UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMISSION

Administrative Proceedings
File No. 3-17226

In the Matter of Application of

Initial Brief of Respondent

ERIC DAVID WANGER

Respondent

Respondent, Eric David Wanger ("Respondent" or "Wanger"), by and through his undersigned counsel, submits this opening brief on the "preliminary issue" of the Commission's jurisdiction over Respondent's Application under Section 19(e) of the Securities Exchange Act ("Respondent's Section 19 Application").

I. SEC HAS JURISDICTION OVER FINRA AS AN SRO TO REVIEW SANCTIONS

A. The Congressional Scheme Under the Exchange Act of 1934

It is axiomatic that under the Exchange Act the Commission has been granted authority to regulate and oversee the operations of all Self Regulatory Organizations ("SROs") in the securities industry. *See generally* Section 19 of the Exchange Act, 15 U.S.C. § 78r. [1] The NASD was registered with the Commission under the 1938 the Maloney Act Amendments to the Exchange Act. *See* Section 19(a) of the Exchange Act, 15 U.S.C. §r(a). That registration brought the NASD under the jurisdiction and oversight of the Commission.

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[1] The Financial Industry Regulatory Authority ("FINRA") , as a registered securities

As originally adopted on June 25, 1938, the Maloney Act Amendments also provided for Commission review of any SRO disciplinary action:

> " (g) If any registered securities association (whether national or affiliated) shall take any disciplinary action against any member thereof, or shall deny admission to any broker or dealer seeking membership therein, *such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby* filed within sixty days after such action has been taken or within such longer period as the Commission may determine."

S. 3255, 75th Cong., 3rd Sess, Chap. 677, at 1073. (June 25, 1938) (emphasis added). At no point since 1938 has the SEC abandoned its jurisdiction over and right to review SRO disciplinary proceedings.

In 1975, Congress again amended the Exchange Act.to provide **increased** authority of the Commission over SROs, particularly through Section 19. *See* Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97. Without abandoning its commitment to "the unique system of self-regulation in the securities industry," S. Rep. No. 94-75, at 2 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 179, 181, "Congress specifically and importantly modified that system to **enhance** the SEC's oversight of self-regulatory organizations." Nat'l Ass'n of Sec. Dealers, Inc. v. S.E.C., 431 F.3d 803, 807 (D.C. Cir. 2005)(emphasis added). The court there stated:

> "The congressional scheme, in short, establishes a system in which the Commission not only closely supervises and approves the processes by which NASD brings disciplinary action, but in which the Commission fully revisits the issue of liability, and can completely reject or modify NASD's decision as it deems appropriate. NASD's disciplinary process essentially supplants a disciplinary action that might otherwise start with a hearing before an ALJ. And NASD's authority to discipline its members for violations of federal securities law is entirely derivative. The authority it exercises ultimately belongs to the SEC, and the legal views of the self-regulatory organization must yield to the Commission's view of the law. This is made

clear in the legislative history of the 1975 amendments."

Id. at 806-07.[2] Therefore, the Commission has jurisdiction over FINRA, including its disciplinary proceedings.

B. Section 19 of the Exchange Act: Commission Proceedings to Review SRO Disciplinary Actions

1. Section 19(d)(2) of the Exchange Act.

Section 19(d)(2) of the Exchange Act grants to the appropriate regulatory agency – which in this case is the Commission[3] – specific jurisdiction over any final disciplinary action imposed by an SRO on any "member, participant, applicant or other person," which sanction shall be subject to review on the Commission's own motion or upon application by the person "aggrieved thereby." 15 U.S.C. §78s(2)., Section 19(d)(2) is a clear grant of authority – which is mandatory and not permissive – for Commission review of Respondent's Section 19 Application.

2. Section 19(e) of the Exchange Act

Section 19(e)(1) of the Exchange Act provides that in any proceeding to review a final disciplinary sanction imposed by an SRO, the Commission, as the appropriate regulatory agency, may by order *affirm* the sanction imposed by the

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[2] "[C]are should be exercised, lest the use of phrases such as 'partnership' and 'cooperative regulation' lead to the impression that the industry and the government fulfill the same function in the regulatory framework or that they enjoy the same order of authority or deserve the same degree of deference .... The self-regulatory organizations exercise authority **subject to** SEC oversight. They have no authority to regulate independently of the SEC's control." Nat'l Ass'n of Sec. Dealers, Inc. v. S.E.C., 431 F.3d 803, 806-07 (D.C. Cir. 2005), quoting from S. Rep. No. 94-75, at 23 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 179, 201.

