

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 79008 / September 30, 2016

Admin. Proc. File No. 3-17226

In the Matter of the Application

ERIC DAVID WANGER

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF ASSOCIATION ACTION

Timeliness of Application for Review

Jurisdiction to Review Association Action

Former associated person of a former registered investment adviser applied for Commission review of FINRA action. *Held*, the application for review is untimely and the matter is not reviewable under Section 19(d) of the Securities Exchange Act of 1934. Application for review is therefore *dismissed*.

APPEARANCES:

Thomas V. Sjoblom for Eric David Wanger

Gary Dernelle for FINRA

Application filed: April 20, 2016

Last brief filed: August 18, 2016

Eric David Wanger, who was the owner, chief compliance officer, and president of Wanger Investment Management, Inc. ("WIN"), a former registered investment adviser, has filed an application seeking to set aside what he alleges is "FINRA's enlargement of [an] SEC Sanction," as reported on FINRA's BrokerCheck website.¹ As discussed below, we dismiss Wanger's application because it is untimely and because we lack jurisdiction over his application.

I. Background

A. In a July 2, 2012 order, the Commission barred Wanger from the securities industry.

On July 2, 2012, we issued an "Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order" on Wanger and WIN (the "Order").² Wanger and WIN agreed to the Order, without admitting or denying its findings, to settle an administrative proceeding instituted against them.³ In the Order, we found that Wanger had engaged in "marking the close" transactions to artificially affect the price of a security on numerous occasions, engaged in improper transactions with a hedge fund he managed, and failed to comply with Commission filing requirements.⁴ Among other things, we found that Wanger provided hedge fund investors and prospective investors "figures that reflected performance results and their proportionate share of the Fund's [net asset value] that were improperly inflated as a result of Wanger's manipulative trading."⁵ Without Wanger's "marking the close" transactions, the hedge fund's "reported performance for [March 2008] would have been approximately 30% lower than reported."⁶

¹ BrokerCheck is a free online tool that enables public investors to research the professional backgrounds of current and former FINRA-registered broker-dealers and their representatives, as well as investment adviser firms and their representatives. See <http://brokercheck.finra.org> (last visited Aug. 29, 2016). The information contained in BrokerCheck about broker-dealers and their representatives is derived from FINRA's Central Registration Depository ("CRD") system, the securities industry's online registration and licensing database. Although public investors do not have access to CRD, certain information in that system is available through BrokerCheck.

² *Eric David Wanger*, Securities Act Release No. 9331, 2012 WL 2524953 (July 2, 2012).

³ *Id.* at *1.

⁴ *Id.* at *3-6.

⁵ *Id.* at *4.

⁶ *Id.*

As a result of this conduct, we found that Wanger violated (among other provisions) Sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933, Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940.⁷ Based on these findings, we ordered that Wanger cease and desist from further violations of the provisions he violated and pay a civil money penalty of \$75,000.⁸ We also ordered that Wanger be "barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization . . . with the right to apply for reentry after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission."⁹

On July 3, 2012, the Order was reported electronically to CRD through the filing of a Uniform Disciplinary Action Reporting Form ("Form U6").¹⁰ The Form U6 stated that Wanger's sanctions included a "Bar (Permanent)" and that the bar was "[p]ermanent, with the right to apply for reentry after 1 year." This information was captured and reported verbatim in CRD.¹¹

B. FINRA reported that Wanger had been barred on its BrokerCheck website.

FINRA maintains BrokerCheck as part of its statutory obligation under Section 15A(i) of the Exchange Act to "establish and maintain a system for collecting and retaining registration information" about registered broker-dealers and to make such information available to the public.¹² "Registration information" includes information about "disciplinary actions, regulatory, judicial, and arbitration proceedings."¹³ FINRA Rule 8312 governs the information that FINRA releases to the public through BrokerCheck, including information regarding current and former FINRA members, as well as their current and former associated persons.¹⁴

⁷ *Id.* at *6-7.

