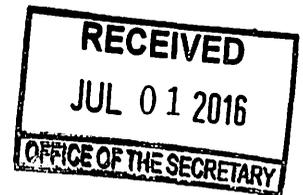


**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**



In the Matter of the Application of

Eric David Wanger

File No. 3-17226

**FINRA'S BRIEF IN OPPOSITION
TO THE APPLICATION FOR REVIEW**

I. INTRODUCTION

Four years ago, the Securities and Exchange Commission (“Commission”) found that Eric David Wanger (“Wanger”), acting through the registered investment adviser he owned, willfully engaged in fraud by, among other things, marking the close of thinly traded securities held by a fund that Wanger advised and managed. For his role in this misconduct, the Commission barred Wanger from the securities industry, with the right to reapply for reentry after one year.

The Commission’s final regulatory action was reported to the Central Registration Depository (“CRD”[®]) through the filing of a Uniform Disciplinary Action Reporting Form (“Form U6”). In accordance with FINRA rules, FINRA released to the public through BrokerCheck[®] information concerning the Commission’s order barring Wanger from the securities industry.

On April 18, 2016, long after the action about which he complains, Wanger filed with the Commission an application seeking the “review or cancellation of a FINRA sanction posted on FINRA’s BrokerCheck website.” On June 8, 2016, the Commission directed the parties to file

briefs on the threshold issue of whether the Commission has jurisdiction to review Wanger's application.

The Commission should dismiss Wanger's application for lack of jurisdiction. Wanger's request that the Commission cancel the permanent bar description noted in BrokerCheck is essentially an effort to edit the content of a BrokerCheck disclosure. But FINRA's release of information through BrokerCheck is not FINRA's imposition of a final disciplinary sanction, nor is it an action that is reviewable under any of the other three prongs that establish Commission jurisdiction under Section 19(d) of the Securities Exchange Act of 1934 ("Exchange Act"). Accordingly, FINRA's release of information through BrokerCheck concerning the Commission's final regulatory action against Wanger is not subject to Commission review.

II. FACTS

A. The Applicant

Wanger owned and was the president of Wanger Investment Management, Inc. ("Wanger Investment Management"). RP 54.¹ Wanger Investment Management served as adviser to the Wanger Long Term Opportunity Fund II, L.P (the "Fund"). *Id.* Wanger Investment Management registered with the Commission on April 6, 2009. *Id.* On November 28, 2011, Wanger Investment Management filed a Form ADV-W Notice of Withdrawal from registration as an investment adviser and Wanger Investment Management's registration ceased on December 31, 2011. *Id.*

¹ "RP ___" refers to the page numbers in the certified record and supplemental certified record that FINRA filed with the Commission on May 31, 2016, and June 23, 2016, respectively.

B. The Commission's Bar Order

On June 2, 2012, the Commission issued an order making findings and imposing remedial sanctions and a cease-and-desist order on Wanger and Wanger Investment Management.² RP 53-63. The Commission found that Wanger repeatedly marked the close of certain thinly-traded securities held by the Fund and improperly inflated the Fund's reported performance and net asset value, information that was then provided to Fund investors and prospective investors.³ RP 56-58. Among other sanctions imposed, the Commission's order "barred [Wanger] from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or national recognized statistical rating organization . . . with the right to reapply for reentry after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission." RP 61-62.

C. The Commission's Order is Reported to CRD Through a Form U6

On July 3, 2012, the Commission's final regulatory action against Wanger was reported to CRD through the filing of a Form U6.⁴ RP 23-29, 131-137. The Form U6 stated that the Commission's order imposing sanctions on Wanger included a "Bar (Permanent)," RP 134, and disclosed further that the bar was "[p]ermanent, with the right to reapply for reentry after 1

² Wanger and the firm consented to the entry of the Commission's order, which was issued in acceptance of an offer of settlement submitted by the respondents. RP 54.

³ The Commission concluded that Wanger, as a result of his misconduct, willfully violated (or aided and abetted violations of) fraud proscriptions within Section 17(a)(1) and 17(a)(3) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206 of the Investment Advisers Act of 1940 ("Investment Advisers Act") and Rule 206 thereunder. RP 60-61.

