**UNITED STATES OF AMERICA**

**Before the**

**SECURITIES AND EXCHANGE COMMISSION**


**Administrative Proceedings**
**File No.** ~~**3-14676**~~ 3-17226

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**In the Matter of**

**ERIC DAVID WANGER**

**Respondent.**

**Application under Section 19 (e) of the Securities Exchange Act of 1934 to Review and Set Aside FINRA's Enlargement of SEC Sanction**

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Pursuant to Section 19(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78s(e), Respondent Wanger ("Respondent" or "Applicant") in the above-captioned matter, by and through his counsel, Thomas V. Sjoblom of Washington, D.C., applies to the Commission for review and reduction or cancellation of a FINRA sanction posted on FINRA's BrokerCheck website. FINRA's website posting is not authorized by law and therefore is invalid.

The reasons for Respondent's application are as follows:

1. *2012 SEC Order*. Respondent, without admitting or denying any of the Commission's allegations or findings, consented to an Order Making Findings and Imposing Remedial Sanctions issued July 2, 2012 that barred Respondent Wanger, but expressly granted Respondent the right to reapply after one (1) year. ("Bar Order" or "SEC Bar Order".) [*See Attachment A to Wanger Application under Section*

*203(f) of the Investment Advisers Act and Rule 193 for Consent to Associate ("Wanger Application")*].

2. *FINRA BrokerCheck Website: "Permanent" Bar.*

To the surprise of Applicant Wanger and his former officers and employees, FINRA, in response to the SEC Bar Order, posted on its BrokerCheck website that Mr. Wanger had been *permanently* barred. [*Attachment B to Wanger Application, Wanger Affidavit, ¶3.*] When Mr. Wanger and his counsel contacted FINRA to ascertain why the order was posted as a *permanent* bar, they were informed that it was FINRA's *policy* to treat all such orders as *permanent*. [*Attachment B to Wanger Application, Wanger Affidavit, ¶3, note 8.*] The concept of "permanence," however, was a construct created by the FINRA of its own accord, made out of whole cloth. The Commission has never said that a bar with right to reapply after one year creates a permanent bar. [*Attachment B to Wanger Application, Wanger Affidavit, ¶3, note 7.*] Nor was Respondent ever provided with the minimum requirements of due process (notice and opportunity for a hearing) by FINRA before such a posting. Instead, FINRA took it upon itself to alter the SEC Bar Order and re-interpret the words of the SEC Bar Order that now perforce has *permanently* blocked Respondent's of his right to seek employment and has now also attached to Respondent's name and reputation a stigma that violates due process of law. [1]

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[1] In a companion filing, Respondent has applied to the Commission for consent to re-enter the securities industry. So that the timing of any appeals from the Commission's ultimate determination of both applications may be coordinated to ensure that any appeals of both applications can occur simultaneously, Respondent requests that this Application under Section 19 for Commission's review of FINRA's enlargement of the SEC Bar Order be considered together with and at the same time

3. *Inability to Obtain Employment.* Since the date of the SEC's Bar Order and FINRA's posting that he is *permanently* barred, and after the demise of his own businesses, Respondent has sought but been unable to obtain any formal employment in the securities industry. He has unsuccessfully sought employment and association with numerous registered broker-dealers, investment advisers and asset managers. [*Attachment B to Wanger Application, Wanger Affidavit ¶6(a).*] However, the officers, managers and compliance officers of those entities have consistently stated that his association with them – particularly in light of the "permanent" bar that appears on the FINRA BrokerCheck website – would subject them to added business and regulatory risk because of the heightened level of regulatory – and possible enforcement – scrutiny to which they would be subjected by the SEC and FINRA were they to employ Mr. Wanger, even with the requisite supervision in place. In their view, he would constitute such a business, reputational and regulatory risk for them that they cannot risk hiring him. [*Attachment B to Wanger Application, Wanger Affidavit ¶6(a).*] Accordingly, given the inability to obtain employment (including sponsorship and supervision), Respondent was unable to reapply immediately following expiration of the one (1) year term under the Commission's Bar Order.

4. *Section 19(e) of the Securities Exchange Act of 1934.*

Section 19(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78s(e) provides that in any proceedings before the Commission to review a final disciplinary sanction imposed by a self regulatory organization ("SRO") on a

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as his Application to the Commission for consent to re-associate with a registered broker-dealer, investment advisor, or other entity , or to set up his own entity.

"participant therein," the Commission, after notice and opportunity for hearing – which may consist solely of the record before the SRO together with any supporting reasons to affirm, modify or set aside such sanction – the Commission may affirm, modify, set aside or remand such sanction back to the SRO. When undertaking this "review," the Commission shall not only determine whether the SRO made findings that the participant engaged in acts or practices in violation of the provisions of the Exchange Act and the rules thereunder, but also shall determine whether the provisions of the Exchange act and the rules thereunder "are and were applied in a manner consistent with the purposes of the [Exchange] Act." Section 19(e)(1)(A) of the Exchange Act, 15 U.S.C. §78s(e)(1)(A). If the Commission so finds, the Commission must "declare" that to be the case. If the Commission is unable to make such a finding, it "shall, by order, set aside the sanction" imposed by the SRO. Section 19(e)(1)(B) of the Exchange Act, 15 U.S.C. §78r(e)(1)(B). In addition, Section 19(e)(2) provides that if the Commission, having due regard for the public interest and the protection of investors, finds either that the sanction imposes a "burden on competition not necessary or appropriate in furtherance of the purposes of " the Exchange Act or that such sanction is "excessive or oppressive," the Commission may cancel, reduce, or require remission of such sanction by the SRO. 15 U.S.C. §78s(e)(2).