⁸ *Id.* at *7-8.

⁹ *Id.* at *7. Wanger was also barred from serving or acting in certain capacities with respect to an investment company with the right to reapply to serve or act in any such capacities after one year. *Id.*

¹⁰ Form U6 is used by regulatory authorities to report final regulatory action.

¹¹ We take official notice of information in CRD. 17 C.F.R. § 201.323; *Aliza A. Manzella*, Exchange Act Release No. 77804, 2016 WL 489353, at *1 n.3 (Feb. 8, 2016).

¹² 15 U.S.C. § 78o-3(i)(1).

¹³ *Id.* § 78o-3(i)(5).

¹⁴ FINRA Rule 8312.

Rule 8312 requires FINRA to make publicly available in BrokerCheck information about former associated persons, regardless of when they were associated with a FINRA member, if they were the subject of a "final regulatory action" that has been reported to CRD on a uniform registration form (including Form U6).¹⁵ A "final regulatory action" includes any final action of the Commission.¹⁶ According to BrokerCheck, from November 2003 until June 2005, Wanger was registered with FINRA member firm Barrington Research Associates, Inc.

In accordance with Section 15A(i) and Rule 8312(c), FINRA publicly released through BrokerCheck information concerning the Commission's final regulatory action against Wanger. FINRA disclosed that "[t]he SEC has permanently barred [Wanger] from acting as a broker or investment adviser, or otherwise associating with firms that sell securities or provide investment advice to the public."¹⁷ It also disclosed that the Commission's sanctions included a "Bar (Permanent)" and that the bar was "[p]ermanent, with the right to reapply for reentry after 1 year"¹⁸—disclosures that repeated the information reported in CRD.

Rule 8312 provides an administrative process for certain "eligible parties," including former associated persons like Wanger, to dispute the accuracy of the information disclosed through BrokerCheck.¹⁹ In order to initiate a dispute, a party must submit a written notice to FINRA.²⁰ After receiving the written notice, FINRA determines whether the dispute is eligible for investigation.²¹ If FINRA determines that the dispute is not eligible for investigation, it

¹⁵ FINRA Rule 8312(c)(1)(A); *see* Order Approving a Proposed Rule Change Relating to the Availability of Information Pursuant to FINRA Rule 8312 (FINRA BrokerCheck Disclosure), Exchange Act Release No. 61002, 2009 WL 3862435, at *1 (Nov. 13, 2009) (adopting release).

¹⁶ FINRA Rule 8312(c).

¹⁷ BrokerCheck by FINRA, search results for Eric D. Wanger, <http://brokercheck.finra.org/Individual/Summary/4727229> (last visited Sept. 14, 2016).

¹⁸ *Id.*

¹⁹ FINRA Rule 8312(e); *see* Order Approving a Proposed Rule Change to Amend Rule 8312 (FINRA BrokerCheck Disclosure), Exchange Act Release No. 62476, 2010 WL 2712887, at *1 (July 8, 2010) (adopting release).

²⁰ FINRA Rule 8312(e)(1)(B).

²¹ FINRA Rule 8312(e)(2)(A)-(C) & Supplementary Material .02 (providing examples of situations in which FINRA will determine that a dispute is not eligible for investigation).

notifies the party in writing, including a brief description of the reason for the determination.²² A determination by FINRA that a dispute is not eligible for investigation is not subject to appeal.²³

On December 2, 2012, Wanger filed a BrokerCheck Dispute Form with FINRA challenging BrokerCheck's description of the Commission's bar order as a "permanent" bar.²⁴ By letter dated December 31, 2012, FINRA notified Wanger that his dispute was not eligible for investigation because FINRA determined that the bar was "properly reported."²⁵ More than three years later, on April 18, 2016, Wanger filed this application for review.

