BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Eric David Wanger

File No. 3-17226

FINRA'S RESPONSE TO RESPONDENT'S INITIAL BRIEF ON PRELIMINARY ISSUE OF JURISDICTION

I. INTRODUCTION

Eric David Wanger ("Wanger") filed an application requesting that the Securities and Exchange Commission ("Commission") review and effectively edit information FINRA discloses through BrokerCheck® that a Commission order bars him "permanently" from the securities industry. The Commission thereafter directed Wanger and FINRA to file briefs addressing the threshold question of whether the Commission has jurisdiction to consider Wanger's application for review under Section 19(d) of the Securities Exchange Act of 1934 ("Exchange Act"). The parties' initial briefs on this issue make it abundantly clear that no ground exists under Section 19(d) for the Commission to consider Wanger's request to cancel the permanent bar description noted in BrokerCheck. The Commission should therefore dismiss his application for lack of jurisdiction.

II. FACTS

The relevant facts are plain and Wanger does not dispute them. They are worthy of repeating here.

In 2012, the Commission issued an order, to which Wanger consented, barring him from the securities industry with the right to reapply for reentry after one year to the appropriate self-regulatory organization or the Commission. RP 53-63. The Commission's final regulatory action was reported to the Central Registration Depository ("CRD®") through a Uniform Disciplinary Reporting Form ("Form U6") that indicated the Commission's order included sanctions imposing a "permanent" bar with the right to reapply for reentry after one year. RP 19-29, 131-37. In accordance with FINRA Rule 8312, and consistent with the Form U6 reporting the Commission's bar order, FINRA discloses through its publicly-available BrokerCheck database that the Commission's order bars Wanger "permanently" with the right to reapply for reentry to the securities industry after one year. *See* FINRA Rule 8312(c); RP 3-17.

III. ARGUMENT

Wanger's initial brief offers several iterations of a singular, flawed claim—FINRA's BrokerCheck disclosure imposes a "final disciplinary sanction" that is subject to Commission review under Section 19(d) of the Exchange Act. No information that FINRA discloses through BrokerCheck about the Commission's bar order, however, constitutes a FINRA-imposed disciplinary sanction that is subject to Commission review under the "final disciplinary sanction" prong of Exchange Act Section 19(d). Such information, which FINRA must disclose under FINRA Rule 8312(c), is simply derivative of and incidental to the Commission's final regulatory action barring Wanger from the securities industry. FINRA's BrokerCheck disclosure is consistent with the terms of the Commission's bar order, and the Form U6 reporting that order, and in no way alters or conditions the right to apply for reentry that the Commission granted

Wanger therein. Because all possible grounds for jurisdiction are absent in this matter, the Commission should dismiss Wanger's application for review.[1]

A. FINRA's BrokerCheck Disclosure Does Not Impose a Final Disciplinary Sanction

FINRA imposes a final disciplinary sanction subject to Commission review under Exchange Act Section 19(d) only when it imposes a "punishment or sanction" following an independent "determination of wrongdoing." *See Morgan Stanley & Co., Inc.*, 53 S.E.C. 379, 383 (1997) (internal quotation marks omitted). That did not happen here. FINRA did not employ its disciplinary procedures against Wanger, it did not determine independently that he violated any statute or rule, and it thus did not impose any final disciplinary sanction on him. *See Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 955-56 (2004) ("Section 19(d) authorizes Commission review when an SRO, through its disciplinary process, determines to impose a final disciplinary sanction . . . .").

The FINRA BrokerCheck disclosure about which Wanger complains results from the requirement that FINRA release such information to the public and is merely incidental or collateral to the Commission's final regulatory action barring him from the securities industry. *See* FINRA Rule 8312(c) (requiring FINRA to release through BrokerCheck 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 reported to CRD on a uniform registration

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[1] 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 associated person; (2) denies membership or participation to an applicant; (3) prohibits or limits any person in respect to access to services offered by FINRA or a member; or (4) bars any person from associating with a member. 15 U.S.C. § 78s(d)(1), (2); *see also WD Clearing, LLC*, Investment Company Act Release No. 75868, 2015 SEC LEXIS 3699, at *10 (Sept. 9, 2015). Wanger does not claim, nor could he make a meritorious claim, that FINRA's BrokerCheck disclosure is subject to Commission review under any prong other than the "final disciplinary sanction" prong of Exchange Act Section 19(d).

form). Releasing information to the public about a Commission bar order is not, and should not be confused with, FINRA itself imposing a final disciplinary sanction. *See Robert E. Strong*, Exchange Act Release No. 57426, 2008 SEC LEXIS 467, at *42-43 (Mar. 4, 2008) (finding a press release concerning a disciplinary action against respondent was not an NASD imposed sanction subject to Commission review). FINRA imposes no disciplinary sanction on Wanger that is subject to Commission review under Section 19(d) of the Exchange Act as a result of its BrokerCheck disclosure concerning the bar that the Commission, not FINRA, imposed on him.[2] *See, e.g., Larry A. Saylor*, 59 S.E.C. 586, 591 (2005) (finding action collateral to an underlying disciplinary action imposing sanctions was not reviewable as a "final disciplinary sanction").

