

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 81111 / July 10, 2017

INVESTMENT ADVISERS ACT OF 1940
Release No. 4728 / July 10, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-14676

In the Matter of
ERIC DAVID WANGER

**ORDER DENYING APPLICATION FOR
CONSENT TO ASSOCIATE**

Eric David Wanger was the owner, chief compliance officer, and president of Wanger Investment Management, Inc. (“WIM”), a formerly Commission-registered investment adviser. In order to settle administrative and cease-and-desist proceedings brought against him, Wanger consented to a Commission order that, among other sanctions, barred him from the securities industry with a right to apply for reentry after one year. He now has filed an application for consent either to (1) associate with any registered or unregistered broker-dealer, investment adviser, or other entity that participates in the securities industry or (2) establish his own entity that provides one or more of those services. He submits this application under both Rule 193 of the Commission’s Rules of Practice and Section 203(f) of the Investment Advisers Act of 1940.¹ For the reasons set forth below, we conclude that Wanger has failed to show that the proposed terms of reentry would be consistent with the public interest. Accordingly, his application is denied.

¹ See 17 C.F.R. § 201.193; 15 U.S.C. § 80b-3(f).

I. Background

A. Wanger consented to a bar from the securities industry with a right to apply for reentry after one year.

On December 23, 2011, we instituted administrative and cease-and-desist proceedings in which the Division of Enforcement alleged three types of misconduct by Wanger and WIM. First, the Division alleged that Wanger and WIM engaged in scienter-based fraud by marking the close in at least 14 transactions executed at month-end or quarter-end for the fund they managed. Wanger allegedly executed these transactions personally, away from the normal broker he used for fund transactions, for the purpose of inflating the fund's reported performance to existing and prospective investors. The transactions allegedly inflated the fund's monthly reported performance by amounts ranging from approximately 3.6% to 5,900%, and the fund's reported net asset value by amounts ranging from approximately 0.24% to 2.5%.

Second, the Division alleged that Wanger and WIM engaged in improper principal transactions with the fund by transferring securities from Wanger's personal account to repay approximately \$500,000 transferred from the fund to WIM to pay WIM's operating expenses and payroll. Wanger and WIM allegedly did not provide written disclosure to the fund, or obtain the fund's consent, as required by Section 206(3) of the Advisers Act. Third, the Division alleged that Wanger and WIM failed to make timely required Form 4 filings for at least eight of Wanger's personal transactions and at least 40 transactions Wanger and WIM directed on behalf of the fund.

Wanger and WIM were represented by counsel in this prior proceeding. Shortly before the scheduled hearing, the parties notified the Law Judge that they had reached agreement on all material terms of a settlement. Wanger and WIM subsequently submitted Offers of Settlement, which we accepted. Pursuant to those Offers, on July 2, 2012, we issued an order making findings and imposing remedial sanctions.² The order found that (1) Wanger and WIM had willfully violated the antifraud provisions of the Securities Act, Exchange Act, and Advisers Act by marking the closing price of certain stocks held by the fund they managed in order to artificially inflate the fund's performance results and then communicating those inflated results to existing and prospective investors; (2) Wanger and WIM had willfully violated Section 206(3) of the Advisers Act by failing to provide the fund with written disclosure, and to obtain the fund's consent, prior to

² *Eric David Wanger and Wanger Investment Management, Inc.*, Exchange Act Release No. 67335, 2012 WL 2524953 (July 2, 2012). Wanger and WIM had filed a motion to dismiss, which the Law Judge denied in part at a pre-hearing conference on January 30, 2012, and in part by an order dated February 21, 2012. Wanger and WIM then sought interlocutory review of the February 21 order and, in particular, the rejection of their contention that the proceeding was untimely under Section 4E(a) of the Exchange Act, 15 U.S.C. § 78d-5(a). We denied that petition because it did not meet the "extraordinary circumstances" standard for interlocutory review. *Eric David Wanger and Wanger Investment Management, Inc.*, Exchange Act Release No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012); see Rule of Practice 400(a), 17 C.F.R. § 201.400(a).

Wanger's transferring securities from his personal account to the fund's account; (3) Wanger had willfully violated Section 16(a) of the Exchange Act by failing to timely file Forms 4 for his personal securities transactions; and (4) WIM had willfully aided and abetted and caused the fund's failure to timely file Forms 4 for transactions by the fund.