II. Analysis

A. Wanger's application for review is untimely.

A party that chooses to appeal a self-regulatory organization ("SRO") action "must file an application for review with the Commission within thirty days after receiving notice of the action."²⁶ Wanger identifies no FINRA action that took place within the thirty days before his application for review was filed. Indeed, FINRA rejected Wanger's challenge to the description of the Order on BrokerCheck on December 31, 2012; Wanger did not file his application for review until April 18, 2016. Nor did Wanger request an extension of time to file an application

²² FINRA Rule 8312(e)(2)(C).

²³ *Id.*

²⁴ FINRA Rule 8312(e)(1).

²⁵ FINRA Rule 8312(e)(2)(c).

²⁶ *Orbixa Tech., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *3 (Nov. 15, 2013) (citing *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *3 (Mar. 1, 2013) (citing Section 19(d)(2) of the Exchange Act, 15 U.S.C. § 78s(d)(2), and Rule of Practice 420(b), 17 C.F.R. § 201.420(b))). Exchange Act Section 19(d) and Rule of Practice 420(b) also require that notice of SRO actions subject to Commission review be filed with the Commission so that the Commission can determine whether to review the SRO action on its own motion. *Id.* at *3 n.12 (citing *Ceballos*, 2013 WL 772515, at *5 n.10 (citing 15 U.S.C. § 78s(d)(2) and 17 C.F.R. § 201.420(b))). Wanger argues that his application is timely because FINRA never filed a notice with the Commission. As discussed below, we agree with FINRA that its action is not one for which notice to the Commission is required. In any case, we have held that "an SRO's failure to file notice with the Commission of the decision under review does not extend the applicant's deadline to file an application for review." *Id.* (citing *Boston Options Exch. Group*, Exchange Act Release No. 59927, 2009 WL 1347419, at *5 n.7 (May 14, 2009)). Even if FINRA's action were subject to Commission review, Wanger's application would still be untimely. *Citadel Sec., LLC*, Exchange Act Release No. 78340, 2016 WL 3853760, at *3 (July 15, 2016) (stating that even if the petition were subject to Commission review, it would be untimely because it was not filed within 30 days of SRO action).

for review of any earlier SRO action. We have long held that we will not extend the thirty-day period for seeking review absent "extraordinary circumstances,"²⁷ and we find no such extraordinary circumstances here. Accordingly, Wanger's application for review is untimely.²⁸

B. We lack jurisdiction over Wanger's application for review.

Even if Wanger's application for review was timely, we lack jurisdiction to consider it. We directed the parties to file briefs addressing our jurisdiction to review Wanger's application.²⁹ None of the bases for jurisdiction that Wanger asserts has merit.

1. Section 19(d) of the Exchange Act does not provide jurisdiction.

Section 19(d) of the Exchange Act authorizes us to review SRO action that: (i) imposes a final disciplinary sanction on a member of the SRO or an associated person; (ii) denies membership or participation to the applicant; (iii) prohibits or limits access to services offered by the SRO; or (iv) bars a person from becoming associated with a member.³⁰ None of these bases for the Commission's jurisdiction exists in Wanger's application.

²⁷ *Ceballos*, 2013 WL 772515, at *3 (citing 15 U.S.C. § 78s(d)(2); 17 C.F.R. § 201.420(b); and *Lance E. Van Alstyne*, Exchange Act Release No. 40738, 1998 WL 830817, at *4 & n.15 (Dec. 2, 1998)).

²⁸ *See Orbixa Tech.*, 2013 WL 6044106, at *3-4, *5 (dismissing application for review as untimely where it did not challenge any SRO action within 30 days of filing of the application); *see also John Vincent Ballard*, Exchange Act Release No. 77452, 2016 WL 1169072, at *2-3 (Mar. 25, 2016) (dismissing application for review as untimely where it did not challenge any SRO action within 30 days of filing of the application and finding no extraordinary circumstances justifying an extension); *Pennmont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *3-5 (Apr. 23, 2010) (same), *petition denied*, 414 F. App'x 465 (3d Cir. 2011).

