UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

Administrative Proceedings
File No. 3-14676

In the Matter of Application

Motion To Appear
And Argue At Hearing

ERIC DAVID WANGER

Respondent.

Pursuant to Rule 154 of the Commission's Rule of Practice , 17 C.F.R. , §201.154, Respondent Eric Wanger ("Wanger"), by and through his counsel, hereby respectfully requests that the Commission hold a hearing open to the public on Wanger's application to re-enter the securities industry and that counsel be permitted to make argument at that hearing. Whether or not a person should be permanently barred from the securities industry – especially in a *de minimis* case like this one where the total injury was $2,269, or $1.67 per month per client, over the course of 33 months – should not be decided by *ex parte* communications between the SEC Enforcement staff and the Commission alone.

Given the draconian nature of such a sanction – which the courts have deemed the equivalent of capital punishment and which has already impacted adversely virtually every aspect of Mr. Wanger's professional and personal life, even well beyond the securities industry – the Commission 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. To present those mitigating factors and to assist the Commission in properly evaluating them, counsel for Mr. Wanger should be allowed to bring all such mitigating evidence to the attention of the Commission free of the staff's biased interpretations and not be required to stand as a spectator in the gallery of the court - or worse, be foreclosed from even attending that court - while the prosecutors argue and decide his fate. Rather, Respondent Wanger must be permitted to stand in the well of the court side by side with his accusers and be given an equal chance to secure employment in the industry of his choice and to clear his name.

The constitutional mandate for due process protection only works and works best only in an open forum between advocates who articulate their respective views on the need for a sanction before an impartial adjudicator.

Dated: May 25, 2017

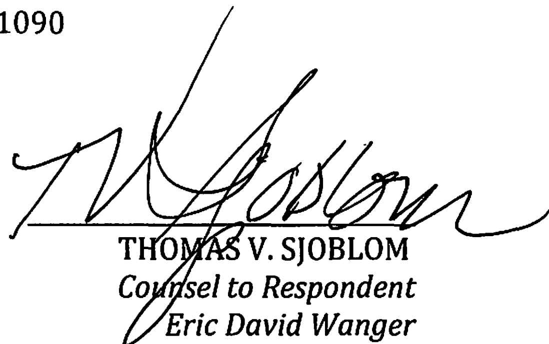
Respectfully Submitted.

Thomas V. Sjoblom
Counsel for Respondent Wanger
International Square
Suite 500
1875 I Street, N.W.
Washington D.C. 20006
(202) 429-7125

CERTIFICATE OF SERVICE

The undersigned certifies that on May 25, 2017, he caused a copy of Respondent's Motion To Appear and Argue Before Commission and the accompanying Memorandum of Points and Authorities to be sent by electronic mail, by facsimile (703) 813-9793, and by Federal Express overnight for delivery on:

Brent Fields, Secretary
Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090



THOMAS V. SJOBLOM
Counsel to Respondent
Eric David Wanger

International Square
Suite 500
1875 I Street, N.W.
Washington D.C. 20006
Office: (202) 429-7125

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SECURITIES AND EXCHANGE COMMISSION

Administrative Proceedings
File No. 3-14676

In the Matter of Application

ERIC DAVID WANGER

Respondent.

MEMORANDUM OF POINTS AND AUTHORITES
IN SUPPORT OF
MOTION TO APPEAR AND PRESENT ARGUMENT

In support of his motion for counsel to appear and argue before the Commission at the time it considers his application to re-enter the securities industry, Respondent Wanger relies on the following points and authorities.

Point I

Procedural due process embodies the need for fair and open proceedings before administrative agencies. The courts have long acknowledged this requirement:

> There is a general policy favoring disclosure of administrative agency proceedings. See FCC v. Schreiber, supra, 381 U.S. at 293, 85 S.Ct. 1459. Further, when performing quasi-judicial functions, agencies 'must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.' Morgan v. United States, 304 U.S. 1, 22, 58 S.Ct. 773, 778, 82 L.Ed. 1129 (1938). That 'an 'open or public hearing [is] a fundamental principle of fair play inherent in our judicial process cannot be seriously challenged.' Fitzgerald v. Hampton, note 6, 152

> U.S.App.D.C. at 10, 467 F.2d at 764. The exclusion of members of the public in derogation of these general principles only occurs in essentially three situations: (1) for the protection of a class of spectators, such as the young, to safeguard their morals; (2) to protect the confidentiality of information or its source; and (3) for the benefit of a witness or party.

Pechter v. Lyons, 441 F. Supp. 115, 118 (S.D.N.Y. 1977), citing United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.), *cert. denied,* 423 U.S. 937, 96 S.Ct. 296, 46 L.Ed.2d 269 (1975).