B. FINRA's BrokerCheck Disclosure Does Not Condition Wanger's Right to Apply for Reentry

Wanger's puzzling claim that FINRA imposed a final disciplinary sanction on him is itself premised on the misguided contention that FINRA's BrokerCheck disclosure is inconsistent with the terms of the Commission's order and attaches to it conditions that preclude him from reentering the securities industry. These alleged conditions do not exist. The information that FINRA disclosed through BrokerCheck is plainly consistent with the terms of the Commission's bar order and the Form U6 that reports the Commission's final disciplinary action. Nothing in the information that FINRA discloses through BrokerCheck imposes any restriction on Wanger's ability to apply for reentry.

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[2] As he does in his application for review, Wanger claims in his initial brief that Section 19(e) of the Exchange Act grants the Commission jurisdiction to review FINRA action. He is mistaken. Section 19(e) specifies the Commission's standard of review of a final disciplinary sanction imposed by a self-regulatory organization like FINRA. *See* 15 U.S.C. § 78s(e). Because FINRA's release of information through BrokerCheck is not FINRA imposing a final disciplinary sanction, the standard of review articulated in Exchange Act Section 19(e) does not apply. *See Sky Capital LLC*, Exchange Act Release No. 55828, 2007 SEC LEXIS 1179, at *9, 10 n.11 (May 30, 2007) ("If we find that we do not have jurisdiction, we must dismiss the proceeding.").

As an initial matter, FINRA's BrokerCheck disclosure is not, as Wanger claims, inconsistent with the Commission's bar order. Although Wanger conveniently characterizes the bar imposed by the Commission as a "one-year voluntary sanction," RP 71, the permanent character of that bar is without any legitimate dispute. A bar with a right to reapply after one year is in fact a "permanent" bar.[3] *See Rockies Fund, Inc.*, Exchange Act Release No. 56344, 2007 SEC LEXIS 1954, at *17 n.21 (Aug. 31, 2007) (citing *Robert F. Lynch*, 46 S.E.C. 5, 11 & n.19 (1975)). The Form U6 reporting the Commission's final regulatory action indicates that the bar imposed on Wanger is permanent and such information is properly disclosed by FINRA through BrokerCheck.[4] *See Page*, 2016 SEC LEXIS 1925, at *33 & n.45 (discussing the distinctions between a true time-limited bar that expires automatically and a permanent bar with a right to reapply).

In any event, the argument that FINRA's BrokerCheck disclosure imposes conditions on or limits Wanger's ability to apply for reentry to the securities industry is unfounded. Wanger's

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[3] As the Commission has made clear, a bar with a right to reapply, as opposed to a bar that expires automatically, provides additional investor protections because it requires barred persons to apply for consent to associate prior to reentering the industry. *See Edgar R. Page*, Investment Advisers Act Release No. 4400, 2016 SEC LEXIS 1925, at *33 & n.45 (May 27, 2016).

[4] As Wanger accurately states, FINRA Rule 8312 concerning BrokerCheck disclosure fulfills FINRA's statutory obligation under Section 15A(i) of the Exchange Act to provide registration information to the public. *See* Order Approving Proposed Rule Change to Availability of Information Pursuant to FINRA Rule 8312 (FINRA BrokerCheck Disclosure), 74 Fed. Reg. 61193, 61196 & n. 37 (Nov. 23, 2009). As he recognizes also, the Commission approved the disclosure requirements set forth in FINRA Rule 8312(c) pursuant to its authority under Section 19(b) of the Exchange Act. *Id.* at 61196. Neither Exchange Act Section 15A(i) nor Section 19(b), however, grants the Commission jurisdiction to review a BrokerCheck disclosure made under FINRA Rule 8312(c). *Cf. Silver v. NYSE*, 373 U.S. 341, 357-58 (1963) (concluding that, although Section 19(b) of the Exchange Act grants the Commission authority to review NYSE rulemaking, it does not confer on the Commission jurisdiction to review the enforcement and application of those rules). While the Commission has numerous oversight tools that may apply to FINRA's rulemaking proposals, Wanger claims jurisdiction in this matter under Section 19(d) of the Exchange Act.