²⁹ *Eric David Wanger*, Exchange Act Release No. 78019, 2016 WL 3181331 (June 8, 2016).

³⁰ 15 U.S.C. § 78s(d). Wanger's argument that Section 19(e) of the Exchange Act sets forth the applicable jurisdictional standard is misplaced. That section provides that, in reviewing a final disciplinary sanction imposed by an SRO, the Commission shall determine whether the associated person engaged in the conduct found by the SRO, whether the conduct violated the SRO rules at issue, and whether those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(e). We have stated that Section 19(e) is not a jurisdictional provision but rather sets forth the standards regarding the scope of our review of an SRO's final disciplinary sanction. *See, e.g., E. Magnus Oppenheim & Co., Inc.*, Exchange Act Release No. 51479, 2005 WL 770880, at *2 (Apr. 6, 2005).

a. Final disciplinary sanction

Wanger contends that FINRA's BrokerCheck disclosure constituted a final disciplinary action. "Section 19(d) grants us jurisdiction to review only those disciplinary actions in which a final disciplinary sanction is imposed."³¹ We have held that "a disciplinary action is an action that responds to an alleged violation of an SRO rule or Commission statute or rule, or an action in which a punishment is sought or intended."³² In this case, FINRA "did not invoke its disciplinary procedures, did not determine that [Wanger] had violated a statute or rule, and did not impose a final disciplinary sanction on him."³³ The Commission's Order found that Wanger violated the securities laws and imposed sanctions on him, but the Order was not a product of any FINRA disciplinary proceeding. It was, rather, the result of Commission action. FINRA's disclosure of the Order on BrokerCheck was also not a product of FINRA disciplinary action; rather, it was a collateral consequence of the Commission's Order, and that disclosure did not itself impose any sanction on Wanger.³⁴

b. Denial of membership or participation

We have stated that our jurisdiction to review SRO action that denies membership or participation to the applicant "is directed at SRO decisions actually denying applications for

³¹ *Sky Capital LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *3 (May 30, 2007).

³² *Id.* (quoting *Russell A. Simpson*, Exchange Act Release No. 40690, 1998 WL 801399, at *3 (Nov. 19, 1998)).

³³ *Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 WL 1902072, at *2 (Apr. 30, 2008) (finding that NASD's denial of Proman's request to vacate a bar imposed as a part of a settlement was not a "final disciplinary sanction" reviewable under Section 19(d)); *see also, e.g., Larry A. Saylor*, Exchange Act Release No. 51949, 2005 WL 1560275, at *3 (June 30, 2005) (finding that NASD's denial of Saylor's motion to vacate thirty-two year old principal bar was not a "final disciplinary sanction" reviewable under Section 19(d)); *Allen Douglas Sec., Inc.*, Exchange Act Release No. 50513, 2004 WL 2297414, at *3 (Oct. 12, 2004) (finding that NASD's decision disapproving certain subordinated loan agreements was not a "final disciplinary sanction" reviewable under Section 19(d)); *cf. Robert E. Strong*, Exchange Act Release No. 57426, 2008 WL 582537, at *11 (Mar. 4, 2008) (finding that NASD's issuance of a press release was not a sanction subject to review).

³⁴ *See, e.g., Proman*, 2008 WL 1902072, at *2 (denial of motion to vacate a bar order is collateral to the underlying disciplinary action and is not itself final disciplinary action that is reviewable under Section 19(d)); *Saylor*, 2005 WL 1560275, at *3 (same); *Van Alstyne*, 1998 WL 830817, at *3 (denial of a motion to set aside a default decision is collateral to the underlying disciplinary action and is not itself final disciplinary action that is reviewable under Section 19(d)).

membership or imposing restrictions on business activities as a condition of membership."³⁵ Wanger is not currently a FINRA member or associated with a FINRA member and has not applied to FINRA for membership or associational status.³⁶ And FINRA's BrokerCheck disclosure did not deny or condition Wanger's membership or participation in FINRA. As a result, FINRA's action had no impact on Wanger's membership or participation in FINRA.

