collaterally estopped from disputing that he acted with the requisite scienter to establish his fraud convictions. Estoppel is properly applied to a criminal verdict, whether general or specific, regarding the issues decided in the criminal case.[67] Bartko was convicted, among other things, for "devis[ing] a scheme and artifice to defraud" investors, and "knowingly" causing delivery of documents in connection with this scheme.[68]

Moreover, follow-on proceedings have long considered district court findings, including in cases following a general verdict, as evidence of the public interest that is not open to collateral challenge.[69] Courts have repeatedly approved this practice.[70] Here, Bartko offers no

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[67] *See Ashe v. Swenson v. United States*, 397 U.S. 436, 443−45 (1970) (applying collateral estoppel to general verdict when the contested issues were determined by the verdict).

[68] Indictment at 11.

[69] *See, e.g.*, *Butler*, 2011 SEC LEXIS 3002, at *21 (noting that "we have 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, [a] conviction"); *Phillip J. Milligan*, Exchange Act Rel. No. 61790, 2010 SEC LEXIS 1163, at *13 (Mar. 26, 2010) (noting that "findings made by the court in the underlying proceeding" are properly considered "in determining the appropriate [follow-on] sanction"); *Charles Phillip Elliott*, Exchange Act Rel. No. 31202, 50 SEC 1273, 1992 SEC LEXIS 2334 (Sept. 17, 1992) (considering, as evidence of the public interest, findings in sentencing memorandum, receiver's report, court order denying post-trial motion, and sentencing transcript, as well as injunctive complaint and criminal indictment); *Michael C. Pattison*, Exchange Act Rel. No. 67900, 2012 SEC LEXIS 2973, at *24−25 (Sept. 20, 2012) (stating, in a proceeding under Rule of Practice 102(e), that a respondent in a follow-on proceeding based on an injunction "is not permitted to collaterally attack the underlying injunction or findings of the court"); *see also* Rule of Practice 320, 17 C.F.R. § 201.320 (permitting the Commission or hearing officer to receive relevant evidence).

[70] *Studer v. SEC*, 148 F. App'x 58, 59 (2d Cir. 2005) (finding that respondent, in an appeal of a follow-on administrative proceeding "is prohibited from relitigating the factual and legal conclusions of the district court regarding his violations of federal securities laws"); *see also*

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reason to doubt that the January 17 Order reflects the facts and issues contested during the criminal trial and the basis for his criminal convictions and, as such, is fairly considered as evidence of his fitness to associate in the securities industry.[71] In denying Bartko's motion for a new trial, the January 17 Order reviewed the entire trial record, including factual issues contested during the trial and his claims that the government violated due process by failing to disclose evidence and permitting false testimony during the criminal trial. The January 17 Order concluded that he "received a fair trial in compliance with due process" and that the "jury verdict is worthy of confidence."[72] Based on its review, the court observed that "[u]ltimately, the trial focused on Bartko's knowledge, intent, and good faith" and concluded that the "case was not a close one. The trial record reveals overwhelming evidence of Bartko's guilt" and that there was a "mountain of evidence marshaled against Bartko [that] demonstrated his guilt beyond any shadow of a doubt."[73] These findings were affirmed by the Fourth Circuit in the criminal appeal, which was the appropriate forum for any challenges to these conclusions or the evidence on which they were based.[74]

In a further challenge to the evidence, Bartko argues that the law judge failed to properly apply the "reliable[,] probative and substantial" standard for evidence under the Administrative

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Gann v. SEC, 361 F. App'x 556, 558 n.3 (5th Cir. 2010) (finding, in an appeal of a follow-on administrative proceeding, that "[b]ecause the factual issues in this case were fully litigated and resolved in the district court, we treat the district court's findings of fact as conclusive and binding on the parties"); *Brownson v. SEC*, 66 F. App'x 687, 688 (9th Cir. 2003) (finding, in a follow-on proceeding appeal, that respondent's "plea agreement and criminal conviction are substantial evidence supporting the SEC's conclusion that it is in the public interest to permanently bar [respondent] from association with a broker or dealer").