Without admitting or denying our findings, Wanger and WIM consented to an order requiring them to cease and desist from future violations, requiring Wanger to pay a \$75,000 civil penalty, and requiring WIM to pay disgorgement and pre-judgment interest of approximately \$2,400. In addition, Wanger agreed to be barred from the securities industry with a right to reapply after one year, and WIM – which had withdrawn its investment adviser registration – was censured. Wanger and WIM subsequently paid their respective penalty and disgorgement amounts.

B. Wanger filed an application under Commission Rule of Practice 193 and Section 203(f) of the Advisers Act seeking consent to associate.

On April 20, 2016, through new counsel, Wanger filed an application, later supplemented, seeking “consent to re-enter the securities industry either to (1) associate with any registered or unregistered broker-dealer, investment adviser, or other entity that participates in the securities industry, or (2) establish his own entity that provides one or more of these services.”

The application provides no information about the entities with which Wanger proposes to associate or establish, what activities they do or would engage in, what activities Wanger would engage in, or what supervision, if any, would be exercised over or by him. Wanger explains this failure by asserting that the bar has made it “impossible” for him to find a firm to sponsor his application or agree to supervise his activities, and he therefore contends that the requirements for reentry under Commission Rule of Practice 193 and Advisers Act Section 203(f) are “incapable of being fulfilled.”

In lieu of providing the information that Rule 193 requires about the proposed association and supervision, Wanger devotes the bulk of his application and supporting materials to challenging the fairness of the underlying proceeding prior to the settlement and the fairness of the terms of the settlement to which he agreed. The application also describes Wanger's purported understanding that he would have the right to reenter the securities industry after one year, rather than the right to apply for reentry subject to our discretion. Wanger further criticizes a posting on FINRA's *BrokerCheck* website that he asserts mischaracterized our bar order.³

Pursuant to Rule 193(e), the Division of Enforcement notified Wanger that it intended to recommend that his application be denied, and provided a written statement of the reasons for that

³ At the same time as the Rule 193 application, Wanger filed an “Application under Section 19(e) of the Securities Exchange Act of 1934 to Review and Set Aside FINRA's Enlargement of SEC Sanction,” similarly arguing that FINRA had improperly characterized his bar. On September 30, 2016, we dismissed the Section 19(e) Application as untimely and for lack of jurisdiction. *Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629 (Sept. 30, 2016).

recommendation. Also pursuant to Rule 193(e), Wanger submitted a response to the Division's statement. He requested that his response be provided to us along with the Division's recommendation, and we have considered it as part of our review of his application.⁴

II. Analysis

A. Wanger has not demonstrated that his proposed association would be consistent with the public interest.

Commission Rule of Practice 193 provides a process by which individuals barred from the securities industry can apply to the Commission for consent to become associated with a registered entity, such as an investment adviser, which is not a member of an SRO.⁵ The Rule requires that applicants "shall make a showing satisfactory to the Commission that the proposed association would be consistent with the public interest."⁶ The Rule identifies factors that the applicant "shall" address in order to make that showing, including the "capacity or position in which the applicant proposes to be associated" and the "manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant."⁷ Our Preliminary Note to the Rule states:

⁴ Wanger also filed a request that we hold a hearing at which his counsel would be permitted to present oral argument in connection with the application. In contrast to a proceeding imposing a remedial sanction, which is required by statute to be on the record after notice and opportunity for hearing, *see* Advisers Act Section 203(f), 15 U.S.C. § 80b-3(f), there is no statutory requirement for a hearing in this proceeding. Wanger's application and supporting materials lay out his factual and legal arguments in detail and, because we do not find that a hearing would significantly aid our decisional process, we deny his request. *See Bravo Enterprises Ltd.*, Exchange Act Release No. 75775, 2015 WL 5047983, at *6 n.51 (Aug. 27, 2015) (determining not to hold hearing on petition to terminate trading suspension where written submissions afforded party reasonable opportunity to address the issues and Commission's "decisional process would not be significantly aided by holding a hearing"); Rule of Practice 451(a), 17 C.F.R. § 201.451(a) ("The Commission will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Commission determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.").

⁵ *See* 17 C.F.R. § 201.193(a). If an applicant seeks to associate with a registered broker-dealer that is a FINRA member, relief must be sought under Exchange Act Rule 19h-1, 17 C.F.R. § 240.19h-1.