[3] The "appropriate regulatory agency" is defined in Section 3(a)(34) (F) of the Exchange Act to mean, in the case of a person who exercises investment discretion over an account and is not a bank, "the Commission in the case of all other such persons." 15 U.S.C §78c(34)(F).

SRO, *modify* it, or *remand* the matter to the SRO for further proceedings, if it finds that the participant has engaged in such acts or practices "as the SRO has found him to have engaged in," that such acts or practices violated the provisions of the Exchange Act or the rules and regulation thereunder, and that such provisions "are and were applied in a manner consistent with the purposes of this title." *See* Section 19(e)(1) of the Exch. Act, 15 U.S.C. §78s(e)(1). If the Commission does not make such findings, it is required to *set aside* the sanction imposed by the SRO and, if appropriate, remand the matter to the SRO for further proceedings. *See* Section 19(e)(2) of the Exch. Act, 15 U.S.C. §78s(e)(2).

This section explicitly grants the Commission jurisdiction to review SRO imposed sanctions. Congress granted to the Commission as part of its oversight function of SROs, including the FINRA, the necessary power to review SRO sanctions over participants in the securities industry. Congress did not believe that an SRO, though it wield self policing powers over its members, should be free of administrative oversight, any more than a federal district court should be free from appellate review. Were it not so, Section 19(e) would then afford an empty remedy if an aggrieved person were unable to seek Commission review of the sanction.

Once section 19 (e) is invoked, the Commission, after notice and opportunity for hearing, must review the SRO sanction. That review may consist of the record before the SRO and an opportunity for the presentation of supporting reasons to affirm, modify or set aside the sanction. *See* 19(e)(1) of the Exch. Act , 15 U.S.C ¶78s(e)(1). Paragraph 5 of Respondent's affidavit, attached to Respondent 's Section 19 Application as Exhibit B, describes Respondent's efforts to dispute what

appears on the FINRA BrokerCheck website, which publicized the Commission's July 2012 Order Making Findings and Imposing Remedial Sanctions (hereinafter "Commission's Sanction Order") as mandating a permanent bar. Footnote 7 of Respondent's affidavit cites to and quotes from a FINRA email that states that is it FINRA's "policy" to portray the sanction as a "permanent bar, notwithstanding the right to reapply...." In contrast, the Commission's Sanction Order states that Respondent Wanger is barred "with the right to reapply for reentry after one (1) year." *See* Respondent Section 19 Application, Exhibit A, Section IV. B, pages 9-10. Accordingly, FINRA posted on its BrokerCheck website information that is inconsistent with and, in fact, is more draconian than the explicit language of the Commission's Sanction Order. Such action by FINRA violates Section 19(e)(1).

The purpose of the Commission' s Sanction Order was not to deprive Respondent of his chosen profession for a lifetime. To induce settlement, the enforcement staff of the Chicago Regional Office ("CRO staff") told Respondent and his then counsel that his application to re-enter after one year would be a "no brainer." *See* Paragraph 2 (c) of Exhibit B, attached to Respondent's Section 19 Application. FINRA has transformed that settlement into a *permanent* condition and stigma, contrary to the representations of the CRO staff.

Such action by FINRA is not only inconsistent with the remedial purposes of the Exchange Act (see discussion at point III.B. below) and therefore violated section 19(e)(1 and 19 (g)(1) of the Act, but also violates constitutional due process. FINRA posted the language of a permanent bar without affording Respondent Wanger prior notice and opportunity for a hearing. *See Wisconsin v. Constantineau,* 400 U.S. 433,

91 S. Ct. 507, 27 L. Ed. 2d 515 (1971)(posting of a notice not only produces the described conditions or exhibits specified traits, but also suggests a danger to the community, which is an unconstitutional denial of procedural due process in absence of notice and hearing prior to such posting.) [4] Such conduct also raises serious stigma-plus claims. [5]

