

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 84526 / November 2, 2018

INVESTMENT ADVISERS ACT OF 1940
Release No. 5060 / November 2, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-16389

In the Matter of

BRETT THOMAS GRAHAM

**ORDER DENYING APPLICATION FOR
CONSENT TO ASSOCIATE**

Brett Thomas Graham was the Chief Executive Officer of VCAP Securities, LLC, a broker-dealer formerly registered with the Commission. In order to settle administrative and cease-and-desist charges brought against him, Graham consented to a Commission order that, among other sanctions, imposed a securities industry bar and a penny stock bar with a right to apply for reentry after three years. He has now filed an application for consent to: (1) associate with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, (2) serve or act as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, and (3) participate in any offering of a penny stock. He submits this application under Rule 193 of the Commission's Rules of Practice.¹ For the reasons set forth below, we conclude that Graham 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.

I. Background

A. Graham consented to a bar from the securities industry with a right to apply for reentry after three years.

On February 19, 2015, we issued a settled order, which found that Graham willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder in connection with a scheme to acquire certain securities from auctions of collateralized debt obligations (“CDOs”) run by Graham in his capacity as CEO of VCAP.² We found that, as part of the scheme, Graham (1) arranged for a separate broker-dealer to place bids in auctions on behalf of Vertical Capital, LLC, VCAP’s affiliated investment adviser, as VCAP and its affiliates were not permitted to bid under the terms of the relevant engagement agreements; (2) took advantage of his access to confidential bidding information from the auctions to ensure that Vertical was able to acquire 23 securities in 5 different CDO liquidations conducted by VCAP; and (3) made material misrepresentations to the trustees of the various CDOs for which VCAP served as liquidation agent by falsely representing that VCAP and its affiliates would not bid in the auctions and would not misuse confidential and/or bidding information afforded to VCAP as the liquidation agent.

In connection with the order, Graham submitted an Offer of Settlement, which we accepted. In his Offer, without admitting or denying the findings, Graham consented to entry of the order making the factual findings detailed above and ordering that Graham cease-and-desist from committing or causing violations and any future violations of Section 10(b) and Rule 10b-5. Graham also consented to pay disgorgement of \$118,284, pre-judgment interest of \$9,449, and a civil money penalty of \$200,000. Graham further consented to a collateral bar, investment company prohibition, and a penny stock bar, with the right to apply for reentry after three years.³ Graham subsequently paid the ordered disgorgement and penalty.⁴

² *In the Matter of VCAP Securities, LLC and Brett Thomas Graham*, Exchange Act Release No. 74305, 2015 WL 692238 (Feb. 19, 2015).

³ The bars were subject to a one-year carve out that permitted Graham to be employed by VCAP for a period of one year after entry of the order solely for the purpose of selling, or transferring to independent managers, existing positions for the benefit of VCAP investors.

⁴ Graham also filed a Motion to Modify Order, which sought to vacate certain provisions in the order (including those barring him from being associated with an investment adviser and with a securities broker or dealer in a non-supervisory function) and sought to add a provision granting a waiver from the disqualification provided for by Rule 506(d) of the Securities Act of 1933. On September 12, 2018, we denied Graham’s motion. *See Brett Thomas Graham*, Exchange Act Release No. 84106, 2018 WL 4348490 (Sept. 12, 2018).

B. Graham filed an application under Commission Rule of Practice 193 seeking consent to associate.

On April 9, 2018, Graham filed his application and supporting materials. The application seeks consent for Graham to associate with any of the entities to which his bar applies and to participate in any offering of a penny stock.⁵

While Graham identifies some theoretical employment options and proposes limited voluntary undertakings, his application does not provide the detailed information concerning the proposed association that we require. Instead, he primarily supports his request by making arguments that are beyond the scope of Rule 193 and improperly attacks both the findings that resulted in our order and the terms of the settlement to which he agreed.