⁴ CRD is a database operated by FINRA and available to authorized users through FINRA's website. See *Aliza A. Manzella*, Exchange Act Release No. 77804, 2016 SEC LEXIS 464, at *3 n.3 (Feb. 8, 2016).

year.”⁵ RP 134-35. This information was captured by and reported verbatim in CRD. RP 26-27.

D. BrokerCheck

BrokerCheck is a database maintained by FINRA and available through FINRA’s website. *Manzella*, 2016 SEC LEXIS 464, at *4 n.2. FINRA established BrokerCheck in 1988 to provide the public with information on the professional background, business practices, and conduct of FINRA members and their associated persons.⁶ *See FINRA Regulatory Notice 09-66*, 2009 FINRA LEXIS 196, at *2 (Nov. 2009).

FINRA Rule 8312 governs the information FINRA releases to the public through BrokerCheck, including information regarding current and former FINRA members, as well as their current and former associated persons. *See* FINRA Rule 8312(a)(1). Among other things, BrokerCheck provides public access to information about former associated persons, regardless of when they were associated with a FINRA member, if they have been the subject of a final regulatory action that has been reported to CRD on a uniform registration form.⁷ *See* FINRA

⁵ The Form U6 is used by self-regulatory organizations and state and federal regulators to report disciplinary actions. *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 5100, at *13 n.23 (June 26, 2014). A blank Form U6 is available through FINRA’s website at <http://www.finra.org/sites/default/files/AppSupportDoc/p116976.pdf> (last visited June 23, 2016).

⁶ BrokerCheck fulfills FINRA’s statutory obligation under Section 15A(i) of the Exchange Act to provide registration information to the public. *See* Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure), 75 Fed. Reg. 41254, 41258 & n.65 (July 15, 2010).

⁷ The information disclosed through BrokerCheck is derived from the CRD system and includes only information regarding actions that have been reported to CRD through the filing of a uniform registration form. *See FINRA Regulatory Notice 09-66*, 2009 FINRA LEXIS 196, at *4 n.3. In addition to the Form U6, the uniform registration forms include the Uniform Application for Broker-Dealer Registration (“Form BD”), Uniform Request for Broker-Dealer

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Rule 8312(c). A final regulatory action in this context includes any final action by the Commission.⁸ *See* FINRA Rule 8312(c).

In accordance with FINRA Rule 8312(c), FINRA released to the public information concerning the Commission's final regulatory action against Wanger. Specifically, through BrokerCheck, FINRA discloses that "[t]he SEC has permanently barred this individual from acting as a broker or investment adviser, or otherwise associating with firms that sell securities or provide investment advice to the public."⁹ Drawing from Wanger's CRD information, a detailed BrokerCheck report, RP 3-16, which is available to the public in .pdf form by clicking a link within BrokerCheck, discloses further that the sanctions the Commission imposed on Wanger include a "Bar (Permanent)" from, among other things, associating with a broker-dealer or investment adviser, and advised that the bar was "[p]ermanent, with the right to reapply for reentry after 1 year."¹⁰ RP 14.

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Withdrawal ("Form BDW"), Uniform Application for Securities Industry Registration or Transfer ("Form U4"), and Uniform Termination Notice for Securities Industry Registration ("Form U5"). *See id.* at *2 n.2.

⁸ FINRA may disclose a final action that is reported by a regulator on a Form U6 even if that action has not been reported on a Form U4 or Form U5 because, for example, the individual was not registered with a FINRA member at the time the final regulatory action was reported to CRD. *See FINRA Regulatory Notice 09-66*, 2009 FINRA LEXIS 196, at *4 n.5.

⁹ *See* BrokerCheck by FINRA, search results for Eric D. Wanger, <http://brokercheck.finra.org/Individual/Summary/4727229> (last visited June 27, 2016). Pursuant to Practice Rule 323, FINRA requests that the Commission take official notice of Wanger's BrokerCheck page. *See* 17 C.F.R. §201.323; *see also* *Manzella*, 2016 SEC LEXIS 464, at *3 n2. (taking official notice of information in BrokerCheck).

