

ROBERTA CROSS GUNS
Special Assistant Attorney General
840 Helena Avenue
Helena, MT 59601
406-444-2040

Attorney for Securities Department

BEFORE THE STATE AUDITOR, EX-OFFICIO COMMISSIONER OF SECURITIES
FOR MONTANA

IN THE MATTER OF:)	
)	CASE NO.: Case C-05-04-06-225
RICHARD H. WESTERMAN,)	
individually and in his capacity as a)	NOTICE OF PROPOSED AGENCY
securities salesperson for Raymond James,)	DISCIPLINARY ACTION AND
)	OPPORTUNITY FOR HEARING
RAYMOND JAMES)	
FINANCIAL SERVICES)	
880 Carillon Parkway)	
St. Petersburg, FL 33716)	
)	
Respondents.)	

Staff of the Securities Department of the office of the State Auditor as Commissioner of Securities of the state of Montana (Department), pursuant to the authority of the Securities Act of Montana, § 30-10-101, et seq., Montana Code Annotated (2005), proposes to the Commissioner that he take specific action against the RICHARD WESTERMAN (Westerman) and RAYMOND JAMES FINANCIAL SERVICES (RJFS) for violations of the Montana Securities Act. The Commissioner has authority to take such action under the provisions of §§ 30-10-102, 30-10-107, 30-10-201, and 30-10-301, MCA.

In particular, the Department's staff is recommending specific action against Westerman and RJFS including imposition of appropriate restitution amounts, imposition of appropriate fines pursuant to the provisions of the Montana Securities Act, an immediate cease and desist order, as well as any equitable relief deemed appropriate.

Service of process is made pursuant to Sections 30-10-107 (8), MCA.

REASONS FOR ACTION

There is reason to believe that the following facts, if true, justify and support specific disciplinary action.

ALLEGATIONS

1. Raymond James Financial Services (RJFS) has been registered in Montana as a broker/dealer firm pursuant to §30-10-201, MCA, since April 20, 1983.

2. Richard Westerman (Westerman) was a registered securities salesperson as defined at §30-10-103 (20), MCA, from on or about May 20, 1983 through January 31, 2007. Westerman was employed as securities salesperson by RJFS from April 29, 1998 to January 31, 2007 in RJFS's Spokane, Washington office when he was discharged by RJFS because he was "uncomfortable supervising."

3. On or about May 4, 2006, the Department received a complaint from a Missoula, Montana resident on behalf of the resident's spouse, regarding their financial advisor, Westerman, of RJFS. This citizen alleged that Westerman mismanaged and used discretion in the citizen's spouse's¹ IRA account without authorization.

4. On or about October 23, 1998 Complainant opened an IRA² at RJFS. On the new account form Complainant indicated Complainant's annual income was less than \$20,000, with a

¹ The spouse shall be identified hereinafter as "Complainant".

² Individual retirement accounts (IRA) are one of two types of individual retirement arrangements that provide tax advantages as investors save for retirement. TheStreet.com online glossary of financial terms.

net worth (excluding residence) of between \$50,000 and \$100,000. Complainant listed the primary investment objective for this account as growth, with a medium risk tolerance and a secondary objective of income with a low risk tolerance³. Complainant indicated that his investment time horizon was greater than 10 years. At the time the account was opened Complainant was age 53. The account did not authorize Westerman to use discretion.

5. On or about September 24, 2003, Complainant's new account form was revised. The newly revised new account form listed Complainant's net worth (excluding residence) as between \$20,000 and \$50,000. The account objectives and investment time horizon remained unchanged.

6. In or about 2003, Complainant's account had approximately 41 trades, resulting in commissions of approximately \$4,392.82. The turnover rate was approximately 1.84⁴ and the account had a cost-to-equity ratio of approximately 12.51%⁵.

7. On or about March 1, 2004, RJFS notified Complainant via letter that Complainant's account "has had a relatively high level of trading activity." Further the letter requests Complainant sign and return the letter, acknowledging that "I am aware that through June 20, 2003, my account has 21 transactions that have generated commissions totaling \$1,965.50." According to internal RJFS emails, this letter was sent originally August 29, 2003

³ Growth is an increase in the value of an investment over time. Stock that pays income in the form of regular dividends over an extended period is often described as income stock. Risk tolerance is the extent to which you as an investor are comfortable with the risk of losing money on an investment. [TheStreet.com online glossary of financial terms](#). It is unclear what "medium risk tolerance" is other than it is not "high risk tolerance".

⁴ According to PIABA, the turnover rate is the number of times the average net equity is used to purchase securities. Volume, rather than cost, is being measured. A turnover rate of 2 creates an inference of churning, a turnover rate of 4 creates a presumption of churning and a turnover rate of 6 is conclusive of churning. PIABA, Public Investors Arbitration Bar Association, whose mission is to promote the interests of the public investor in securities and commodities arbitration by protecting public investors from abuses in the arbitration process and creating a level playing field for the public investor in securities and commodities arbitration. Courts and arbitrators often rely upon PIABA expertise in cases involving excessive trading.

⁵ CEMR is calculated by dividing the average account equity by the total commissions during a 12-month period. According to PIABA, a CEMR of 4% in an investment account indicates there is an inference of churning; a CEMR of 8% indicates there is a presumption of churning; and a CEMR of 12% is conclusive that excessive trading is occurring.

and again on October 29, 2003. Complainant never responded to these earlier letters. However, Complainant did sign and return the letter from RJFS dated March 1, 2004.