Pursuant to Rule 193(e), the Division of Enforcement notified Graham that it intended to recommend that his application be denied, and provided a written statement of the reasons for that recommendation. Also pursuant to Rule 193(e), Graham submitted a response to the Division's statement, which we have considered as part of our review of his application.

II. Analysis

A. Graham 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 certain registered entities, such as investment advisers, which are not members of an SRO.⁶ The Rule requires that applicants make a showing “satisfactory to the Commission that the proposed association would be consistent with the public interest.”⁷ In order to make this showing, the Rule requires that an application include an affidavit from the applicant that addresses certain factors,

⁵ In addition, the application seeks a waiver of the disqualification provided for by Securities Act Rule 506(d) for Graham individually and for any entity with which he may in the future become associated. However, the Commission has established a procedure for the submission of Rule 506 waiver applications to the Division of Corporation Finance. *See Statement on Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D*, <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml> (Mar. 13, 2015). Graham did not follow that procedure. We therefore decline to address Graham's waiver request here and deny that request without prejudice. *See Graham*, 2018 WL 4348490, at *10 (denying without prejudice Graham's Rule 506 waiver request because he did not submit the waiver request to the Division of Corporation Finance).

⁶ *See* 17 C.F.R. § 201.193. 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.

⁷ 17 C.F.R. § 201.193(c). Much of the relief sought in Graham's application – including his requests to associate with registered broker-dealers and with non-Commission registered entities, as well as his request to participate in any offering of penny stock – is beyond the scope of Rule 193. However, we have relied upon the Rule 193 standard and factors as guides for considering other applications for consent to associate. *See Kenneth W. Corba*, Advisers Act Release No. 2732, 2008 WL 1902077, at *2 (April 30, 2008) (consent to associate with a state-registered investment adviser granted under Advisers Act Section 203(f) where applicant “made a satisfactory showing that the proposed association is consistent with the public interest”).

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.”⁸ Our Preliminary Note to the Rule states:

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 imposition of the bar.⁹

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.¹⁰

Graham does not provide any of this information in his application. He does not specify a proposed employer, only broad categories of unidentified industry participants (such as “an existing broker-dealer”) that he “potentially” could join. Moreover, other than proposing certain voluntary undertakings, he does not identify the terms and conditions under which he would work and be supervised, or the disciplinary history of the employer and the individuals who would supervise him. By not providing any information concerning what he would be doing or what interactions he would have with investors or other market participants, his application fails to demonstrate that the proposed association is reasonably designed to prevent a recurrence of the conduct that led to imposition of the bar and thus fails to demonstrate that the requested relief would be consistent with the public interest.

We recently denied a similar application for open-ended consent to associate “with any registered or un-registered broker-dealer, investment adviser, or other entity that participates in the securities industry.” See *Eric David Wanger*, Exchange Act Release No. 81111, 2017 WL 2953369, at *1 (July 10, 2017), *petition for review dismissed*, *Wanger v. SEC*, 720 Fed. App’x. 792 (7th Cir. 2018). In denying the application, we explained that:

[Wanger] 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,

⁸ 17 C.F.R. § 201.193(d)(5) & (6). The affidavit also must address the time period since imposition of the bar, any restitution or similar action taken by the applicant, compliance with the bar order, employment subsequent to imposition of the bar, and any relevant courses or other actions completed by the applicant to prepare for possible reentry.

⁹ *Id.* (Preliminary Note)

¹⁰ 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).

investors, or other market participants. . . . 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.”

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.