c. Prohibition or limitation of access to services

"A denial of access involves a denial or limitation of 'the applicant's ability to utilize one of the fundamentally important services offered by the SRO.'"³⁷ "Such services must be central to the function of the SRO, such as access to an exchange trading floor or registration as a market maker."³⁸ Wanger does not identify any services to which he has been denied access by virtue of FINRA's BrokerCheck disclosure, and our independent review of the record reveals none.

d. Bar from association

Wanger next contends that FINRA's BrokerCheck disclosure barred him from associating with any FINRA member. But it was the Commission and not FINRA that imposed the bar on Wanger. And while Wanger asserts that his right to seek employment has been "permanently blocked" as a result of the bar, he ignores the fact that the Order granted him the right to apply for reentry, by application to the Commission, into the securities industry after a year. FINRA did not take any action against Wanger that affected his ability to apply for reentry. The BrokerCheck disclosure stated specifically that the Order provided a "right to reapply for reentry after 1 year."³⁹

³⁵ *WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 WL 5245244, at *4 (Sept. 9, 2015).

³⁶ If Wanger requested to associate with a FINRA member, and that request was denied, we would have jurisdiction to review the denial under Section 19(d). *See id.* at *4 & n.20.

³⁷ *Proman*, 2008 WL 1902972, at *2 (quoting *Morgan Stanley & Co., Inc.*, Exchange Act Release No. 39459, 1997 WL 802072, at *3 (Dec. 17, 1997)).

³⁸ *Id.*

³⁹ Indeed, Wanger has filed an application with the Commission to reenter the securities industry pursuant to Rule of Practice 193. *See* 17 C.F.R. § 201.193 (providing a process by which barred individuals can apply to the Commission for consent to become associated with an entity that is not an SRO member, *e.g.*, an investment adviser, an investment company, or a transfer agent). According to Wanger, because the Commission has jurisdiction over his application under Rule 193, it also has jurisdiction over his application for review of FINRA's BrokerCheck disclosure. Wanger cites no support for this proposition. Nor does he provide support for his assertion that both applications "are to be considered together." Wanger cannot use his Rule 193 application, which has no bearing on his application for review of FINRA

(continued...)

2. Section 19(b) of the Exchange Act does not provide jurisdiction.

Wanger further contends that FINRA has a policy of treating a bar with a right to reapply as a "permanent" bar and that FINRA's "interpret[ation]" of the Order as imposing a "permanent" bar amounted to a "proposed rule change" that established a "new standard of conduct" and required Commission approval under Section 19(b) of the Exchange Act and Exchange Act Rule 19b-4.⁴⁰ FINRA did not "interpret" the Order but merely disclosed it in accordance with its statutory obligation under Section 15A(i) and Rule 8312. Although Wanger argues that FINRA "convert[ed]" the bar with a right to reapply into a "permanent" bar, that is not the case. FINRA's BrokerCheck disclosure was taken verbatim from CRD, which accurately reported that the sanctions imposed on Wanger included a "Bar (Permanent)."⁴¹ As a result, FINRA's BrokerCheck disclosure did not establish a "new standard of conduct" implicating the requirements of Section 19(b).⁴²

C. FINRA did not deny Wanger due process.

Wanger argues that he was not "provided with the minimum requirements of due process (notice and opportunity for a hearing)" prior to FINRA's BrokerCheck disclosure and that the public release of this information "has now attached to [his] name and reputation a stigma that violates due process of law." Because FINRA is not a state actor, however, the constitutional requirements of due process do not apply in FINRA proceedings.⁴³ And the record indicates that

(...continued)

action, to confer jurisdiction over his application for review of FINRA action when it does not exist under Section 19(d).

⁴⁰ 15 U.S.C. § 78s(b); 17 C.F.R. § 240.19b-4.