71 *See Kornman v. SEC*, 592 F.3d 173, 187 (D.C. Cir. 2010) (finding that the Commission, in an appeal of a follow-on administrative proceeding could "reasonably reject, in view of the criminal record, Kornman's attempts to minimize the gravity of his [conduct] and his mental state"); *SEC v. Bilzerian*, 29 F.3d 689, 693 (D.C. Cir. 1994); *Maietta v. Artuz*, 84 F.3d 100, 103 n.1 (2d Cir. 1996); *see also Armstrong v. SEC*, 476 F. App'x 864, 865 (D.C. Cir. 2012); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir.1994) (per curiam); *cf. United States v. Bras*, 483 F.3d 103, 107−08 (D.C. Cir. 2007) (finding that judicial factfinding may satisfy a "preponderance of the evidence standard" for sentencing purposes).

72 January 17 Order at 118 & 119.

73 January 17 Order at 1 & 2.

74 *Franklin*, 2007 SEC LEXIS 2420, at *11 (finding, in a proceeding instituted under Exchange Act Section 15(b)(6)(A), that "[t]he appropriate forum for Franklin's challenge to the validity of the injunction and the district court's evidentiary rulings is through an appeal to the United States Court of Appeals, which . . . Franklin is pursuing and in which he is raising some of these same issues"), *petition denied*, 285 F. App'x 761 (D.C. Cir. 2008) (per curiam).

Procedure Act.[75] He contends that this standard is not consistent with the preponderance of the evidence standard of proof that was applied by the law judge pursuant to *Steadman v. SEC*,[76] which Bartko argues applies only to securities fraud. To the contrary, the preponderance standard applies in administrative proceedings addressing a variety of violations,[77] and the preponderance analysis in *Steadman* is based on the Supreme Court's interpretation of the Administrative Procedure Act, not the securities laws.[78] Moreover, while it is unclear whether Bartko's objection is to the nature of the evidence in the record or the weight given to the evidence, he has not substantiated either type of objection. He has not offered any basis for doubting the relevance, reliability, or probative value of the January 17 Order's findings regarding the conduct giving rise to his convictions. Nor has he identified any evidence, either in the record or that he identified and sought to adduce before the law judge, that would undermine those findings or demonstrate that allowing him to participate in the securities industry would be in the public interest.

Bartko argues that it is unfair to rely on the January 17 Order because it does not address his claims of prosecutorial misconduct and collusion. But collateral estoppel is not the basis for the finding, discussed below, that such claims do not raise a genuine issue of mitigation in this proceeding because they are not relevant to the risks posed by Bartko's participation in the securities industry.[79] And as we have long held, follow-on proceedings are not the proper forum for addressing claims of prosecutorial or Division misconduct.[80] Bartko's criminal

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75 5 U.S.C. § 556(d).

76 450 U.S. 91 (1981).

77 *See, e.g.*, *Kornman*, 592 F.3d at 187 (approving Commission bar order in an administrative proceeding following a conviction for providing a false statement after the Commission "consider[ed] the mitigating factors pursuant to an analysis of the *Steadman* factors").

78 450 U.S. 91, 102 (1981) (finding that the APA evidentiary standards were adopted to "eliminat[e] . . . agency decisionmaking premised on evidence which was of poor quality—irrelevant, immaterial, unreliable, and nonprobative—and of insufficient quantity—less than a preponderance").

79 *Cf. Fireman's Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1022 (9th Cir. 2001) (finding that the court relied on "traditional summary judgment principles" rather than collateral estoppel in rejecting a factual challenge); *Kornman v. SEC*, 592 F.3d 173, 188 (D.C. Cir. 2010) (finding no hearing on mitigation necessary when there was no evidence adduced supporting mitigation).

80 *See Frederick W. Wall*, Exchange Act Rel. No. 52467, 2005 SEC LEXIS 2380, at *11 (Sept 19, 2005) (declining to consider claims of "evidence obstruction and witness tampering" in the underlying criminal proceedings); *see also James E. Franklin*, Exchange Act Rel. No. 56649, 2007 SEC LEXIS 2420, at *13 (Oct. 12, 2007) (stating that "this is not the appropriate forum for challenging the propriety of the Division's conduct"), *petition denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Lincoln*, 1998 SEC LEXIS 193, at *7, 8 (finding that collateral estoppel "extends to issues relating to the validity of the conviction" and "the exercise of prosecutorial discretion").

proceedings—including his appeal—afforded him an opportunity to pursue his procedural and other objections to the prosecution,[81] and the court of appeals, like the district court, ultimately concluded that its "confidence in the jury's conviction of Bartko was not undermined . . . ."[82] If Bartko had prevailed in overturning all of the verdicts, he could have filed a motion to vacate the administrative order.[83] Accordingly, we find it appropriate to consider the January 17 Order as evidence of the public interest in barring Bartko from associating with a broker or dealer.