¹⁰ FINRA Rule 8312 provides an administrative process through which parties may dispute the accuracy of certain information disclosed through BrokerCheck. *See* FINRA Rule 8312(e). The record is clear that Wanger had access to and availed himself of this process. RP 113-15, 129.

III. ARGUMENT

The scope of the Commission's jurisdiction to review FINRA's actions is established by statute. *WD Clearing, LLC*, Investment Company Act Release No. 75868, 2015 SEC LEXIS 3699, at *10 (Sept. 9, 2015) "[T]here must be a statutory basis for us to exercise jurisdiction."). Section 19(d) of the Exchange Act authorizes the Commission to review a FINRA action only if that action: (1) imposes a final disciplinary sanction on a member or an associated person of a member; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by such organization or member thereof; or (4) bars any person from becoming associated with a member.¹¹ 15 U.S.C. § 78s(d)(1), (2); *see also* *WD Clearing*, 2015 SEC LEXIS 3699, at *10. FINRA's public release of information through BrokerCheck concerning the Commission's final regulatory action against Wanger is not subject to Commission review as one of these four categories of actions. Because all possible grounds for jurisdiction under Exchange Act Section 19(d) are absent, the Commission should dismiss Wanger's application for review.

A. FINRA Did Not Impose a Final Disciplinary Sanction

Wanger's application for review is premised largely on the argument that FINRA imposed a second sanction on him by releasing through BrokerCheck information concerning the Commission's order barring him from the securities industry.¹² RP 42, 44-48. This argument is

¹¹ "The grounds for Commission jurisdiction enumerated in [Commission Rule of Practice] 420(a) are the same as those described in Section 19(d)(1) of the Exchange Act." *Lawrence Gage*, Exchange Act Release No. 54600, 2006 SEC LEXIS 2327, at *11-12 (Oct. 13, 2006).

¹² In his application for review, Wanger bases his argument for Commission jurisdiction primarily on Section 19(e) of the Exchange Act. RP 44-48. Section 19(e), however, merely specifies the standard pursuant to which the Commission reviews specific self-regulatory organization actions. *See* 15 U.S.C. § 78s(e). Unless Wanger's application for review meets the
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without merit. FINRA has not, through the public release of information about the Commission's final regulatory action against Wanger, employed its disciplinary procedures nor made any independent determination that Wanger violated the federal securities laws or FINRA rules, actions that are prerequisites to imposing a "final disciplinary sanction" that is reviewable under Section 19(d) of the Exchange Act. *See Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 955-56 (2004) ("NASD did not employ its disciplinary procedures, did not make a determination that Allen Douglas had violated a statute or rule, and did not impose a final disciplinary sanction."). The FINRA action about which Wanger complains, which is consistent with the requirements of FINRA Rule 8312(c), is purely derivative of and collateral to the Commission's final regulatory action against Wanger and naturally cannot provide a basis for the Commission to review his application.¹³ *See Saylor*, 58 S.E.C. at 591 ("NASD's denial of Saylor's Motion to vacate

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jurisdiction requirements of Exchange Act Section 19(d), the standard of review under Section 19(e) is irrelevant. *See Sky Capital LLC*, Exchange Act Release No. 55828, 2007 SEC LEXIS 1179, at *9 n.11 (May 30, 2007); *cf. Larry A. Saylor*, 58 S.E.C. 586, 590 (2005) ("Section 19(f) does not provide the basis for Commission jurisdiction over SRO actions."). In the alternative, Wanger claims that FINRA engaged in rule making subject to Commission oversight under Section 19(b) of the Exchange Act. FINRA's release of information through BrokerCheck, however, does not establish any new standard of conduct under FINRA rules that implicates the requirements of Exchange Act Section 19(b). *See* 15 U.S.C. § 78s(b); *SIG Specialists, Inc.*, 58 S.E.C. 519, 531 n.26 ("[W]e do not view this case as involving the kind of 'new standard of conduct' that would implicate the Exchange Act's rule change requirements.").