C. The Commission Has Jurisdiction Over BrokerCheck.

Section 15A (i) of the Exchange Act requires FINRA to maintain a system for collecting and retaining "registration information," which is defined to include disciplinary and regulatory proceedings. *See* Section 15A(i)(5), 15 U.S.C. §78o-3(i)(5). With the Commission's approval, BrokerCheck was established in 1988 (then known as the Public Disclosure Program). In December 2013, almost 18 months after entry of the Order in this case, the Commission exercised its jurisdiction to approve a proposed rule change by FINRA to include in BrokerCheck information about non-FINRA member firms and their associated persons. *See*

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[4] FINRA can be a state actor because it has the authority to prosecute violations of the **federal** securities laws. "The 1975 amendments are also significant, for our purposes, because, for the first time, **Congress** explicitly authorized NASD to adjudicate **in the first instance** cases in which members had allegedly **violated the Exchange Act or SEC rules and regulations** interpreting it." Nat'l Ass'n of Sec. Dealers, Inc. v. S.E.C., 431 F.3d 803, 808 (D.C. Cir. 2005)(emphasis added). No private actor or private trade association is granted authority by Congress to prosecute violations of **federal** law, and the authority to do so makes FINRA a state actor.

[5] A "stigma-plus" claim is a subset of procedural due process. It is brought for injury to one's reputation (the stigma) coupled with the deprivation of some tangible interest or property right (the plus), without adequate process. Although the "plus" alleged is often termination of government employment, it also applies to "termination of **some other legal right or status.**" *See e.g., White Plains Towing Corp v. Patterson*, 991 F.2d 1049, 1063 (2nd Cir. 1993).

Release No. 34-71195 (December 27, 2013). The Commission has thus assumed jurisdiction over FINRA's use of BrokerCheck.

Pursuant to Section 19(b) of the Exchange Act, FINRA must file with the Commission any "proposed rule change" over BrokerCheck. *See* 15 U.S.C. §78r(b). Subparagraph (a)(6) of Rule 19b-4 states that a "stated policy, practice, or interpretation" of the SRO constitutes a "proposed rule change" when:

> "(ii) Any statement made generally available to the membership of, to all participants in, or to persons having or seeking access ... to facilities of, the self-regulatory organization ("specified persons"), or to a group or category of specified persons ... establishes or **changes** any standard, limit, or guideline with respect to: * * * (B) The meaning, administration, or **enforcement** of an existing rule.

See 17 C.F.R. 240.19b-4(a)(6)(ii)(B) (emphasis added) [6]

The FINRA ombudsman orally informed Respondent that the permanent bar language was consistent with FINRA's "policy" to interpret such bars as permanent, *see* Respondent's Affidavit, ¶3, note 8, and then memorialized that statement in an email to Respondent, stating that it was "FINRA's policy" to treat "this type of sanction" as a "permanent bar, notwithstanding the right to reapply." *Id.* note 9.

Since FINRA's stated policy and interpretation in fact relates to enforcement of existing FINRA and SEC rules, FINRA must first make a Rule 19-4 filing with the Commission, and the Commission has jurisdiction to decide whether to approve it.

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[6] Under paragraph (c) of Rule 19b-4, a "stated policy, practice or interpretation" by the SRO 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)(emphasis added).

Respondent has been unable to locate any such 19b-4 filing, which would seem particularly necessary when depriving persons of their constitutional due process rights and publishing statements that engender cognizable stigma-plus claims.

II. SINGLE FILING OF RESPONDENT'S JOINT COMPANION APPLICATIONS

Respondent filed the instant Application as a companion filing along with his Application under Section 203(f) of the Investment Advisers Act and Rule 193, 17 C.F.R. §201.193 ("Respondent's Application to Associate"). *See* Respondent's Section 19 Application, note 1, and Respondent's Application to Associate, note 3, both dated April 18, 2016 and filed jointly. Both Applications are to be considered together and not to be read apart from each other.[7] The Commission has jurisdiction over the Application to Associate and therefore has jurisdiction over Respondent's Section 19 Application.

III. ABUSE OF DISCRETION TO DENY REVIEW AND ALLOW PUNITIVE SANCTION TO STAND

The Commission has asserted jurisdiction over NASD and FINRA since NASD came into existence in 1938 as an SRO. It would be highly anomalous if the Commission were now – more than 75 years later – to claim that it lacks jurisdiction over FINRA, especially over FINRA's treatment of the Commission's own enforcement proceedings and sanctions. Such a claim would constitute an abuse of discretion.