B. Collateral bars are not impermissibly retroactive.

As we explained in *John W. Lawton*, bars from associating with any investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO are not impermissibly retroactive when the respondent has demonstrated unfitness for the securities industry that extends beyond his or her past or present industry associations. Such collateral bars, including bars from municipal advisors and NRSROs, are appropriately applied as "prospective remedies whose purpose is to protect the investing public from future harm."[84] Here, although Bartko's misconduct pre-dated Dodd-Frank, Bartko was not then associated with municipal advisors or NRSROs and he did not have a vested right to any such future association.[85]

Bartko cites *Gupta v. Securities and Exchange Commission*[86] and *Mart v. Gozdecki, Del Guidice, Americus & Farkas LLP*[87] to argue that none of Dodd-Frank's provisions may be

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81 *See Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1108 (D.C. Cir. 1988) (stating that "an attack on the validity of [an underlying] proceeding" that could have been raised in the earlier proceeding is "doomed to fail"); *Wolfson v. Baker*, 623 F.2d 1074, 1080−81 (5th Cir. 1980) (rejecting argument that prosecution withheld evidence because the underlying criminal proceeding afforded an opportunity to raise those objections).

82 2013 U.S. App. LEXIS 17914, at *32. *See* Petition for Review at 3 (stating that his *Brady* claims were addressed in the January 17 Order and that "[a]ll of these issues and more will be addressed in Respondent's appeal of his criminal conviction now pending before the United States Court of Appeals").

83 *See, e.g.*, *Jimmy Dale Swink, Jr.*, Exchange Act Rel. No. 36042, 52 SEC 379, 1995 SEC LEXIS 2033, at *2 (Aug. 1, 1995) (vacating bar upon reversal of underlying conviction).

84 2012 SEC LEXIS 3855, at *38. Although the Division did not appeal the law judge's refusal to impose a bar from association with any municipal advisor or NRSRO, we determined, on our own initiative, to review the sanctions pursuant to Rule of Practice 411(d). *See supra* note 32.

85 *See Kornman*, 592 F.3d at 188 (describing industry participation as "a privilege voluntarily granted" rather than a right (quoting *Hudson v. United States*, 522 U.S. 93, 104 (1997)).

86 796 F. Supp. 2d 503 (S.D.N.Y. 2011).

87 910 F. Supp. 2d 1085 (N.D. Ill. 2012).

applied in cases addressing conduct pre-dating the statute. But these cases are inapposite. *Gupta* addressed a motion for declaratory and injunctive relief in which Gupta argued, among other things, that the decision to institute an administrative proceeding authorized under Dodd-Frank Section 929P constituted an impermissibly retroactive application of Dodd-Frank, but the court ultimately declined even to reach the retroactivity issue.[88] *Mart* addressed a legal malpractice claim based on an attorney's failure to file a timely whistleblower lawsuit under Section 806 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). The decision dismissed the malpractice suit because it concluded that the whistleblower claim would not have succeeded even if timely filed. It found that the text of Sarbanes-Oxley Section 806 unambiguously excluded Mart, as the employee of a privately-held subsidiary of a public company, from its whistleblower protections. Mart noted that Dodd-Frank Section 929A later extended these protections to private subsidiary employees and argued that this amendment covered his pre-amendment whistleblower claim because it clarified an ambiguity in Sarbanes-Oxley. The court rejected this argument. Reasoning that the text of the original statute unambiguously excluded his pre-amendment claim, the court held that the Dodd-Frank amendment was an alteration, rather than clarification, of the whistleblower protections that could not be applied retroactively.