¹³ Wanger's argument that BrokerCheck imposes on him a "final disciplinary sanction" is itself based on the inherently false claim that FINRA effectively converted "a bar with a right to reapply into a permanent bar" by disclosing through BrokerCheck that the Commission's final regulatory action "permanently" barred Wanger from the securities industry, with the right to reapply after one year. RP 43, 45-46. The information FINRA discloses through BrokerCheck is derived from CRD, which in Wanger's case includes information from the Form U6 reporting the Commission's bar order. The Form U6 contains two boxes from which to select and indicate that the sanction imposed by the reported regulatory action includes a bar – "Bar (Permanent)" or "Bar (Temporary/Time Limited)." RP 134. A bar with a right to reapply is a "permanent" bar, not a temporary or time-limited bar that expires automatically at the end of a stated period. *See*

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NASD's thirty-two year old principal bar is collateral to the underlying disciplinary action in which Saylor has already been sanctioned."); *see also Lance E. Van Alstyne*, 53 S.E.C. 1093, 1097 (1998) ("By Van Alstyne's reasoning, the denial of any collateral motion seeking to vacate a final SRO decision . . . could constitute imposition of a 'final disciplinary sanction' so as to provide the Commission with jurisdiction under Section 19(d).").

B. FINRA Did Not Deny Membership or Participation to Wanger

Wanger does not contend, nor can he, that FINRA took any action against him that qualifies as a denial of membership or participation under Section 19(d) of the Exchange Act. This basis for review is directed at self-regulatory organization decisions that deny applications for membership or impose restrictions on business activities as a condition of membership. *WD Clearing*, 2015 SEC LEXIS 3699, at *12. FINRA has not rendered any decision against Wanger that denied, altered, or otherwise affected membership in FINRA. *See id.*

C. FINRA Did Not Prohibit or Limit Wanger's Access to Services

Wanger also does not argue, and there is no evidence from which to conclude, that FINRA prohibited or limited Wanger's access to services such that the Commission has grounds

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Edgar R. Page, Investment Advisers Act Release No. 4400, 2016 SEC LEIXS 1925, at *33 (May 27, 2016) ("There is a significant distinction between a true time-limited bar and a bar that includes a right to reapply after a certain period of time."); *Rockies Fund, Inc.*, Exchange Act Release No. 56344, 2007 SEC LEXIS 1954, at *17 n.21 (Aug. 31, 2007) ("[A]lthough Respondents characterize the sanction imposed in Lynch as a 'one-year bar and no fine,' the sanction was in fact a permanent bar with the right to reapply after one year."). The Form U6 reporting the Commission's bar order accurately indicated that the sanctions imposed by the Commission included a "Bar (Permanent)." RP 134. The information that FINRA releases through BrokerCheck about the permanence of Wanger's bar from the securities industry is undoubtedly accurate too. FINRA imposes no sanction on Wanger as a result of the information it releases about him through BrokerCheck. *Cf. Robert E. Strong*, Exchange Act Release No. 57426, 2008 SEC LEXIS 467, at *42-43 (Mar. 4, 2008) ("[T]he press release issued by NASD was not a sanction subject to review in this proceeding.").

to review his application. To determine whether a FINRA action prohibits or limits access to services within the meaning of Exchange Act Section 19(d), the Commission considers whether FINRA has denied or limited the applicant's ability to utilize one of the "fundamentally important services" offered by FINRA that are also "central to" FINRA's function. *WD Clearing*, 2015 SEC LEXIS 3699, at *17 n.28 (internal quotation marks omitted). FINRA's release of information through BrokerCheck neither prohibits nor limits Wanger's access to services offered by FINRA.