Id. at *3-4. Graham’s application is materially indistinguishable from the one we denied in *Wanger*.¹¹

Graham contends that finding a sponsoring employer “is simply not possible in the real world while such a restrictive Order is in place.” However, in denying the application in *Wanger*, we rejected a similar argument, noting that “difficulty finding suitable employment is ‘among . . . the natural and foreseeable consequences that flow from a ban on employment in the securities industry.’”¹² We explained that difficulty finding suitable employment “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 markets.”¹³ Contrary to Graham’s claim, while the Rule 193 standard is difficult, it is not impossible to meet, as our reentry decisions make clear.¹⁴

Graham also contends that denying his application would be unconstitutionally punitive. In support he cites cases addressing the appropriateness of sanctions imposed in a contested

¹¹ Graham attempts to differentiate his case from *Wanger* by arguing that his misconduct was more benign. However, *Wanger* also asserted the allegedly benign nature of his misconduct. *Wanger*, 2017 WL 2953369, at *5. Both Graham and *Wanger* settled to Commission orders finding scienter-based violations of the antifraud provisions, which imposed securities industry bars (with rights to reapply in three years for Graham and one year for *Wanger*) and significant civil penalties (\$200,000 for Graham, \$75,000 for *Wanger*).

¹² *Wanger*, 2017 WL 2953369, at *4 (quoting *Michael H. Johnson*, Exchange Act Release No. 75894, 2015 WL 5305993, at *4 & n.20 (Sept. 10, 2015)); see also *Edward I. Frankel*, Exchange Act Release No. 38378, 1997 WL 103785, at *2 (Mar. 10, 1997) (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)).

¹³ *Wanger*, 2017 WL 2953369, at *4 (citing *Mark S. Parnass*, Exchange Act Release No. 65261, 2011 WL 4101087, at *3 (Sept. 2, 2011)); see also *Graham*, 2018 WL 4348490, at *5 (difficulty attaining suitable employment does not justify vacating a remedial sanction such as a bar).

¹⁴ See, e.g., *Michael L. Silver*, Advisers Act Release No. 4691, 2017 WL 1492189 (Apr. 26, 2017) (granting consent to associate in specific capacity under specific supervision); *Randy G. Ruhl*, Advisers Act Release No. 4570, 2016 WL 6805052 (Nov. 17, 2016) (same); *Bruce Lieberman*, Advisers Act Release No. 3631, 2013 WL 3756501 (July 18, 2013) (same); *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).

proceeding.¹⁵ These cases are not applicable to the situation here where a party waived the right to a hearing and consented to a particular sanction. The test under Rule 193 is whether an individual has provided the information necessary for the Commission to make an informed decision that the proposed association would be consistent with the public interest. Graham has not done that.

Graham also argues that a right to apply for reentry “contains a presumption that the person subject to the order will be permitted to re-enter the securities industry when the time to seek such re-admission has been reached.” However, this argument is inconsistent with the terms of his Offer of Settlement, which make clear that any application for reentry “does not guarantee reentry” and that any such application “will be reviewed under the processes specified in Rule 193” and “subject to the discretion of the Commission.” It also is inconsistent with Rule 193 and our decisions under the Rule, which clearly place the burden on the applicant to demonstrate that the proposed association would be consistent with the public interest.¹⁶

Moreover, Graham argues that his long career without incident prior to the conduct at issue in the order, his conduct during the one-year carve out period, and his compliance with the securities laws since the entry of the order demonstrate that granting his application would be in the public interest. He adds that any risk to the public good would be mitigated by the proposed undertakings detailed in the application, and maintains that denying the application would hurt the public interest by depriving potential employers and investors of his talents and experience. While Graham may have complied with the securities laws prior to and after his misconduct and may have talent and expertise to offer, these factors do not, on their own, satisfy Rule 193 and the public interest standard. Graham’s proposed voluntary limitations on his activities through undertakings similarly do not satisfy this standard.¹⁷ Rule 193 was designed to give the Commission the information necessary to make an informed decision that – in a specific

¹⁵ See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 339-40, 344 (1998) (forfeiture imposed on defendant in criminal case was disproportionate to gravity of offense and violated Excessive Fines Clause of the Eighth Amendment); *BMW of N. Am. v. Gore*, 517 U.S. 559, 585-86 (1996) (punitive damages award of \$2 million in private tort action grossly excessive under Due Process Clause of the Fourteenth Amendment); *McCarthy v. SEC*, 406 F.3d 179, 190-91 (2d Cir. 2005) (remanding to Commission for explanation of basis for two-year suspension from NYSE membership).