Neither decision addresses the collateral bars authorized in Dodd-Frank Section 925 or offers any legal analysis that is contrary to our conclusion in *Lawton* that Section 925 does not operate retroactively because it provides forward-looking remedies that target the risk of future misconduct. As we held in *Lawton*, our analysis in applying collateral bars is prospective: "[W]e consider the record evidence to determine whether [the collateral bar] is necessary or appropriate to protect investors and markets from the risk of future misconduct by the respondent and to preserve the fair and effective functioning of the securities markets."[89]

C. Bartko's conduct demonstrates the need for industry-wide bars.

The facts here demonstrate Bartko's unfitness and the risks he would pose to investors and the markets in each of the capacities covered by the collateral bar.[90] Bartko exercised a

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88 796 F. Supp. 2d at 513.

89 *Lawton*, 2012 SEC LEXIS 3855, at *32; *cf. Kornman*, 592 F.3d at 188 (bars may be appropriate for occupations presenting "opportunities for future misconduct"); *McCarthy*, 406 F.3d at 189 (finding that sanctioning determinations should show "individual attention to the unique facts and circumstances of [the] case" or "findings that would indicate any additional protection the trading public would receive" as a result of the sanctions); *Paz v. SEC*, 566 F.3d 1172, 1175−76 (D.C. Cir. 2009) (indicating that the Commission must make "findings regarding the protective interests to be served" by a bar).

90 *See generally Lawton*, 2012 SEC LEXIS 3855, at *18 *et seq.* (finding collateral bar justified when respondent "reveal[ed] an attitude toward regulatory oversight that is fundamentally incompatible with the principles of investor protection"; violated professional responsibilities that are "not limited to a particular aspect of the securities industry"; and demonstrated "his ongoing unfitness and risk that he would engage in further misconduct if

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leadership role in the execution of the scheme. He formed the two investment funds to give his investment scheme a false impression of legitimacy; knowingly relied on fraudulent fundraising; acted as a liaison between co-conspirators; directed deposits and transfers of scheme funds; sent financial statements to investors as part of the scheme; structured the fraudulent transactions; and recruited additional participants to the conspiracy to maintain access to investor funds. Bartko's central role in organizing this complex and self-serving fraudulent scheme demonstrates his unfitness for associating in the industry in any capacity, each of which "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants."[91]

A further exacerbating factor is that Bartko engaged in affinity fraud, which preys upon "the trust and friendship that exist[s] in groups of people who have something in common" to convince group members that "a fraudulent investment is legitimate and worthwhile."[92] Such frauds pose heightened risks to investors because they "can be difficult for regulators or law enforcement officials to detect," particularly where, as here, "the fraudsters have used respected community or religious leaders to convince others to join the investment."[93] Bartko's involvement in affinity fraud, which by definition exploits the trust of investors, is more than sufficient to demonstrate his unfitness to act as a fiduciary—either as an investment adviser or municipal advisor.[94]

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given future opportunities in the industry", where "opportunities for similar misconduct arise in each of the associational capacities covered by the collateral bar").

91 *Kornman*, 2009 SEC LEXIS 367, at *23 (also noting that "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"); *Conrad P. Seghers*, Advisers Act Rel. No. 2656, 2007 SEC LEXIS 2238, at *28 (Sept. 26, 2007), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008) (noting that the securities industry "presents continual opportunities for dishonesty and abuse").

92 Affinity Fraud: How to Avoid Investment Scams That Target Groups, available at http://www.sec.gov/investor/pubs/affinity.htm.

93 *Id.*

94 Dodd-Frank § 975(c), 124 Stat. at 1851 (indicating that municipal advisors "shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts . . ."); *see also Lawton*, 2012 SEC LEXIS 3855, at *43 n.59 (finding that violating duties to clients demonstrates unfitness to take on "heightened responsibilities" as a fiduciary). *Cf. SEC v. Bankosky*, 716 F.3d 45, 49 (2d Cir. 2013) (finding that defendant "demonstrate[d] unfitness to serve as a corporate fiduciary" by engaging in "conduct betray[ing] an impulse to place self-interest ahead of" the interests of employer and shareholders); *SEC v. Gupta*, 11 Civ. 7566, 2013 U.S. Dist. LEXIS 102274, at *11 (S.D.N.Y. July 17, 2013) (permanently barring defendant

