

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 68462 / December 18, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3517 / December 18, 2012

Admin. Proc. File No. 3-13481

In the Matter of

KENNETH E. MAHAFFY, Jr.

ORDER VACATING BARS

Kenneth E. Mahaffy, Jr. seeks to vacate a Commission order entered against him on September 20, 2010 barring him from associating with any broker, dealer, or investment adviser.¹ The order was issued in an administrative proceeding instituted under § 15(b) of the Securities Exchange Act of 1934 and § 203(f) of the Investment Advisers Act of 1940 based on Mahaffy's conviction, in 2009, for participating in a conspiracy to commit securities fraud. After the Commission order was issued, on August 2, 2012, the United States Court of Appeals for the Second Circuit vacated the criminal conviction.²

In seeking to vacate the bar order against him, Mahaffy argues that the sole basis for the bar order was his criminal conviction and that he no longer stands convicted. The Division of Enforcement opposes Mahaffy's request, stating that, "because the court's opinion is not yet final," the Commission should "hold in abeyance its consideration of the motion to vacate until such time as the appellate order becomes final."³ The Division's opposition brief was filed on August 28, 2012. September 14, 2012 was the deadline to seek reconsideration or en banc review by the Second Circuit. We take official notice that neither reconsideration nor review was sought and the Court of Appeals's mandate has now issued.⁴

¹ Securities Exchange Act Release No. 62937, 2010 SEC LEXIS 3079 (Sept. 20, 2010).

² *U.S. v. Mahaffy*, 693 F.3d 113, 119 (2d Cir. 2012) (finding, among other things, that the prosecution failed to turn over investigative transcripts required to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963), and that this failure undermined confidence in the jury verdict). The Second Circuit also vacated the conviction of David G. Ghysels, another respondent in the administrative proceeding. Ghysels has not moved to vacate the bars ordered against him in the administrative proceeding.

³ Division Response at 1.

⁴ *See* 17 C.F.R. § 201.323 (rule of practice relating to official notice).

We have held that administrative bar orders will remain in place in the usual case and are vacated only in compelling circumstances.⁵ We have found such compelling circumstances where, as here, the statutory basis for the bar, in this case Mahaffy's 2009 criminal conviction, has been vacated.⁶ Under these circumstances, it is appropriate to vacate the order.

In light of the foregoing, IT IS ORDERED that the September 20, 2010 order entered against Kenneth E. Mahaffy is hereby vacated.

By the Commission.

Elizabeth M. Murphy
Secretary

⁵ See, e.g., *Salim B. Lewis*, Order Granting and Denying in Part Petition to Vacate Administrative Bar Order, Exchange Act Release No. 51817, 58 SEC 491, 2005 SEC LEXIS 1360 (June 10, 2005).

⁶ See, e.g., *Jimmy Dale Swink, Jr.*, Exchange Act Release No. 36042, 52 SEC 379, 1995 SEC LEXIS 2033, at *2 (Aug 1, 1995) (vacating findings and administrative bar order when an appellate court reversed the criminal conviction that was the basis for the proceeding); cf. *Terry Harris*, Investment Advisers Act Release No. 2622, 2007 SEC LEXIS 1645, at *7 (July 26, 2007) (ordering dismissal of administrative proceeding after finding that "none of the three bases for proceeding under Advisers Action Section 203(f) that were alleged in the [order instituting proceedings] remains valid on the record before us on appeal").