For the Commission's proceedings to be respected and free of criticism, it needs to function whenever possible out in the open. The Respondent's application to re-enter the securities industry is such a proceeding. Due process and fairness require no less.

Point II

The Administrative Procedure Act ("APA") recognizes the right of a respondent to participate in agency deliberation concerning sanctions. Decisions of this magnitude – bearing as they do on a person's livelihood – should be held in an open meeting with participation by the Respondent and not occur behind closed doors and decided solely upon *ex parte* communications between the enforcement staff and the Commission.

Subsection (a) of section 556 of the APA, 5 USC §556, provides that the provisions of 556 shall apply when section 554, which governs agency adjudications, applies. The APA defines an "adjudication" as "agency process for the formulation of an *order.*" 5 U.S.C. § 551(7)(emphasis added). An "order" includes all dispositions of an agency, whether affirmative, negative, or declaratory in form in a matter other than rulemaking but including licensing. 5 U.S.C. § 551(6).

Subsection (d) of Section 556 of the APA states the conditions under which an order issuing sanctions can be imposed.

> (d) Except as otherwise provided by statute, the **proponent of** a rule or **order has the burden of proof.** Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A **sanction** may not be imposed or rule or order issued **except on consideration of the whole record** or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. .... **A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.**

5 USC §556(d). Accordingly, the APA recognizes that a person like Respondent Wanger should be permitted to participate in the Commission's deliberations, require that the Commission consider the full record that has been developed before the staff, present evidence, and make rebuttal argument. Fairness and impartiality require no less.

1. Impropriety of Staff Ex Parte Communications

Of great concern to Respondent is the Commission's practice of only allowing the staff to address the Commission when deciding sanctions. Under the APA, an "*ex parte* communication" is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice is not given." 5 U.S.C. § 551(14). Section 557(d) of the APA, which forbids *ex parte* communications by persons <u>outside the agency</u> to members of the body comprising the agency, does not

apply to *ex parte* communications between the staff and the Commission. [1] However, the spirit of the APA and the purpose of the ban on *ex parte* communications prohibition ensure that agency decisions are not influenced by private, off-the-record communications from those personally interested in the outcome. In other law enforcement proceedings, government attorneys – for example, those brought by the United States Attorneys Offices - are forbidden from having *ex parte* communications with the trial judge or with an appellate panel. No court would cotton *ex parte* communications between it and a prosecutor to decide the sentence of a criminal defendant or the judgment of a civil defendant. The rule banning *ex parte* communications ensures that the proceedings are conducted in an open and fair manner with all parties present and that all parties have the same information as the ultimate decision maker. Each party has an equal voice in the proceedings, and if either party disagrees with the final ruling, they can appeal to a higher authority, or in this case, to the United States Court of Appeals.

The instant proceeding does not involve a decision to charge someone or institute an initial enforcement proceedings, which are traditionally non-public proceedings, where the staff may need to discuss behind closed doors the evidence gathered in its investigation pointing to possible violations of the federal securities laws. In that context, the staff and the Commission need to discuss the quality of that evidence and the implications of such conduct on the Commission's various policies and enforcement programs, without worry of the risk of reputational injury

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[1] The Commissions' Rules of Practice are silent on the matter at issue here. See 17 C.F.R. § 201.120, which governs ex parte communications between persons presiding over evidentiary hearings and others regarding fact issues.

to a potential respondent, were the public and press otherwise allowed to be present.

Those same policy considerations are not present here. The need to protect against risk to reputation of Respondent Wanger has past. It has occurred. Likewise, the need to consider the policy implications of novel legal theories and interpretations and their application to new or uncharted areas of the industry are not present. Therefore, *ex parte* communications between the staff and the Commission should not be allowed when considering Respondent's re-application into the securities industry, especially under the "public interest" standard.

2. The "Public Interest" Standard

What constitutes the "public interest" by its very nature demands that both the Respondent and the public be permitted to participate in and evaluate such determinations. Since the "public interest" standard easily lends itself to subjective determinations and opinions, respondents who are the target of such subjective determinations have a right to participate. The "public interest" standard should not be defined either in the first instance or in the final analysis by the very people who brought the law enforcement proceedings in the first place. The risk of bias is too great. Self-justification can pervade such a proceeding.

Just as the enforcement staff needs to justify its own enforcement proceedings, so too the Respondent's views should be given equal time and weight as to why a given sanction should now be terminated.

Further, there must be some objective criteria by which "in the public interest" is measured in the context of a bar order with right to reapply after one

year when the enforcement staff insists that it must remain in full force and permanent. The Commission cannot offer with one hand a sanction and words of relief after the passage of one year in order to obtain settlement, but then on the other hand withdraw the one-year "carrot" and insist on the "stick" of the sanction in perpetuity. [2]

3. Need for Continued Sanction

These considerations are particularly pronounced is this proceeding where the Commission's hearing will decide the continuation of a sanction. When a sanction, like this one, has become so obviously punitive, the Commission carries the burden of explaining and articulating why it must continue and why it is not punishment. [3] That is no place for *ex parte* communications between the staff and the Commission alone.