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Furthermore, all securities professionals "routinely gain access to sensitive financial and investment information of investors and other market participants, and persons associated with municipal advisors and NRSROs routinely learn confidential and potentially market-moving information about securities, issuers, and potential transactions."[95] Accordingly, securities professionals have heightened responsibilities to the investing public and must avoid temptations to fraudulently misuse such information and their expertise for "inappropriate—but potentially lucrative or self-serving—ends."[96] Bartko demonstrated an incapacity to exercise such restraint when he orchestrated a longstanding, self-serving, and egregious conspiracy that violated basic principles of market fairness and integrity that apply to all securities professionals.

Bartko repeatedly failed to respect the most basic limits on his own conduct and the conduct of his associates and sought to evade regulatory scrutiny, demonstrating an "attitude toward regulatory oversight that is fundamentally incompatible with the principles of investor protection and with association in any capacity covered by the collateral bar."[97] He deliberately sought to avoid regulatory oversight and constraints both by transferring investor funds intended for the Caledonian Fund from an account subject to NASD audit to his lawyer trust account and by redirecting investor funds held by Capstone Equity through a purported investment club and then back into Capstone Equity to evade limits on non-accredited investor investments.[98] Even after Caledonian Fund depleted all of the investors' principal without generating any returns, Bartko extended the conspiracy by creating Capstone Equity and later the investment club.

Particularly troubling is Bartko's eagerness to extend and expand the scheme and rely on Hollenbeck to raise more than a million dollars from investors each month even after he knew that Hollenbeck had admitted to fraudulent and unregistered securities sales and had agreed to cease and desist from further fraudulent activities. Bartko also knew that Hollenbeck saw Bartko's conspiracy as an "alternative deployment vehicle" for continuing to raise funds from investors after he consented to the Mobile Billboards cease-and-desist order. Under these

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from serving as an officer or director of any publicly traded company and finding that his conduct "demonstrates unfitness to serve as a corporate fiduciary"); *Drinkard v. Walnut St. Sec., Inc.*, 3:09-cv-66-FDW, 2009 U.S. Dist. LEXIS 44016, at *9 (W.D.N.C. May 11, 2009) (finding that allegations of affinity fraud in which agents "actively exploited religious connections to establish trust and confidence, are sufficient to state a claim for breach of fiduciary duty").

95 *Lawton*, 2012 SEC LEXIS 3855, at *44.

96 *Id.*

97 *Id.* at *45.

98 *Brown & Jamerica*, 2011 SEC LEXIS 2073, at *22 (finding that respondent's "attempts to disguise his actions" support a bar); *Guy P. Riordan*, Exchange Act Rel. No. 61153, 2009 SEC LEXIS 4166 (Dec. 11, 2009) (finding that respondent's efforts to conceal and avoid detection supported a bar).

circumstances, Bartko's decision to expand the conspiracy, his reliance on Hollenbeck, and his apparent indifference to regulatory scrutiny of Hollenbeck's fraudulent sales techniques, confirm that Bartko's unfitness extends to all areas of the industry subject to investor protection standards, market fairness and integrity, and regulatory oversight.

Bartko also took advantage of his own knowledge of the securities industry and his securities-related activities to extend his scheme. For instance, he used his expertise to form the two funds, to send and process fraudulent offering and investment documents to further the scheme, and to repeatedly restructure the investment scheme. Even worse, he created a false semblance of legitimacy with investors by advising them that he was required to refund their money because, as non-accredited investors, their investments did not comply with securities regulations, while arranging for these refunds to be redirected into Capstone Equity through a different fraudulent vehicle, the investment club. Bartko also leveraged the information and relationships he formed as part of the conspiracy to generate other professional opportunities in the securities industry and, in turn, used his other securities-related professional activities to further the fraudulent scheme. For instance, in his capacity as an attorney, he represented his co-conspirator, Hollenbeck, in regulatory investigations of fraudulent sales tactics for Mobile Billboards similar to those that Bartko knew that Hollenbeck was employing for Caledonian Fund, and then recruited Hollenbeck and other individuals involved in the Mobile Billboards lawsuit and investigations to support Capstone Equity and the investment club.