⁴¹ See *The Rockies Fund, Inc.*, Exchange Act Release No. 56344, 2007 WL 2471612, at *4 n.21 (Aug. 31, 2007) (stating that "[a]lthough Respondents characterize the sanction imposed in [*Robert F.*] *Lynch* [Exchange Act Release No. 11737, 1975 WL 160406 (Oct. 15, 1975)] as a 'one-year bar and no fine,' the sanction was in fact a permanent bar with the right to reapply after one year"); see also, e.g., *Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *2, *9 & n.45, *18 (May 27, 2016) (describing a bar with a right to reapply after five years as a "permanent bar with a right to reapply to associate after five years").

⁴² See, e.g., *SIG Specialists, Inc.*, Exchange Act Release No. 51867, 2005 WL 1421103, at *5 n.26 (June 17, 2005) (stating that because the respondent's obligations were reasonably and fairly implied by exchange's rule the disciplinary action did not involve the kind of "new standard of conduct" that would implicate the Exchange Act's rule change requirements).

⁴³ See, e.g., *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *6 n.36 (July 27, 2015) (stating that "[w]e have long held the requirements of constitutional due process do not apply to FINRA proceedings because FINRA is not a state actor").

FINRA complied with its procedures under Rule 8312 (which were approved in accordance with the requirements of Exchange Act Section 19(b)) in denying Wanger's BrokerCheck dispute.⁴⁴ Wanger also cites no evidence that the adverse consequences he asserts resulted from FINRA's BrokerCheck disclosure. FINRA's BrokerCheck disclosure reported the information in the Order, and the Order was already publicly available.⁴⁵ In any case, "SRO action is not reviewable merely because it adversely affects the applicant."⁴⁶

* * *

⁴⁴ Wanger contends that the Commission "assumed" jurisdiction over FINRA's BrokerCheck disclosure through its approval of proposed changes to FINRA Rule 8312 pursuant to Section 19(b). But our authority under Section 19(b) to approve changes to Rule 8312 does not include the authority to review disclosures made pursuant to that rule. 15 U.S.C. § 78s(b).

⁴⁵ See <https://www.sec.gov/litigation/admin/2012/33-9331.pdf>. Wanger claims that FINRA's BrokerCheck disclosure "contributed to the destruction of three businesses," "dislocate[d] clients and their funds," and denied "his basic economic and property rights—credit cards, brokerage and SEP IRA accounts, and the ability to lease office space." The difficulties Wanger identifies are nothing more than the "natural and foreseeable consequences" that flow from a bar. *Michael H. Johnson*, Exchange Act Release No. 75894, 2015 WL 5305993, at *4 n.20 (Sept. 10, 2015).

⁴⁶ *Citadel Sec.*, 2016 WL 3853760, at *5 (quoting *Proman*, 2008 WL 1902072, at *2).

Because Wanger's application for review is untimely, and because we lack jurisdiction over FINRA's BrokerCheck disclosure, we dismiss the application for review.⁴⁷

An appropriate order will issue.⁴⁸

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

⁴⁷ Wanger asserts that the Commission should issue a subpoena to FINRA "to determine when, how, pursuant to what authority, and who (including metadata) filled out Form U6." Although Wanger invokes Rule of Practice 232, that rule does not permit Wanger to engage in the discovery he seeks. *See* 17 C.F.R. § 201.232 (allowing for production of documents pursuant to subpoena "in connection with any hearing ordered by the Commission"). Moreover, the information Wanger seeks does not appear relevant to the issues of whether he filed a timely application for review or whether we have jurisdiction to consider that application.

⁴⁸ We have considered all the arguments advanced in the parties' briefs. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79008 / September 30, 2016

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In the Matter of the Application

ERIC DAVID WANGER

For Review of Action Taken by

FINRA

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION OF REGISTERED
SECURITIES ASSOCIATION

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

ORDERED that Eric David Wanger's application be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields
Secretary