⁶ 17 C.F.R. § 201.193(c). As noted above, Wanger also is seeking consent to associate with unregistered entities, and his application therefore was submitted under Section 203(f) of the Advisers Act, as well as under Rule 193. We apply the same "consistent with the public interest" standard to applications submitted under either provision. *See Kenneth W. Corba*, Advisers Act Release No. 2732, 2008 WL 1902077, at *2 (April 30, 2008). Because, for reasons explained below, we conclude that Wanger has failed to show that his reentry would be consistent with the public interest for purposes of Rule 193, we also deny his request to associate with unregistered entities pursuant to Section 203(f).

⁷ 17 C.F.R. § 201.193(d)(5) & (6).

The nature of the supervision that an applicant will receive or exercise as an associated person with a registered entity is an important matter bearing upon the public interest. In meeting the burden of showing that the proposed association is consistent with the public interest, the application and supporting documentation must demonstrate that the proposed supervision, procedures, or terms and conditions of employment are reasonably designed to prevent a recurrence of the conduct that led to the imposition of the bar.⁸

Accordingly, in determining whether a proposed association would be consistent with the public interest, an examination of the nature and disciplinary history of the proposed employer and the proposed supervisory structure to which the applicant will be subject is appropriate.⁹

Wanger does not address either of these factors in his application. He does not identify a proposed employer, the terms and conditions of his planned employment, or the supervision, if any, that would be exercised over him in his new position. He does not say what he would be doing, for whom (if anyone) he would be doing it, or how he would be interacting with clients, investors, or other market participants. Instead, his application seeks our consent to “associate with any registered or unregistered broker-dealer, investment adviser, or other entity that participates in the securities industry” or, failing that, to “establish his own entity that provides one or more of those services.” Such a general, unconditional request is inconsistent with the carefully tailored reentry conditions that Rule 193 contemplates.¹⁰ Wanger’s application offers no evidence that his unidentified future activities would be conducted in a manner designed to “prevent a recurrence of the conduct that led to the imposition of the bar” in the first place, and provides us with no basis on which to conclude that granting his request would be “consistent with the public interest.”¹¹

⁸ *Id.* (Preliminary Note).

⁹ See *Harry M. Richardson*, Exchange Act Release No. 51236, 2005 WL 424920, at *3 (Feb. 22, 2005); *Arthur H. Ross*, Exchange Act Release No. 30956, 1992 WL 188932, at *2 (July 27, 1992); *Paul Edward Van Dusen*, Exchange Act Release No. 18284, 1981 WL 315505, at *3 (Nov. 24, 1981).

¹⁰ See *Applications by Barred Individuals for Consent to Associate with a Registered Broker, Dealer, Municipal Securities Dealer, Investment Adviser or Investment Company*, Exchange Act Release No. 20783, 1984 WL 547096, 49 Fed. Reg. 12185, 12205 n.21 (Mar. 29, 1984) (“*Rule 193 Release*”) (“Commission approval of an application is limited to association in a specified capacity with a particular registered entity and is subject to specific terms and conditions. If any of the individual’s duties or responsibilities vary materially from the terms and conditions under which the application was approved, or if he or she seeks to become associated with another registered entity, a new application must be submitted.”).

¹¹ See *Matthew D. Sample*, Exchange Act Release No. 75893, 2015 WL 5305992, at *4 (Sept. 10, 2015) (respondent’s failure to show that proposed supervision was reasonably designed to prevent a recurrence of the misconduct that led to the bar is “standing alone . . . a sufficient basis for us to deny his application as inconsistent with the public interest”); *Sidney I.*

Wanger's request is functionally equivalent to asking us to vacate the bar entirely and free him from any restrictions or oversight on his future activities. But that is extraordinary relief that we grant only under the most "compelling circumstances," and Wanger's application fails to present any such circumstances.¹² Although Wanger contends that the bar has made it "impossible" for him to identify a sponsoring firm and thus satisfy Rule 193's requirements, difficulty finding suitable employment is "among . . . the natural and foreseeable consequences that flow from a ban on employment in the securities industry."¹³ It is not a "compelling circumstance" that would justify wholly vacating a remedial sanction designed to prevent recurrence of misconduct and protect investors and the integrity of the markets.¹⁴ Wanger has failed to carry his burden of showing that the requested relief would be consistent with the public interest and, accordingly, his request should be denied.¹⁵

Shupack, Advisers Act Release No. 1061, 1987 WL 757575, at *4 (Mar. 23, 1987) (denying relief "when no effective supervision would be exercised over his activities").