Bartko argues that the law judge failed to consider as mitigating his purported cooperation with a June 28, 2005 Commission staff examination of Capstone BD. But this examination, which took place after the conspiracy, mail fraud, and unregistered securities sales had ended and purportedly before Bartko became aware of an investigation of his own conduct, is not mitigating in light of the seriousness of his crimes and the numerous steps Bartko took to evade regulatory scrutiny before the Commission staff learned about Capstone Equity.

Bartko also argues that the bars are punitive because the law judge failed to consider lesser sanctions, because he is not currently registered in the securities industry, and because imprisonment prevents him from engaging in professional activities. While Bartko's current circumstances limit his securities-related activities, we are not persuaded that they render bars inappropriate given the gravity of the threat he presents to investors.[99] Bartko had a history of associating in the securities industry in multiple capacities over more than fifteen years and demonstrated his propensity to repeatedly devise new ways to defraud investors, obscure his involvement in fraud, and expand an ongoing conspiracy despite regulatory scrutiny of his co-conspirator. His resourcefulness and audacity in using his securities industry association to generate new opportunities to defraud investors and evade regulatory constraints under these

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[99] *See Paz*, 566 F.3d at 1176; *Horning v. SEC*, 570 F.3d 337, 346 (D.C. Cir. 2009) (holding that Commission need not state why a lesser sanction would be insufficient); *cf. Kornman*, 592 F.3d at 188 (finding summary disposition appropriate when the respondent "presented no ground for an evidentiary hearing on mitigation").

circumstances, and his continuing insistence that he did nothing wrong, confirm a serious risk that he would seek to return to the industry and pursue opportunities to enrich himself at the expense of investors and the markets in any capacity left open to him.

Bartko's pattern of using his securities industry association for his own fraudulent and self-interested ends demonstrates that "allowing him to enter the securities industry in *any capacity* would create too great a risk" to the securities markets and investors to be permitted.[100]

D. Bartko's claims of prosecutorial misconduct are unavailing.

Throughout the proceeding, Bartko has claimed that his conviction resulted from misconduct and improper collusion between regulatory authorities. For instance, he argues that Commission staff acted improperly during a March 2005 discussion with FINRA and used a June 28, 2005 examination of Capstone BD to "dupe[]" him into turning over materials as part of a "collusive investigation" by the Division and the United States Attorney's Office that "severely prejudiced him at his criminal trial" and was a "clear violation of due process."[101] We have already explained that this is not an appropriate forum for raising these matters.

Bartko's procedural claims are similarly off base. Bartko argues that (a) his claims should be considered mitigating for purposes of the sanctions determination; (b) summary disposition was improperly granted because he was entitled to a hearing to develop his claims of prosecutorial misconduct; (c) the Commission should be precluded, under the doctrine of unclean hands, from enforcing follow-on remedies based on his criminal convictions; and (d) he was improperly denied discovery from the Division's files to bolster his claims of prosecutorial misconduct.

Bartko's claims of prosecutorial misconduct neither mitigate the seriousness of his own misconduct nor lessen the public interest in preventing his future association in the industry. We are mindful of the need to address potential mitigating factors and the "remedial and protective efficacy" of sanctions involving expulsion from the securities industry.[102] But Bartko's claims are not mitigating in the administrative proceedings because our *Steadman* analysis properly focuses on the risk that Bartko poses to investors and the integrity of the securities markets—not on the propriety of the investigation prior to his conviction.[103]

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100 *Lawton*, 2012 SEC LEXIS 3855, at *47 (emphasis in original).

101 Resp't Br. at 9−10; Reply Br. at 7.

102 *Cf. Saad v. SEC*, 718 F.3d 904 (D.C. Cir. 2013); *McCarthy v. SEC*, 406 F.3d at 190; *but see Paz* 566 F.3d at 1176 (stating that a bar from association with any SRO member firm does not require the Commission to "state why a lesser sanction would be insufficient").

103 *Kornman*, 2009 SEC LEXIS 367, at *36.

