

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9304 / March 29, 2012

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66678 / March 29, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3386 / March 29, 2012

INVESTMENT COMPANY ACT OF 1940
Rel. No. 30013 / March 29, 2012

Admin. Proc. File No. 3-14676

In the Matter of

ERIC DAVID WANGER
and
WANGER INVESTMENT MANAGEMENT, INC.

ORDER DENYING
PETITION FOR
INTERLOCUTORY REVIEW

Wanger Investment Management, Inc., a registered investment adviser, and Eric Wanger, its owner, president, and compliance officer (collectively, the "Respondents"), seek interlocutory review of an administrative law judge's order denying their motion to dismiss the order instituting proceedings ("OIP") against them. The Division of Enforcement (the "Division") opposes the petition for interlocutory review. For the reasons discussed below, interlocutory review is denied.

I.

On December 23, 2011, the Commission issued an OIP against Respondents alleging, among other things, violations of the antifraud provisions of the securities laws in connection with Respondents' efforts to "mark the close," -- *i.e.*, the placing and executing of orders shortly before the close of trading on any given day to artificially affect the closing price of a security -- in certain thinly-traded securities held by a hedge fund that Eric Wanger managed.

On January 26, 2012, Respondents moved to dismiss the OIP on the grounds that the Commission failed to issue the OIP within the 180-day time limit established by Section 929U of

the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹ Section 929U provides that, "[n]ot later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action."² Respondents argued that, because the Commission provided them with a written Wells notice on June 7, 2011, the 180-day time limit expired on December 3, 2011, and therefore the issuance of the OIP on December 23, 2011, was untimely. Section 929U allows the Director of the Division (or the Director's designee) to extend the 180-day deadline for an additional 180 days if the Director "determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action cannot be completed within the 180 days . . . after providing notice to the Chairman of the Commission."³ Respondents argued that the Division failed to take these steps to obtain an extension.

On February 21, 2012 (the "February 21 Order"), the law judge rejected Respondents' assertions that the Division failed to establish compliance with the 180-day time limit and denied the motion to dismiss the OIP.⁴ On February 28, 2012, Respondents asked the law judge to certify the February 21 order for interlocutory review and to stay the proceedings.

On March 12, 2012, the law judge denied Respondents' application for certification and for a stay. The law judge found that an appeal of her February 21 Order would present a mixed question of law and fact, not "a controlling issue of law as to which there is substantial ground for difference of opinion,"⁵ and therefore was not appropriate for certification.

II.

Respondents have now filed the present petition urging the Commission to exercise its discretionary authority to grant interlocutory review of the law judge's February 21 Order and to stay the proceedings. Respondents argue primarily that Section 929U requires a determination that an investigation is sufficiently complex in order to warrant an extension of time to institute proceedings; that the Division's only evidence of its claimed compliance with Section 929U is an affidavit that does not reference any "complexity determination"; and that the Division's failure to demonstrate that the Director made a "complexity determination" constitutes "extraordinary circumstances," warranting interlocutory review.

The Division opposes Respondents' petition, arguing that it "lacks any trace of the 'extraordinary circumstances' needed for the Commission's granting of interlocutory review and

¹ Section 929U, also known as Section 4E of the Securities Exchange Act of 1934, is codified at 15 U.S.C. § 78d-5.

² 15 U.S.C. § 78d-5(a)(1).

³ 15 U.S.C. § 78d-5(a)(2).

⁴ The law judge also denied Respondents' request for a subpoena seeking the Division's production of all documents "evidencing compliance" with Section 929U.

⁵ 17 C.F.R. § 201.400(c)(2) (setting forth the requirements for certification).

should be denied." The Division contends that it fully complied with Section 929U, and that even if it had not complied with Section 929U, dismissal of the OIP would not be warranted because the 180-day period is an internal deadline for Commission staff and not a statute of limitations.

III.

The Commission generally does not consider petitions for interlocutory review where the law judge has "declined to certify [the] motion for interlocutory review."⁶ Although the Commission has discretion to grant interlocutory review on its own motion at any time, it has made clear that such review is "disfavored" and is generally granted only in "extraordinary circumstances."⁷ In setting this standard, the Commission has sought "to make clear that petitions for interlocutory review . . . rarely will be granted."⁸

The standard for interlocutory review has not been met here. There is no indication that the issues raised by the February 21 Order present the kind of "extraordinary circumstances" warranting the Commission's interference with the orderly hearing process.⁹ Moreover, as the Commission has stated in a similar situation, "whether the Division took the necessary steps to comply with the requirements in Section 929U for obtaining an extension to the 180-day deadline" is "a mixed one of law and fact," and therefore is not appropriate for certification for interlocutory appeal.¹⁰ The appropriate remedy for Respondents' challenge to the Commission's exercise of prosecutorial discretion is to litigate the instant proceeding to a final decision.¹¹

Accordingly, IT IS ORDERED that Respondents' petition for interlocutory Commission review of the law judge's February 21, 2012 order be, and hereby is, denied.¹²

⁶ *Montford & Co, Inc.*, Investment Advisers Act Rel. No. 3311 (Nov. 9, 2011), 102 SEC Docket 48181, 48184 (order denying suggestion for interlocutory review).

⁷ 17 C.F.R. § 201.400(a); *see Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Securities Exchange Act Rel. No. 49412 (Mar. 19, 2004), 82 SEC Docket 1744, 1749 ("The Commission adopts proposed Rule 400 to make clear that petitions for interlocutory review are 'disfavored' and rarely will be granted. The amendment recognizes, however, that the Commission retains discretion to undertake such review on its own motion at any time.").

⁸ *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, 82 SEC Docket at 1749.

⁹ *See, e.g., Kevin Hall, CPA*, Exchange Act Rel. No. 55987 (June 29, 2007), 90 SEC Docket 3068 (holding that Respondents' challenge to the efficacy of counsel during the investigation and Wells process, and their complaint about the Division's tardy production of documents, did not constitute "extraordinary circumstances" warranting interlocutory review).

¹⁰ *Montford & Co.*, 102 SEC Docket at 48184 & n.7 (citing cases).

¹¹ *Montford & Co.*, 102 SEC Docket at 48184 & n.8 (citing *Hall*, 90 SEC Docket at 3069).

¹² In light of our disposition of Respondents' petition for interlocutory review, we

By the Commission by the Office of General Counsel, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

deny the motion for a stay.