¹² See *Robert Hardee Quarles*, Exchange Act Release No. 66530, 2012 WL 759386, at *2-3 (Mar. 7, 2012) (finding "compelling circumstances" to vacate bar where respondent had more than 20 years of unblemished conduct in securities industry pursuant to Commission consent to associate with particular firms under bar); *Mark E. Ross*, Exchange Act Release No. 43033, 2000 WL 964574, at *1 (July 13, 2000) (vacating bar where 25 years had elapsed since bar was imposed and respondent had unblemished record in securities industry pursuant to Commission consent to associate with particular firms under bar); *John W. Bendall, Jr.*, Exchange Act Release No. 38326, 1997 WL 76700, at *1 (Feb. 24, 1997) (vacating bar where 28 years had elapsed since bar was imposed and respondent had unblemished record in securities industry for 19 years pursuant to Commission consent to associate with particular firm under bar).

¹³ *Michael H. Johnson*, Exchange Act Release No. 75894, 2015 WL 5305993, at *4 & n.20 (Sept. 10, 2015); see *Edward I. Frankel*, Exchange Act Release No. 38378, 1997 WL 103785, at *2 (negative stigma that has been an impediment to work inside and outside the securities industry is a "natural consequence of the action taken against" respondent) (quoting *William H. Pike*, Investment Company Act Release No. 20417, 1994 WL 389872, at *2 (July 20, 1994)).

¹⁴ See *Mark S. Parnass*, Exchange Act Release No. 65261, 2011 WL 4101087, at *3 (Sept. 2, 2011).

¹⁵ On March 7, 2016, Wanger filed a request to vacate the NRSRO and municipal adviser portions of his bar following the decision in *Koch v. SEC*, 793 F.3d 147 (D.C. Cir. 2015). On February 1, 2017, in response to our request for briefing, Wanger further requested that, in light of the decision in *Bartko v. SEC*, 845 F.3d 1271 (D.C. Cir. 2017), "all aspects of the Collateral Bar Order . . . be vacated, except to the sole extent it applies to an investment adviser." That proceeding remains pending before us.

B. Wanger’s challenges to the fairness of the underlying proceeding and the settlement are beyond the scope of his application, and are unavailing in any event.

Wanger argues that the underlying administrative and cease-and-desist proceeding, as well as the terms of the settlement to which he agreed, were unfair to him. Those complaints fall beyond the scope of this proceeding for two reasons.

First, our Preliminary Note to Rule 193 makes clear that we “will not consider any application that attempts to reargue or collaterally attack the findings that resulted in the Commission’s bar order.”¹⁶ We have a strong interest in the finality of our orders and we have consistently applied the principle set out in Rule 193 to reject collateral attacks that seek to undo the underlying proceeding, the findings in our order, or the terms of the settlement.¹⁷ Wanger offers no persuasive reason to deviate from the Rule and our precedent here.¹⁸

Second, under our Rules of Practice and the federal securities laws, Wanger had the right to present evidence at a hearing, to submit proposed findings of fact and law, to receive an initial decision by the Law Judge, to obtain *de novo* review by the Commission, and to obtain judicial review by an appropriate United States Court of Appeals. While represented by counsel, he

¹⁶ 17 C.F.R. § 201.193 (Preliminary Note).

¹⁷ See, e.g., *Michael H. Johnson*, 2015 WL 5305993, at *4-5 (Commission has strong interest in finality of its settled orders; rejecting petition to modify bar based on additional evidence); *Matthew D. Sample*, 2015 WL 5305992, at *6 (respondent, who was represented by counsel, consented to bar and therefore waived any “claim of errors or inaccuracies in the bar order”; denying application for consent to associate); *Kenneth W. Haver*, Exchange Act Release No. 54824, 2006 WL 3421789, at *3 (Nov. 28, 2006) (Commission has strong interest in finality of its settled orders; denying motion to reopen proceeding or vacate Rule 102(e) suspension based on additional evidence); *Arthur H. Ross*, Exchange Act Release No. 30956, 1992 WL 188932, at * 3 n.14 (July 27, 1992) (“It has long been our view that applicants for permission to serve in positions covered by a Commission bar must accept the findings supporting that order.”); *Sidney I. Shupack*, 1987 WL 757575, at *4 (Preliminary Note to Rule 193 states that Commission will not consider application that attempts to reargue or collaterally attack findings that resulted in bar order; rejecting application for consent to associate based on argument that violations were unintentional).