¹⁶ Graham also suggests that he is being treated unfairly because persons who are suspended from association in the securities industry are “automatically” permitted to reenter after expiration of the suspension while those (like him) who are barred must reapply to the Commission and satisfy the public interest standard. But suspensions and bars are different sanctions. The time-limited nature of suspensions is established by statute and is what differentiates them from bars. E.g., Exchange Act Section 15(b)(6) (“Commission, by order, shall . . . suspend for a period not exceeding 12 months or bar any such person . . .”).

¹⁷ Graham proposes that, for two years, he will voluntarily comply with certain undertakings, including that he will not exercise investment discretion over the assets of any other person, solicit investments from unaccredited investors, or represent any person in connection with a securities auction. By their terms, however, these undertakings would not prohibit him from “associating with, or otherwise forming or owning, an investment adviser or securities broker-dealer during the [t]wo-year period . . .” In light of the open-ended nature of his application, and the carve-out that would permit him to own an investment adviser or broker-dealer, these proposed undertakings do not provide assurance that the conduct that led to the imposition of the bar will not reoccur. They are voluntary, limited in time and scope, and afford no opportunity for Commission oversight or independent confirmation that they are being followed.

proposed context – the conduct that led to the imposition of the bar will not recur. By not providing any information in his application concerning what he would be doing or under what, if any, supervision, Graham does not allow us to make such an informed determination.¹⁸ Accordingly, the application should be denied.

B. Graham’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.

Graham attempts to challenge the fairness of the terms of the settlement to which he agreed, the adequacy of his legal representation during the Commission’s investigation and settlement negotiations, and the voluntary nature of his offer of settlement. In the first instance, these arguments are beyond the scope of a Rule 193 proceeding.

The Preliminary Note to Rule 193 provides that the “Commission will not consider any application that attempts to reargue or collaterally attack the findings that resulted in the Commission’s bar order.” In *Wanger*, we rejected a similar challenge to settlement terms noting, “[w]e 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 settlement.”¹⁹ Graham offers no persuasive reason to deviate from the Rule and our precedent here.

Absent his decision to offer settlement, under the Rules of Practice and the federal securities laws, Graham would have had the right to present evidence at a hearing, to submit proposed findings of fact and law, to receive an initial decision, to obtain *de novo* review by the Commission, and to obtain judicial review in the United States Court of Appeals. He chose to waive these rights in his Offer of Settlement and accept the settlement terms. Accordingly,

¹⁸ See *Wanger*, 2017 WL 2953369, at *3-4 (denying relief where respondent “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.”); *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. 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”).

¹⁹ *Wanger*, 2017 WL 2953369, at *4; see also *Graham*, 2018 WL 4348490, at *4 (rejecting Graham’s argument that his misconduct was isolated, unintentional and immaterial and explaining “[w]e will not consider Graham’s collateral attack on the Commission’s findings”); *Johnson*, 2015 WL 5305993, at *4-5 (rejecting petition to modify bar based on additional evidence, Commission explained it has “a strong interest” in the finality of its settled orders) (citation omitted); *Sample*, 2015 WL 5305992, at *6 (denying application for consent to associate, Commission explained that respondent consented to bar and waived any “claim of errors or inaccuracies in the bar order”); *Kenneth W. Haver*, Exchange Act Release No. 54824, 2006 WL 3421789, at *3 (Nov. 28, 2006) (denying motion to reopen proceeding or vacate Rule 102(e) suspension based on additional evidence, Commission explained it has a strong interest in the finality of its settled orders); *Ross*, 1992 WL 188932, at *3 n.14 (“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.”); *Shupack*, 1987 WL 757575, at *4 (denying application for consent to associate, explaining that Preliminary Note to Rule 193 states that Commission will not consider an application that attempts to reargue or collaterally attack findings that resulted in bar order).

