UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In The Matter Of Application Of

ERIC DAVID WANGER **File No. 3-14676**

Respondent.

Respondent Wanger's Response to Order Requesting Initial Briefing

Respondent Eric David Wanger ("Wanger"), by and through undersigned counsel, submits this brief in response to the Commission' Order of February 28, 2017, which requested initial briefing on the issue of whether the conduct supporting the Bar Order entered on July 2, 2010 (Investment Advisers Act Release No. 3427) occurred "on or after" the date of that Bar Order.

The Bar Order imposed by the Commission on July 2, 2012 stated respondent Wanger is:

> "barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
>
> "prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.10
> with the right to apply for reentry after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission."

Investment Adviser Act Release No. No. 3427, at 9-10. The Bar Order of July 2, 2010 was based solely on alleged conduct of Mr. Wanger in his capacity as investment adviser preceding the date of the Bar Order's entry.

That Bar Order is objectionable, however, because it is a "collateral bar order," since it addresses not just conduct of Mr. Wanger as an investment adviser, but prospectively extends to six (6) other categories: broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and national recognized statistical rating agencies. It is also objectionable and overbroad because it further seeks to prohibit Mr. Wanger from "serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person such investment advisor, depositor, or principal underwriter."

The D.C Circuit as most recently as January 2017 criticized the Commission for the applying collateral bars not only to areas of misconduct with which the respondent had no nexus (*e.g.*, applying a broker-dealer bar to an investment adviser), but also impermissibly applying a collateral bar retroactively to conduct that pre-dated the Dodd – Frank Act of July 2010. *See Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017). Thus, the Commission's authority to impose collateral bars is now subject to a twofold limitation: First, the Commission cannot bar an individual from a class with which he has no association—or, no "nexus." *See Gregory Bartko v. SEC*, 845 F.3d 1217, 1223-24 (D.C. Cir. 2017). *See also Tiecher v. SEC*, 177 F.3d 1016, 1020-21 (D.C.Cir.1999). The Commission must show that the respondent was associated with – or seeking to become associated with – one of the classes or

categories of industry participation described in the statute. *See Gregory Bartko v. SEC*, 845 F.3d at 1220. In order words, the Commission cannot collaterally bar someone from every class of conduct mentioned in the statute unless it first shows that the person was associated with that class.

The Commission claimed in *Bartko* that the court's *Koch* decision (which rejected the retroactive application of the Dodd-Frank provisions to municipal advisors and nationally recognized statistical rating agencies) permitted collateral bars into the other areas. According to the Commission's reading of the *Koch* decision, that decision implicitly allowed the retroactive application of a collateral bar to a broker, dealer, investment adviser, municipal securities dealer and transfer agent classes "notwithstanding the fact that, at the same time, it explicitly prohibited the Commission from extending that bar to the newly regulated municipal advisor and NRSRO classes." The Commission thus argued that *Koch* held that a "limited" collateral bar—that is, the prohibition against acting as a broker-dealer, investment adviser, municipal securities dealer and transfer agent—constituted a mere *procedural* change and therefore did not run afoul of the retroactivity prohibition. 845 F.3d at 1224.

The District of Columbia Circuit flatly rejected the Commission's reading of *Koch*. The same is true here. The Commission's Bar Order cannot reach any area other than that with which Mr. Wanger was associated– *to wit,* an investment adviser. Thus, the Commission's pretended Bar Order of July 2010 that purports to reach the industry categories of broker, dealer, member of an advisory board of or depositor for an underwriter, transfer agent, municipal advisor, municipal securities

dealers, and nationally recognized statistical rating agencies is void. There is no basis in law for such an Order in this Circuit. *See Gregory Bartko v. SEC*, 845 F.3d at 1220 ("a collateral bar was not statutorily authorized").

Second, while Dodd -Fran - which was adopted after the Bar Order in this case -- may have removed the "nexus" requirement, the Commission still cannot *retroactively* impose collateral bars to conduct that per-dates Dodd-Frank because to do so would "attach new legal consequences to events before its enactment." *Gregory Bartko v. SEC*, 845 F.3d 1217, 1223-24 (D.C.Cir. 2017). Thus, here, the Commission cannot retroactively impose any collateral bar to conduct outside the category of investment advisory business. The Division of Enforcement seems to acknowledge that to be the case and has stated in its Initial Brief that it "does not object to vacating the NRSRO and municipal advisor bars." How the Enforcement Division can leave off the other categories added by Dodd-Frank —*e.g.*, transfer agents — as well as leave off the other categories of collateral bars with which Mr. Wanger had no association — is inexplicable.

Therefore, all aspects of the Collateral Bar Order dated July 2010 must be vacated, except to the sole extent it applies to an investment advisor. [1]

Dated: March 20, 2017 Respectfully Submitted,

[1] Respondent Wanger has applied in a separate proceeding to obtain Commission consent to associate either under Rule 193 of the Exchange Act, which applies to registered investment advisers, or Section 203(f) of the Investment Advisers Act of 1940, which applies to unregistered investment advisers.

[redacted]

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 20, 2017 he caused a copy of

Respondent's Response Brief to be hand delivered to the Commission to:

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