¹⁸ In this proceeding, Wanger also for the first time challenges the constitutionality of the appointment of the Law Judge who oversaw the underlying proceeding prior to his Offer of Settlement. As we have held in this very context, a respondent may not collaterally attack a Commission final order simply by asserting a constitutional challenge that could have been raised when the order was entered. See *Gordon Brent Pierce*, Exchange Act Release No. 77643, 2016 WL 1566396 (Apr. 18, 2016), *petition for review dismissed*, No. 16-1185 (D.C. Cir. Nov. 7, 2016) (per curiam).

chose instead to waive those rights and offer to settle.¹⁹ Although his application indicates that he may now question his choice, he has “forfeited his opportunity” to undo the settlement through the arguments he now asserts.²⁰

Even if we were to consider Wanger’s waived collateral challenges, however, we would find them unpersuasive. As evidence of the unfairness of the underlying proceeding, he relies heavily on the Law Judge’s denial of his motion to dismiss. His motion to dismiss made two principal arguments: (1) the alleged marking the close transactions were immaterial because Wanger and WIM ultimately obtained only a small amount of increased management fees as a result, and (2) the underlying proceeding was untimely under Section 4E(a) of the Exchange Act. We see no error – let alone a fundamental unfairness – in the Law Judge’s denial of the motion. The Order Instituting Proceedings in this case plainly alleged facts (such as the willful and repeated month-end and quarter-end transactions intended to inflate the fund’s performance) that could support a finding of materiality with respect to the transactions in which Wanger allegedly marked the close.²¹ And as for Wanger’s untimeliness argument, we, and the federal courts, have made clear that Section 4E(a) imposes no constraints on our jurisdiction and creates no

¹⁹ Wanger’s Offer of Settlement states that he “hereby acknowledges his waiver of the rights specified in Rules 240(c)(4) and (5) [17 C.F.R. § 201.240(c)(4) and (5)] of the Commission’s Rules of Practice.”

²⁰ *Kenneth W. Haver*, 2006 WL 3421789, at *3 (“Haver also fails to appreciate the significance of his offer of settlement. . . . Haver’s offer of settlement states expressly that ‘[b]y submitting this Offer, Haver hereby acknowledges his waiver of those rights specified in Rules 240(c)(4) and (5) of the Commission’s Rules of Practice. . . . Haver thus forfeited his opportunity to adduce his evidence, which would require evaluation at the hearing before an administrative law judge that Haver waived. Haver may not now complain that the record is inaccurate or incomplete.”); *see also William H. Pike*, 1994 WL 389872, at *2 (respondent “forfeited” opportunity to adduce additional evidence by agreeing to settled order; denying motion to vacate bar order based on additional evidence).

²¹ *See S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *7 (Dec. 5, 2014) (materiality generally can be resolved as a matter of law only when the information is “so obviously important [or unimportant] to an investor, that reasonable minds cannot differ”) (quoting *SEC v. Cochran*, 214 F.3d 1261, 1267 (10th Cir. 2000)); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 126 (2d Cir. 2013) (“[A] complaint may not properly be dismissed . . . on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.”) (quoting *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 162 (2d Cir. 2000)); *Marks v. CDW Computer Centers, Inc.*, 122 F.3d 363, 370 (7th Cir. 1997) (“[t]he determination [of materiality] requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact”; a materiality determination is rarely appropriate at the summary judgment stage, let alone on a motion to dismiss”) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)).

enforceable rights or defenses for a respondent in an administrative and cease-and-desist proceeding.²²

Wanger also contends that the underlying proceeding was unfair because he was unable to obtain fact witnesses to attend the hearing. In an affidavit he submitted in support of his application, he speculates that Division staff contacted some of the witnesses he wished to call “in order to corner them into agreeing prior to trial that marking the close was illegal,” and he contends that he “lost the majority of [his] fact witnesses because they were fearful of SEC retribution if they appeared.” But Wanger offers no evidence of who these witnesses were, the nature of what their testimony might have been, or whether he sought to compel their attendance at the hearing.²³ Moreover, nothing in the record supports his speculation that the Division attempted to influence individuals whom he might have called to testify on his behalf, or that fear of retaliation by the Commission dissuaded anyone from appearing as a witness for his defense.