initial brief, which discusses his so-called "companion filing" under Section 203(f) of the Investment Advisers Act of 1940, makes clear that Wanger understands well that the right to reapply for reentry provided in the Commission's bar order remains unchanged.[5] FINRA has taken no action against Wanger that imposes any tangible limit on his ability to seek reentry to the securities industry. *Cf. Joseph Dillon & Co.*, 54 S.E.C. 960, 965 (2000) ("The operation of the Rule and the NASD's exemption denial have no bearing on Dillon's membership in the NASD, which continues unchanged whether or not the exemption is granted."). Any adversity or "stigma" that Wanger claims he has suffered as a result of FINRA's BrokerCheck disclosure fails to provide ground for the Commission to consider his application for review under Section 19(d) of the Exchange Act.[6] *See, e.g., id.* ("SRO action is not reviewable merely because it adversely affects the applicant."); *Morgan Stanley*, 53 S.E.C. at 383 ("We determined that the action did not have a disciplinary character, notwithstanding its adverse impact on the member."); *see also WD Clearing*, 2015 SEC LEXIS 3699, at *10 ("[T]here must be a statutory

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[5] Rule 193 of the Commission's Rules of Practice specifies the procedures and standards for the Commission to assess Wanger's application for reentry. *See* 17 C.F.R. §201.193(a), (d). That process nevertheless does not involve FINRA nor concern FINRA's BrokerCheck disclosure. The Commission's consideration of Wanger's application for reentry puts in stark contrast the lack of a jurisdictional basis for the Commission to review FINRA's BrokerCheck disclosure under Section 19(d) of the Exchange Act.

[6] Wanger's "stigma-plus" due process claim fails on several levels. FINRA is not a state actor subject to due process requirements. *See Eric J. Weiss*, Exchange Act Release No. 69177, 2013 SEC LEXIS 837, at *21 n.40 (Mar. 19, 2013) (collecting cases); *see also Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004) (stating that both the "stigma" and the "plus" in a stigma-plus claim must come from state action). Moreover, Wanger has identified no tangible burden placed on him as a result of FINRA's BrokerCheck disclosure. *See Ganek v. Liebowitz*, No. 15cv1446, 2016 U.S. Dist. LEXIS 30721, at *29 (S.D.N.Y. Mar. 10, 2016) (stating the prerequisites for a "stigma-plus" due process claim). Were Wanger somehow stigmatized by FINRA's BrokerCheck disclosure, a fact that is not established by the record, such stigma, without more, is insufficient to satisfy the requirements for a "stigma-plus" due process claim. *See id.* at *33 ("[D]eleterious effects flowing directly from a sullied reputation, standing alone, do not constitute a plus under the stigma-plus doctrine." (internal quotation marks omitted)).

basis for us to exercise jurisdiction."). Claims similar to those Wanger presents here, namely that self-regulatory action has the effect of or is tantamount to imposing a sanction or limitation that is subject to Commission review under Exchange Act Section 19(d), have been correctly dismissed by the Commission for lack of jurisdiction. *See, e.g.*, *WD Clearing*, 2015 SEC LEXIS 3699, at *19 (rejecting arguments that FINRA "effectively" barred the applicant's representatives from association with a FINRA member); *Lawrence Gage*, Exchange Act Release No. 54600, 2006 SEC LEXIS 2327, at *20 (Oct. 13, 2006) ("Nor does the PHLX's action have the effect of barring any person from becoming associated with a PHLX member."); *Allen Douglas Sec.*, 57 S.E.C. at 957-58 (dismissing an application for review for lack of jurisdiction where the applicant claimed NASD action was "tantamount to a disciplinary sanction").

Because Wanger has established no ground for the Commission to consider his complaints, the Commission should dismiss Wanger's application for review.

Respectfully submitted,

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Date: July 15, 2016

CERTIFICATE OF SERVICE

I, Gary Dernelle, certify that on July 15, 2016, I caused the original and three copies of FINRA's Brief in Response to Respondent's Initial Brief on Preliminary Issue of Jurisdiction, 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:

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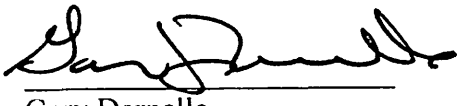
Electronic email and overnight delivery were used as methods of service on applicant's counsel because a facsimile number was not provided to FINRA.



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July 15, 2016

VIA MESSENGER

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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 Response to Respondent's Initial Brief on Preliminary Issue of Jurisdiction in the above-captioned matter.

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

Very truly yours,

Gary Dernelle

Enclosures

cc: Thomas V. Sjoblom