Under those provisions of the Exchange Act, Respondent Wanger apples to the Commission for review of the actions taken by FINRA to impose a sanction of a permanent bar and post such a sanction on its BrokerCheck website. The application of FINRA's so-called *policy* of converting a bar with right to reapply into

a permanent bar is not "consistent with the purposes of the [Ex change] Act." Section 19(e)(1)(A) of the Exchange Act, 15 U.S.C. §78s(e)(1)(A). The purposes of the Exchange Act, including the protection of investors and the public interest, are not furthered by allowing FINRA to increase a sanction that the Commission obtained and approved. FINRA must comply with and enforce the provisions of the Exchange Act and the rules thereunder as applied and interpreted the Commission . See Section 19(g)(1) of the Exchange Act, 15 U.S.C. §78s(g)(1). FINRA sanctions, like those imposed by the Commission, must serve the Act's future remedial purposes, and not be imposed for punitive reasons for past wrongs. [2] FINRA cannot

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[2] The Court of Appeals for the District of Columbia Circuit has held under Section 19(e) that it is an *abuse of discretion* by the Commission not to address – and explain – why a stricter sanction, including one imposed by an SRO, is necessary for remedial purposes. In PAZ Sec., Inc. v. S.E.C., then Circuit Court Judge Ginsburg wrote:

> "If the Commission upholds the sanctions as remedial, then it must explain why; furthermore, 'as the circumstances in a case suggesting that a sanction is excessive and inappropriately punitive become more evident, the Commission must provide a more detailed explanation linking the sanction imposed to those circumstances if it wishes to uphold the sanction.' [Citations omitted.] *** We do not suggest the Commission must make an on-the-record finding that a sanction is remedial, but it must *explain why imposing the most severe, and therefore apparently punitive sanction is, in fact, remedial,* particularly in light of the mitigating factors brought to its attention."
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> "The Commission did state its view that the sanctions here imposed by the NASD would 'serve as a deterrent to others who may be inclined to ignore NASD's information requests,' *but such 'general deterrence' is essentially a rationale for punishment, not for remediation.* *** Here, however, general deterrence was not considered as part of a larger remedial inquiry; the Commission offered no other rationale whatsoever. It simply held the [NASD] sanctions were not excessive or oppressive..... Nowhere did the Commission advert to any purpose other than 'deterr[ing] others who may be inclined to ignore NASD's [rules and requests].' Therefore, the Commission did not

make up the law – or its own arbitrary so-called "policy" – on its own, particularly when doing so violates constitutional due process protections. Moreover, FINRA's permanent bar is "excessive and oppressive," not only because it increases and exceeds the Commission's sanction, effectively blocking any attempt by Respondent to find employment, but also because it contributed to the destruction of three businesses, the departure of officers and employees, and worse, the dislocation of clients and their funds. Accordingly, FINRA's self-imposed sanction is not in the public interest and can hardly be said to operate for the protection of investors. [3]

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> adequately explain why the sanctions the NASD imposed upon the petitioners were not punitive rather than remedial."
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> Accordingly, "[t]he Commission abused its discretion by failing to address certain mitigating factors the petitioners raised before it and by affirming the severe sanctions imposed upon them by the NASD without first determining those sanctions were remedial rather than punitive. "

PAZ Sec., Inc. v. S.E.C., 494 F.3d 1059, 1065-66 (D.C. Cir. 2007).

[3] To justify FINRA's heightened sanction of an unqualified bar, the Commission must assume – as must FINRA – that its permanent bar serves some future prophylactic purpose of protecting against other possible future actions that may harm investors, assuming, of course, that there is an underlying "presumption" that the Respondent Wanger, as the alleged violator, presents too great a risk to the market and investors to be allowed to remain in or re-enter the securities industry because of such other possible future actions. Not only is this not necessarily the case, particularly in light of the SEC's exaggerated claims in the OIP [*see Attachment B to Wanger Application, Wanger Affidavit, ¶ 2(b), pages 2-6*], but in fact, as detailed in Wanger's Affidavit, actual harm to investors and markets can and has been caused by *FINRA's own* use of unqualified sanctions: destruction of Respondent Wanger's businesses and dislocation of clients and their funds who were satisfied with the family office services they received from WOW. [*Attachment B to Wanger Application, Wanger Affidavit, ¶¶ 4 and 5.*] FINRA's so-called policy therefore avoids addressing the fundamental contradiction that a supposedly futuristic remedial purpose may be served by *permanently excluding* an individual from the securities industry based on some notion of a perceived likelihood of *other* possible future investor harms. Such faulty logic is apparent on its face and cannot be justified.