The Commission is considering the need for continuation of a sanction that has outlasted its remedial purpose. The hue and cry of the enforcement staff that Mr. Wanger's case demands continued and permanent "regulatory prophylaxis" is quixotic, vacuous and illogical. Respondents in similar cases have received the much lesser sanction of a suspension of only one (1) year, after which they

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[2] Respondent's March 20, 2017 letter, page 9, cites to an email from his then counsel who advised that the CRO staff has "given every indication that as long as you do not violate the bar, or otherwise become statutorily disqualified, your re-entry application would be accepted" after one (1) year. *See Exhibit A, page 9.*

[3] This case has generated enough interest that *The New York Times* published a lengthy article in its Sunday Business section on May 7, 2017. That article can be found at: In S.E.C.'s Streamlined Court, Penalty Exerts a Lasting Grip -... www.nytimes.com/2017/05/04/business/sec-internal-cou...

automatically re-entered the securities industry.[4] Moreover, the staff simply cannot, as required by section 556(d) of the APA, carry its burden of proving the likelihood of future misconduct. There can be no such proof, because there is none, and such proof must be based on something other than the argument or inference that past misconduct alone suggests repetition in the future.[5] It does not and cannot.

Therefore, how the Commission decides its sanctions and the terms under which and the extent to which the Commission will continue various sanctions – on the so-called grounds of "remedial" and "prophylaxis" purposes – are precisely the kinds of things a respondent, who will be affected by those decisions, should have a participatory role in discussing and about which the public should be entitled to witness first hand.

Point III

The United States Court of Appeals for the District of Columbia Circuit requires the Commission to consider mitigating factors when imposing sanctions. So that such mitigating factors are presented and appropriately considered by the Commission from the Respondent's perspective, unfiltered by the staff's view of them, Respondent's counsel should be permitted to present them.

The United States Court of Appeals for the District of Columbia Circuit has recognized that a lifetime bar is "the equivalent of capital punishment." Saad v. SEC,

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[4] *See* Application Under Section 203(f) of the Investment Advisers Act and Rule 193 for Consent to Associate with an Investment Adviser of Broker-Dealer, dated April 16, 2016, ¶ 3 and cases cited therein, attached as Exhibit B.

[5] *See* Supplemental Affidavit of Eric D. Wanger, ¶ 10-12, attached as Exhibit C.

718 F.3d 904, 905 (D.C. Cir. 2013). Given the draconian nature of such a sanction – which has already impacted adversely virtually every aspect of Mr. Wanger's professional and personal life, well beyond the securities industry – the Commission 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." Id. In his initial affidavit dated April 11, 2016 and his supplemental affidavit dated May 20, 2016, both of which were submitted to the Enforcement staff with his application to re-enter the securities industry, Mr. Wanger has recounted his efforts to gain employment in the securities industry, his ejection from the CFA Institute, his rejection from various teaching positions, closure of bank and credit card accounts, and even his inability to obtain computer software consulting positions.

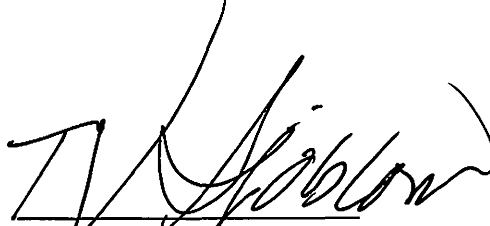
The Commission's sanction orders should not have such omnipotent and ubiquitous reach. Even within the securities industry itself, the United States Court of Appeals for the District of Columbia Circuit now requires the Commission to justify collateral bar orders. See e.g., *Bartko v. SEC,* 845 F.3d 1217 (D.C .Cir. 2017)(holding that the Commission cannot bar an individual from a category of industry participation with which he has no nexus). If that is true within the securities industry itself, more should be required to continue a sanction that cuts a broad swathe across virtually every aspect of Mr. Wanger's professional, personal and private life.

That the Commission's bar order – even with right to reapply after one year – has been punitive, there can be no doubt. That there is no longer any further

remedial need for it is also beyond doubt. If the staff believes that "public interest" standard justifies further continuation of this bar order, Respondent's counsel should be permitted to rebut those arguments before the Commission at the same time that the staff presents them.

Dated: May 25, 2017

Respectfully Submitted,



Thomas V. Sjoblom
Counsel for Respondent Wanger
International Square
Suite 500
1875 I Street, N.W.
Washington D.C. 20006
(202) 429-7125