Graham has forfeited his opportunity to challenge the underlying findings and settlement in his matter.²⁰

Even if Graham’s arguments were properly presented in this proceeding, we would find them unpersuasive. Graham asserts that he did not receive “proper” and “independent” legal representation during the investigation and settlement negotiations that led to the order because his attorney also represented other parties in the matter. Graham does not dispute that during the investigation the Division of Enforcement staff specifically raised this issue with Graham, cautioned him about the potential conflict of interest, and explained that the choice whether to proceed with the multiple representation was his alone. Graham chose to proceed notwithstanding the potential for conflict. Although years later Graham now questions his choice and the adequacy of his representation, that is not a basis for relief from the terms of the settlement.²¹

Graham also characterizes his conduct as having caused no harm to any investor or third-party, asserts that no investor has filed suit against him or complained of his conduct, and claims the terms of the settlement to which he agreed were “unwarranted and unjustified,” “punitive,” and “draconian.” As we made clear in *Wanger*, the time to consider those factors and make those arguments was at the time of settlement, not years later in a Rule 193 application.²²

In addition, Graham suggests that “he was pressured into settling under the prospect of an administrative proceeding whose constitutionality is now in question.” To the extent Graham believed any potential administrative proceeding had constitutional shortcomings, he had the right to raise and litigate those arguments before the Commission and, on petition for review, the appropriate United States Court of Appeals. Instead, he chose to waive that right and offer to settle. We have consistently held that a respondent may not collaterally attack a Commission

²⁰ *Wanger*, 2017 WL 2953369, at *4 (Wanger “has forfeited his opportunity to undo the settlement through the arguments he now asserts”) (internal quotation omitted); *see also Graham*, 2018 WL 4348490, at *4 (Graham “forfeited” his right to complain about the record in the underlying investigation by agreeing to settle); *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.”); *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 Wanger*, 2017 WL 2953369, at *4 (finding Wanger’s arguments about the fairness of the underlying proceeding to be unavailing and beyond the scope of his application); *see also Graham*, 2018 WL 4348490, at *7 (“ineffective assistance of counsel is not a defense in civil proceedings, and it does not provide a basis for a collateral attack on the Order”).

²² *See Wanger*, 2017 WL 2953369, at *4 (rejecting argument that “the terms of the settlement to which he agreed . . . were unfair to him” as “beyond the scope of this proceeding”); *id.* at *5 (rejecting challenge to fairness of settlement terms based on claim that violations were “De Minimis” and “immaterial”); *see also Graham*, 2018 WL 4348490, at *6 (finding Graham’s claims that he caused no harm to be “an improper collateral attack on the findings of the Order,” which “improperly contradicts the findings of the Order” because Graham did cause harm and the order created a Fair Fund from which investors sought and obtained compensation for injury).

final order by asserting a constitutional challenge that could have been raised when the order was entered.²³ Moreover, to the extent Graham is now claiming he was pressured into agreeing to settle, he provides no supporting evidence and his claim is contrary to the affirmative representation that he made to us in his Offer of Settlement; namely that: “Respondent states that . . . this Offer is made voluntarily, and that no promises, offers, threats, or inducements of any kind or nature whatsoever have been made by . . . any . . . 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 Graham’s application and his response to the Division’s statement of reasons for recommending denial, we find that Graham has not demonstrated that the proposed association would be consistent with the public interest.

Accordingly, IT IS ORDERED that the application of Brett Thomas Graham for consent to associate be, and it hereby is, DENIED.

By the Commission.

Brent J. Fields
Secretary

²³ See *Wanger*, 2017 WL 2953369, at *4 n.18; *Gordon Brent Pierce*, Exchange Act Rel. No. 77643, 2016 WL 1566396, at *3-5 (Apr. 18, 2016), *petition for review dismissed*, No. 16-1185 (D.C. Cir. Nov. 7, 2016) (per curiam).