D. FINRA Did Not Bar Wanger From Associating With FINRA Members

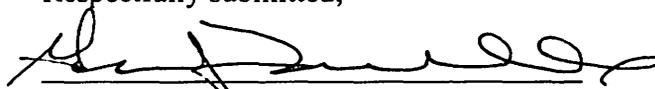
Finally, FINRA's release of information through BrokerCheck concerning the Commission's final regulatory action against Wanger is not an action that bars Wanger from associating with a FINRA member. Although Wanger contends that the information released to the public through BrokerCheck "perforce has *permanently* blocked . . . his right to seek employment," RP 43 (emphasis in original), he is mistaken. Wanger, as a result of the right to reapply granted by the Commission's bar order and given the passage of time, may seek association with a FINRA member broker-dealer. FINRA has taken no action against Wanger that limits or prevents his ability to do so.¹⁴ *See WD Clearing*, 2015 SEC LEXIS 3699, at *19 ("FINRA did not bar WD Clearing or its representatives from associating with . . . any other FINRA-member firm, let alone all FINRA-member firms, as would be required for us to assume

¹⁴ Wanger is a person subject to a statutory disqualification as a result of the Commission's order finding that he willfully violated (or aided and abetted violations of) the Exchange Act, Securities Act, and Investment Advisers Act, and rules promulgated under those statutes. *See* FINRA By-Laws Art. III, Sec. 4; *see also* Exchange Act Section 3(a)(39)(F) (incorporating Exchange Act Section 15(b)(4)(D)), 15 U.S.C. § 78c(a)(39)(F). The FINRA Rule 9520 Series sets forth the procedures for a person to become or remain associated with a member, notwithstanding the existence of a statutory disqualification. *See* FINRA Rule 9521(a). Wanger has not submitted himself to this process.

jurisdiction on this ground.”). While a statement that the Commission “permanently” barred Wanger from the securities industry is understandably disadvantageous to him, any adversity that Wanger may suffer from the release of this information through BrokerCheck does not provide grounds for Commission jurisdiction to consider his application for review. *See Allen Douglas Sec.*, 57 S.E.C. at 959 (“[A]lthough NASD’s determination . . . made it more difficult for Allen Douglas to resume operations as a broker-dealer, we have held that SRO action is not reviewable merely because it adversely affects the applicant.” (internal quotation marks omitted)); *see also Morgan Stanley & Co., Inc.*, 53 S.E.C. 379, 383 (1997) (rejecting a claim that NASD action had the effect of barring a person from becoming associated with a member because of the “negative impact” it had on the applicant’s business). FINRA’s action does not implicate this, or any other, prong of Section 19(d) of the Exchange Act.¹⁵

Because the Commission lacks jurisdiction, it should dismiss Wanger’s application for review.

Respectfully submitted,



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Date: July 1, 2016

¹⁵ The FINRA action on which Wanger bases his application for review occurred in 2012, very nearly four full years ago. Even were the Commission to find that it possesses jurisdiction to consider Wanger’s application for review, the Commission should reject the application on the grounds that it is a late-filed appeal under Section 19(d)(2) of the Exchange Act. *See* 15 U.S.C. § 78s(d)(2); *see also Van Alstyne*, 53 S.E.C. at 1099 (“Even if we were to construe Van Alstyne’s application for review as a late appeal . . . , we would conclude that [he] has made no showing warranting our acceptance of a filing outside of the time limits specified in the statute.”).

CERTIFICATE OF SERVICE

I, Gary Dernelle, certify that on July 1, 2016, I caused the original and three copies of FINRA's Brief in Opposition to the Application for Review, In the Matter of the Application of Eric David Wanger, Administrative Proceeding File No. 3-17226, to be served by messenger and facsimile on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090
Fax: (202) 772-9324

and one copy of the foregoing brief to be served by electronic mail and Federal Express Overnight Delivery on:

Thomas V. Sjoblom, Esq.
International Square
1875 I. Street, N.W. Suite 500
Washington, D.C. 2006
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Electronic email and overnight delivery were used as methods of service on applicant's counsel because a facsimile number was not provided to FINRA.



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Financial Industry Regulatory Authority

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July 1, 2016

VIA MESSENGER

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10915
Washington, DC 20549-1090

RE: In the Matter of the Application of Eric David Wanger
Administrative Proceeding No. 3-17226

Dear Mr. Fields:

Enclosed please find the original and three copies of FINRA's Brief in Opposition to the Application for Review in the above-captioned matter.

Please contact me at (202)728-8255 if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gary Dernelle".

Gary Dernelle

Enclosures

cc: Thomas V. Sjoblom