Bartko claims that "the misconduct of Division staff and that of Respondent's federal prosecutors goes directly to the heart of [his] state of mind" during the relevant period.[104] But his state of mind was litigated during the criminal trial.[105] Bartko does not explain, nor can we find, a plausible connection between his claims of prosecutorial misconduct and his own scienter while engaging in the criminal conspiracy and mail fraud for which he was convicted—particularly because Bartko claims that he was not aware of the purported collusion between Commission, United States Attorney's Office, and FINRA staff when it took place. Moreover, Bartko began organizing the scheme in January 2004—before he formed either of the two funds and well before any possible regulatory investigation of the scheme he led through those funds.

Bartko's other arguments about the alleged prosecutorial misconduct are also misplaced. Bartko erroneously argues that the law judge erred by failing to accept as true his claims of prosecutorial misconduct and collusion. Rule 250(b) authorizes summary disposition "if there is no genuine issue with regard to any material fact."[106] Summary disposition on sanctions is appropriate when, as in this case, the respondent has failed to establish a genuine issue concerning mitigation. As discussed, Bartko's claims, even taken as true, are not mitigating.[107]

We are similarly unpersuaded by Bartko's unclean hands defense. The doctrine of unclean hands is not generally available in a Commission action when, as here, the Commission is "attempting to enforce a congressional mandate in the public interest."[108] Courts recognize

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104 Petition for Review at 4.

105 *See supra* text accompanying note 70. Moreover, as the January 17 Order explained, "the trial focused on Bartko's knowledge, intent, and good faith" and it concluded that there was ultimately overwhelming evidence of Bartko's guilt.

106 17 C.F.R. § 201.250.

107 *Cf. Gibson v. SEC*, 561 F.3d 548 (6th Cir. 2009) (finding the Commission did not abuse its discretion in considering the *Steadman* factors and mitigating evidence to impose a bar).

108 *Franklin*, 2007 SEC LEXIS 2420, at *13; *accord Harold F. Harris*, Exchange Act Rel. No. 53122, 2006 SEC LEXIS 68, at *23 n. 28 and accompanying text (Jan. 13, 2006), citing *SEC v. KPMG LLP*, 03 Civ. 671, 2003 U.S. Dist. LEXIS 14301, at *8 (S.D.N.Y. Aug. 20, 2003); *SEC v. Rosenfeld*, 97 Civ. 1467, 1997 U.S. Dist. LEXIS 10159, at *5 (S.D.N.Y. July 16, 1997); *see also SEC v. Lorin*, 90 Civ. 7461, 1991 WL 576895, at *1 (S.D.N.Y. June 18, 1991) ("Generally, an unclean hands defense is not available in a SEC enforcement action."); *SEC v. Condron*, Civ. No. B-85-87, 1985 U.S. Dist. LEXIS 19046, at *1 (D. Conn. June 10, 1985) ("Unclean hands is not a defense against an action sought by the SEC."); *see generally Heckler v. Cmty. Health Servs., Inc.*, 467 U.S. 51, 60 (1984) (stating that "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined").

"the need to deter governmental abuses,"[109] but in order to raise this equitable defense against a government agency, courts "have required that the agency's misconduct be egregious and the resulting prejudice to the defendant rise to a constitutional level."[110] Bartko has not articulated how Commission staff prevented him from properly defending himself in the criminal proceeding. In any case, the appropriate forum for any constitutional challenge to the conviction was through his criminal appeal, and the appellate court did not find constitutional prejudice in this case.

Nor are we persuaded that Bartko is entitled to discovery in this proceeding to substantiate his prosecutorial misconduct theory. Bartko argues that the Division staff should be required under Rule 230 to "search[] its records to determine if there were documents that were responsive to Bartko's requests outside of the rubric of the 'investigative file'" and turn over any such records.[111] He also argues that the Division had a duty to "make inquiry of other federal agencies," including of the United States Attorney's Office, and that the law judge improperly declined to subpoena these materials.[112]

We have already concluded that Bartko's allegations of prosecutorial misconduct are not relevant to our sanctions determination and that the criminal trial and appeal process—not this proceeding—was the proper forum for developing his challenges to the criminal charges. Moreover, Bartko cites no authority indicating that Rule 230 requires discovery beyond the investigative file or inquiries of other government agencies, nor are we aware of any such authority.[113] Nor has Bartko demonstrated any impropriety in the rejection of his subpoena

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109 *Lorin*, 1991 WL 576895, at *1 ("Recognizing the need to deter governmental abuses, courts do allow the defense of government misconduct to be invoked where it appears that the government may have engaged in outrageous or unconstitutional activity.").