Under these circumstances, the Commission must "declare" that FINRA's so-called policy has not been applied consistent with the purposes of the Exchange Act and should cancel the permanent bar altogether or at a minimum reduce it to the same words that the Commission's Order imposed, *to wit*: a bar with right to reapply with in one (1) year. [4]

5. *FINRA's Stated "Policy" Was Subject to Section 19(b) and Rule 19b-4 of the Exchange Act.*

By interpreting SEC Bar Order with right to reapply after one (1) year as being "permanent" bar, FINRA was obliged to file a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §78s(b)(1),

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[4] In Wright v. SEC, 112 F.2d 89, 95-96 (2d Cir. 1940), Judge Swan, disagreeing with the panel, wrote what later would become the position of the Second Circuit when reviewing SEC sanctions. What Judge Swan wrote back then is equally pertinent here:

> "The petitioner urges that the order of expulsion is unduly harsh; that an order of suspension would have accorded investors all the protection they need. So far as appears this was Wright's first infraction of the statute. For many years he has been operating in Wall Street and his transactions in Kinner stock are the only blemish upon his reputation. There is nothing to indicate that he is an habitual manipulator or would be likely to try to manipulate the market in the future. To deprive him for all time of an opportunity to pursue his calling in a lawful manner does seem severe. But a majority of the court holds the view that we are without power to supervise the Commission's discretionary determination that expulsion of the petitioner is necessary and appropriate for the protection of investors. The writer of this opinion does not share that view, believing that under the power conferred upon this court to "modify", as well as to affirm or to set aside an order in whole or in part, we may reduce the relief accorded investors. My own opinion is that the Commission should be directed to reduce it."

and Rule 19b-4 thereunder, 17 C.F.R. § 240.19b-4. Its failure to do so makes its so-called policy invalid and unenforceable.

Rule 19b-4(c) requires the filing of a proposed rule change with the Commission of any "stated policy, practice or interpretation."

> "(c) A stated policy, practice, or interpretation of the self-regulatory organization shall be deemed to be a proposed rule change unless (1) it is reasonably and fairly implied by an existing rule of the self-regulatory organization or (2) it is concerned solely with the administration of the self-regulatory organization and is **not** a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization."

17 C.F.R. 240.19b-4 (c). Rule 19b-4(a)(6) in pertinent part defines a "stated policy, practice or interpretation," as follows:

> (6) The term *stated policy, practice, or interpretation* means:
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> > (ii) Any statement made generally available to the membership of, to all participants in, or to persons having or seeking access (including, in the case of national securities exchanges or registered securities associations, through a member) to facilities of, the self-regulatory organization ("specified persons"), or to a group or category of specified persons, standard, limit, or guideline with respect to:
> >
> > ...
> >
> > (B) The *meaning, administration, or enforcement of an existing rule.*

17 C.F.R. §240.19b-4(a)(6).

Counsel has been unable to find any filing by FINRA with the Commission of any proposed rule change for its "stated policy" of interpreting the SEC Bar Order as "permanent" and can find no notice to the public of any such filing, as required by Section 19(b)(1) of the Exchange Act. Unless FINRA has met the requirements of

Section 19(b)(1) and (2) of the Exchange Act, its interpretation and policy of the SEC Bar Order as constituting a "permanent" bar is invalid. Indeed, pursuant to Section 19(d) of the Exchange Act, the Commission, as part of its oversight function, may "abrogate, add to, and delete from (hereinafter collectively referred to as 'amend') the rules of a self-regulatory organization" when necessary to "conform its rules to requirements of this title and the rules and regulations thereunder,...." 15 U.S.C. §78s(c).[5] FINRA's "stated policy" runs contrary to and enlarges upon the policies of, and the sanction authorized or imposed by, the Commission. Therefore, it is invalid and cannot be used.

6. *Public Interest and Protection of Investors*

It does not serve the public interest or the protection of investors to enlarge upon a remedial sanction imposed by the Commission. The effect of FIRNA's permanent bar dislocated clients and their funds, helped destroy three (3) businesses, and has kept a qualified person from regaining employment in the securities industry well beyond the time constraint imposed by the Commission. [*Attachment B to Wanger Application, Wanger Affidavit, ¶¶ 4, 5 and 6*]. If the Commission's CRO Staff believed that Respondent's re-entry application would be a "no brainer" after one (1) year, it behooves FINRA to abide by the same standards. It is counterproductive for FINRA to enlarge the sanction and create a set of conditions that make it impossible for Respondent to satisfy – or find a firm that can

[5] Section 19(g)(1) of the Exchange Act also states that "[e]very self-regulatory organization shall comply with the provisions of this title [and] the rules and regulations thereunder...." 15 U.S.C. §78s(g)(1).

satisfy – the requirements of SEC Rule 193, including the need for supervision and sponsorship.

7. *Conclusion .* Respondent Wanger requests that the Commission declare FINRA's so-called policy invalid and cancel FINRA's self-imposed "permanent" bar.

Dated: April 18 , 2016

Respectfully Submitted,

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