Wanger further argues that the proceeding was unfair because of the Division’s challenge to his proposed expert’s testimony. The record reflects that, in advance of the hearing, the Division moved *in limine* to exclude the testimony of Wanger’s expert because it amounted to impermissible legal opinions on issues such as whether information was “material” and whether conduct was undertaken with “recklessness.” We can find no evidence in the record (and Wanger cites none) that Wanger filed an opposition to the motion or that the Law Judge ruled on the motion prior to settlement. We do not see how the Division’s timely filing of a motion *in limine* resulted in unfairness to Wanger.

Wanger’s challenges to the fairness of the settlement terms are similarly unavailing. Wanger argues that his violations were “De Minimis” and “immaterial,” and that the sanction to which he agreed is unfair in light of other settlements. With respect to the nature of his violations, Wanger focuses principally on the small amount of increased management fees that he obtained as a result of the alleged marking the close transactions. But the fact that Wanger ultimately did not receive a significant financial benefit is not determinative of the appropriate

²² See *Montford & Co., Inc. v. SEC*, 793 F.3d 76, 83 (D.C. Cir. 2015) (“Nothing in the text or structure of Section 4E overcomes the strong presumption that, where Congress has not stated that an internal deadline shall act as a statute of limitations, courts will not infer such a result.”) (denying petition for review of *Montford & Co., Inc.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *12 (May 2, 2014)); *SEC v. NIR Group, LLC*, No. 11-cv-4723, 2013 WL 5288962, at *5 (E.D.N.Y. Mar. 24, 2013) (“Every relevant authority supports the conclusion that expiration of the 180-day deadline imposed by section [4E] does not create a jurisdictional bar to SEC enforcement actions.”); *SEC v. Levin*, No. 12-cv-21917, 2013 WL 594736, at *13 (S.D. Fla. Feb. 14, 2013) (“Section 4E imposes only an internal deadline on the SEC, not a private right to be free from agency action occurring beyond the internal deadline.”); *SEC v. Scammell*, No. 11-cv-6597, Order, Dkt. No. 13 (C.D. Cal. Nov. 15, 2011) (“[i]t is well-established that a violation of statutory deadlines for internal agency action does not bar a claim by the agency if it is otherwise brought within the statute of limitation” period).

²³ See Rule of Practice 232(a), 17 C.F.R. § 201.232(a) (“In connection with any hearing ordered by the Commission . . . a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses . . .”).

sanction for his intentional manipulation of the market.²⁴ With respect to the fairness of his settlement compared to others, virtually all of his purported comparisons are dated and existed at the time of his settlement – he was free to take them into account in determining whether to agree to the terms of his settlement. (The one post-2012 settlement he cites involves FINRA, not SEC, enforcement sanctions.) More to the point, even in the litigated context, there is no requirement that Commission sanctions be uniform.²⁵ And in the specific context of settled bar orders like the one at issue here, we have made clear that “whether a particular sanction is excessive cannot be determined by comparison with the sanctions imposed on respondents in other cases.”²⁶

C. Wanger’s purported understanding of the settlement terms is not reasonable.

Wanger now claims that he believed the settlement afforded him the “right after one (1) year to re-enter the securities industry,” not simply the right to reapply subject to Commission discretion. He contends that he would not have agreed to the settlement had he understood that it involved only a right to reapply. This claim is unpersuasive for multiple reasons.

First, Wanger’s claim is directly at odds with the plain language of the bar order and his own Offer of Settlement. The bar order plainly provides that (1) Wanger is “barred from association with any broker, dealer, investment adviser, municipal advisor, transfer agent, or nationally recognized statistical rating organization,” (2) he has “the right to apply for reentry” after one year “to the Commission,” and (3) “[a]ny reapplication for association . . . will be subject to the applicable laws and regulations governing the reentry process.” The Offer of Settlement, which Wanger signed, states with equal clarity that (1) he must apply for reentry, (2) reentry is *not* guaranteed, and (3) the Commission retains full discretion whether to grant reentry:

Respondent Wanger understands that by settling to a bar with the right to reapply as specified in the Commission’s Order, Respondent Wanger will be able to make an application to reapply after the specified time period. *This application, however, does not guarantee reentry.* Rather, Respondent Wanger’s application will be subject to the applicable law governing the reentry process and *Respondent Wanger’s reentry will be subject to the discretion of the Commission* An application made directly to the Commission will be reviewed under the processes specified in Rule 193 of the Commission’s Rules of Practice, or as specified in the order in this proceeding.