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[7] *See* Application, note 1 ("Respondent requests that this Application under Section 19 ... be considered together with and at the same time as his Application ... for consent to re-associate...") Applicant also specifically requested coordinated disposition to ensure simultaneous appeals of both applications. *See* Respondent's Application for Consent to Associate, note 3.

A. Commission Cannot Disregard The Statutory Scheme

FINRA has informed Respondent that it is up to the SEC – not FINRA – to allow re-entry, and until the Commission acts, the posting on BrokerCheck will remain. *See* Affidavit ¶3, attached as Exhibit B to Respondent's Section 19 Application. If FINRA can claim that it lacks jurisdiction to change its posting and at the same time the Commission, in disregard of the statutory scheme outlined above, also states that it lacks jurisdiction to review FINRA's action, Respondent is caught in "never, never land." If that is true, then FINRA may create sanctions of its own volition that even the Commission cannot remove, and the aggrieved party has no recourse.[8] Such a result, however, would be contrary to the jurisdictional statutory scheme and an abuse of discretion.

B. Lack Of Remedial Purpose

It constitutes an abuse of discretion for the Commission not to address – and explain – why a stricter sanction, especially one imposed by an SRO, is necessary for remedial purposes. *See PAZ Sec., Inc. v. SEC.*, 494 F.3d 1059 (D.C. Cir. 2007). There, 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.] *** [I]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.

[8] If FINRA is neither a private actor subject to suit, *see e.g., In Re Series 7 Broker Qualification Exam Scoring Lit.*, 548 F.3d 110 (D.C.Cir. 2008), nor a state actor, *see e.g., Santos-Buch v. FINRA,* 32 F. Supp. 475 (S.C.N.Y. 2014), then FINRA can act with impunity. The only redress that can be provided will be that afforded by the Commission.

> "The Commission did state its view that the sanctions here imposed by the NASD would 'serve as a deterrent to others ... *but such 'general deterrence' is essentially a rationale for punishment, not for remediation.*"

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

No remedial purpose is served by converting the Commission's Sanction Order from a right to reapply after one year into a permanent bar, perhaps the most draconian remedy FINRA can apply, when to do so denies Respondent not only of ability to seek employment, but also his basic economic and property rights – credit cards, brokerage and SEP IRA accounts, and ability to lease office space. Such regulation goes way too far [9] – especially for conduct that equates to no more than $69 per month and 00.85 % of fees - and attaches a stigma-plus that should never have been intended by the Commission, though clearly foreseeable. [10]

IV. CONCLUSION

For the foregoing reasons, FINRA's BrokerCheck posting should be removed.

Dated: June 30, 2016

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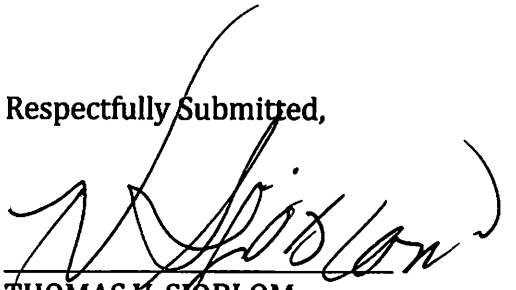
[9] There is nothing remedial about denying people their basic property and other economic rights. Such regulation goes way too far and may rise to the level of constitutional violations. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (Justice Holmes, in developing the concept of a regulatory taking, explained that "[t]he general rule at least is that, while property may be regulated to a certain extent, **if regulation goes too far** it will be recognized as a taking."). Respondent cannot be denied through regulation "the most essential sticks in the bundle of rights" commonly characterized as property. *See Horne v. Dep't of Agriculture*, 135 S.Ct. 2419, 192 L.Ed.2d 388, 83 USLW 4503 (2015)(regulatory taking of personal property); *Lucas v. South Carolina Costal Council*, 505 U.S. 1003, 112 S.Ct. 2866, 120 L.Ed. 798(1992)(regulatory taking).

[10] "[E]ven wrongdoers are entitled to assume that their sins may be forgotten." *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on June 30, 2016, he caused a copy of Respondent's Initial Brief and Motion to Extend Time to File Briefs to be deposited into the U.S Mails for overnight delivery on:

Brent Fields, Secretary
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Washington, D.C. 20549-1090

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