110 *SEC v. Follick*, 00 Civ. 4385, 2002 U.S. Dist. LEXIS 24112, at *23 (S.D.N.Y. Dec. 18, 2002) (quoting *SEC v. Elecs. Warehouse, Inc.*, 689 F. Supp. 53, 73 (D. Conn. 1988), *aff'd*, 891 F.2d 457 (2d Cir. 1989)); *see also SEC v. Cuban*, 798 F. Supp. 2d 783, 794 (N.D. Tex. 2011) (finding that to the extent the defense of unclean hands is available in an SEC enforcement action, it is only in "strictly limited circumstances" when, among other things, "the misconduct . . . result[s] in prejudice to the defense of the enforcement action that rises to a constitutional level and is established through a direct nexus between the misconduct and the constitutional injury").

111 Reply at 3.

112 *Id.* at 4.

113 *See Kornman*, 2009 SEC LEXIS 367, at *50 n.70 (noting that Rule 230 applies to "existing information in the Division's investigative file, but [not] to new discovery" sought by the respondent); *id.* at *48 (finding that law judge properly rejected attempts during a follow-on proceeding to "seek information supporting Kornman's allegations as to Commission staff misconduct during the criminal matter"); *cf. Scott Epstein*, Exchange Act Rel. No. 59328, 2009 SEC LEXIS 217, at *61 n.54 (Jan 30, 2009) (noting that respondent "is not 'entitled to conduct a

(continued…)

request under Rule 232, which grants the law judge discretion to decide such requests.[114] In any event, trial transcript excerpts that Bartko attached to his brief suggest that he had the chance to develop his misconduct and collusion claims during the criminal trial, where he questioned Commission staff about their interactions with Bartko and with other regulators. And the Fourth Circuit appeal of the criminal case was the appropriate forum to further pursue those concerns, which Bartko had the opportunity to do. That court has issued its opinion and, notwithstanding its concern with the discovery practices in the United States Attorney's Office in the Eastern District of North Carolina, the court found that the discovery issues in the criminal case did not undermine confidence in the jury verdict.

* * *

Bartko's conduct demonstrates his fundamental unfitness for the securities marketplace and that his future association in the industry in any capacity would unduly risk further misconduct threatening the fairness, transparency, and regulatory oversight of the securities markets. As the Supreme Court has explained, "[t]he 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.'"[115] We find that the record demonstrates Bartko's inability to uphold such ethical standards, which are required throughout the industry. We therefore find that barring Bartko from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO serves the public interest and is remedial.

(continued…)

fishing expedition . . . in an effort to discover something that might assist him in his defense'. . . or 'in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory'" (internal citations omitted)). As a result, we find Bartko is mistaken in his contention that the Division was obligated under Rule 230 to search beyond the investigative file for this follow-on proceeding, to make a separate inquiry to "other federal agencies connected to the investigation giving rise to the issuance of the OIP," including the United States Attorney's Office that criminally prosecuted Bartko, and to gather "a compendium of documents used in Bartko's prosecution" in search of *Brady* material.

[114] *See* Rule of Practice 232(b), 17 C.F.R. § 201.232(b); *Barr Financial Group, Inc.*, Advisers Act Rel. No. 2179, 56 SEC 1243, 2003 SEC LEXIS 2340, at *29 (Oct. 2, 2003) (affirming a law judge decision to decline a subpoena request under the "unreasonable, oppressive, excessive in scope, or unduly burdensome" standard).

[115] *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 315 (1985) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186−87 (1963)).

An appropriate order will issue.[116]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN); Commissioners GALLAGHER and PIWOWAR, concurring in part and dissenting with respect to the bar from association with municipal advisors and nationally recognized statistical rating organizations. A dissenting opinion will issue separately.

Elizabeth M. Murphy
Secretary

[116] 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
Rel. No. 71666 / March 7, 2014

Admin. Proc. File No. 3-14700

In the Matter of

GREGORY BARTKO

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Gregory Bartko is hereby barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

By the Commission.

Elizabeth M. Murphy
Secretary