²⁴ See *Donald I. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *15, 21 (May 16, 2014) (imposing unqualified collateral industry bar on investment adviser for marking the close on two dates even though the increase in advisory fees obtained was “relatively modest”), *petition for review denied in relevant part*, 793 F.3d 147 (D.C. Cir. 2015).

²⁵ See *Butz v. Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187 (1973) (“The employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.”); *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (“The Commission is not obligated to make its sanctions uniform, so we will not compare this sanction to those imposed in prior cases.”).

²⁶ *Michael H. Johnson*, 2015 WL 5305993, at *4.

(Emphasis added.) This language – in a document Wanger signed – unambiguously precludes a reasonable belief that Wanger had a “right” to reentry after one year.²⁷

Second, our rules and precedent on reentry are all publicly available and provide clear notice regarding the effect of bar orders with a right to apply for reentry and the substantive requirements for reentry. They also reflect our longstanding practice, when relief is appropriate, of granting relief incrementally based on association under specific supervision and conditions of employment while the bar remains in place.²⁸ And they make clear, as our Preliminary Note to Rule 193 plainly states, that where an applicant, like Wanger, “wishes to become the sole proprietor of a registered entity and thus is seeking Commission consent notwithstanding the absence of supervision, the applicant’s burden will be difficult to meet.”²⁹ In light of the clarity of the documents he signed and accepted while represented by counsel, and the clarity of our rules and precedent, Wanger’s claim years later that he did not understand the nature of the bar he consented to or the conditions under which he might apply for reentry is unreasonable.

²⁷ See *Matthew D. Sample*, 2015 WL 5305992, at *6 (rejecting argument for reentry that respondent who was represented by counsel in the settlement “misunderstood the scope of the bar order and believed he would be able to continue working . . . as an independent contractor”).

²⁸ See 17 C.F.R § 201.193 (Preliminary Note) (should relief be granted, “the applicant will be limited to association in a *specified capacity* with a *particular registered entity* and may also be subject to specific terms and conditions”) (emphasis added); *Rule 193 Release*, 1984 WL 547096, 49 Fed. Reg. at 12205 (“Commission approval of an application for consent to associate . . . does not modify or vacate the Commission order nor does it remove or lift the bar; the order and bar remain in effect.”); *Bruce Lieberman*, Advisers Act Release No. 3631, 2013 WL 3756501 (July 18, 2013) (granting consent to associate in specific capacity under specific supervision); *William E. Ennis*, Advisers Act Release No. 2853, 2009 WL 692618 (Mar. 17, 2009) (same); *Timothy J. Miller*, Advisers Act Release No. 2702, 2008 WL 10977985 (Feb. 11, 2008) (same).

²⁹ 17 C.F.R § 201.193 (Preliminary Note). Wanger also asserts that, in undocumented oral communications between his former counsel and Enforcement Division staff at the time of the settlement, his former counsel was told that reentry after one year would be approved by the Commission. Wanger does not identify which of his former counsel or which staff members allegedly participated in these discussions, nor does he offer any evidence beyond his own hearsay assertion (based on what the unidentified former counsel purportedly told him about discussions for which Wanger was not present) that the statements actually were made by the unidentified staff members. Beyond the lack of evidence, Wanger’s argument is inconsistent with the affirmative representation he made in his signed Offer of Settlement – contemporaneously with the purported statements on which he now claims to have relied – that “no promises, offers . . . or inducements of any kind or nature whatsoever have been made by . . . any . . . officer, employee, agent, or representative of the Commission in consideration of this Offer or otherwise to induce him to submit this Offer.”

For the foregoing reasons, having considered Wanger's application as supplemented and his response to the Division's notice, we find that Wanger has not demonstrated that the proposed association would be consistent with the public interest.

Accordingly, IT IS ORDERED that the application of Eric David Wanger for consent to associate be, and it hereby is, DENIED.

By the Commission.

Brent J. Fields
Secretary