8. In or about 2004, Complainant's IRA account had approximately 44 trades, resulting in commissions of approximately \$4,717.23. The turnover rate was approximately 1.86 and the account had a cost-to-equity ratio of approximately 11.09%.

9. In or about 2005, Complainant's IRA account had approximately 34 trades, resulting in commissions of approximately \$4,853.71. The turnover rate was approximately 2.47 and the account had a cost-to-equity ratio of approximately 12.42%.

10. In or about the first quarter of 2006, Complainant's account had approximately 11 trades, resulting in commissions of approximately \$1,637.86. The annualized turnover rate for this period was approximately 2.52 and the annualized cost-to-equity ratio of approximately 15.52%.

11. On or about January 20, 2006, RJFS notified Complainant via letter that Complainant's account "has had a relatively high level of trading activity." Further the letter requests Complainant sign and return the letter, acknowledging "I am aware that my account has 23 transactions that have generated commissions totaling \$3,228.80 through the fourth quarter of 2005." Complainant signed and returned this letter to RJFS.

12. On or about April 26, 2006, RJFS notified Complainant via letter that Complainant's account "has had a relatively high level of trading activity." Further the letter requests Complainant sign and return the letter, acknowledging that "I am aware that my account has 35 transactions that have generated commissions totaling \$4,794.81 through the fourth quarter of 2005."

13. In an April 3, 2006 memorandum regarding "Region III Active Trade Review: Reviewing Quarter IV ending December 30, 2005", James Neilsen, the Region III Compliance Advisor for RJFS indicates Complainant's account would be frozen. The memorandum states that for 2005, Complainant's IRA had a commission to equity ratio of 12.07% and that the account had multiple short term stock trades in 2005. Further, the memorandum states "a caution letter was sent out as a result of the third quarter activity but the c/e has remained above 5% and has actually gone above 10% so a FREEZE letter will be sent and the account will be require to go fee based."

14. On or about April 13, 2006, Westerman's marketing assistant sent Complainant a letter stating "regarding the previous 2005 activity letter you received from our Compliance Office in January, the Compliance Department has re-reviewed your 2006 activity based on previous activity and they need your account to be converted to a Passport Fee Account. The fee will be 1%." Enclosed with this letter were the appropriate forms required to change Complainant's account to a fee-based account. It is not known if Complainant filled out the paperwork. However, Complainant was not charged any advisory fees. Westerman was not registered as an investment adviser representative in Montana at the time Complainant was asked to sign the Passport Fee Account paperwork.

15. Complainant closed his IRA account with RJFS on or about July 17, 2006.

16. Between April 2002 and when Complainant's IRA was closed in or about July 2006, there were approximately 155 trades in the account.

17. Because RJFS failed to provide trade confirmations for trades prior to November 25, 2002 the Department was able to analyze only the commissions paid between November 25, 2002 and April 7, 2006 (the date the account was frozen by RJFS). During the period between

November 25, 2002 and April 7, 2006, Complainant's account endured 143 trades. Based on the Department's analysis of this same time period Complainant's account had commissions and fees of approximately \$16,331. During this period the average account equity for Complainant's account was approximately \$37,907. Therefore, during this 40 month time period the account would have had to have an approximate investment return of 43.1% to just pay the commissions and fees charged.

18. The average hold period for those securities purchased by Westerman in Complainant's account was approximately 176 days. Complainant's listed investment time horizon on his new account form was 10+ years.

19. From April 2002 to the time the account was closed, the account suffered economic loss.

Based on the foregoing allegations, the Department submits the following:

CONCLUSIONS OF LAW

1. The State Auditor is the Commissioner of Securities (Commissioner) pursuant to §§30-10-107 and 2-15-1901, MCA.

2. The Commissioner has jurisdiction over this matter pursuant to §§30-10-102, 30-10-107, 30-10-201, 30-10-301, 30-10-304, 30-10-305, and 30-10-309, MCA.

3. Westerman violated §30-10-301(1)(b), MCA, when he omitted the material facts that the type of trading strategy Westerman was implementing in Complainant's IRA was unsuitable based on Complainant's net income, net worth, investment objectives, and age.

4. Westerman violated §30-10-301(1)(b), MCA, when Westerman engaged in a practice of unsuitable trading in Complainant's account, based on Complainant's net income, net worth, investment objectives, and age.

5. Westerman violated § 30-10-201 (13) (g), MCA, and ARM § 6.10.126 (2) (f), when Westerman engaged in a dishonest and unethical practice of executing approximately 155 trades in 4 year period, which appears unsuitable based on Complainant's net income, net worth, investment objectives, age, and the type of account

6. Westerman violated § 30-10-201 (13) (g) and ARM § 6.10.126 (2) (f) when Westerman engaged in a dishonest and unethical practice of trading in Complainant's account without authorization to do so.

7. Westerman violated § 30-10-201 (13) (g) and ARM § 6.10.126 (2) (f) when Westerman engaged in a dishonest and unethical practice of using discretion to trade in Complainant's account without authorization to do so.

8. Raymond James Financial Services violated § 30-10-201 (13) (k), MCA, by failing to reasonably supervise Westerman when it allowed him to engage in a unsuitable trading strategy in Complainant's IRA account, based on Complainant's net income, net worth, investment objectives and age.

9. Raymond James Financial Services violated § 30-10-201 (13) (k), MCA, by failing to reasonably supervise Westerman when it allowed him to transact business in Complainant's IRA account without authorization or written discretion.

10. Raymond James Financial Services violated § 30-10-201 (13) (k), MCA, by failing to reasonably supervise Westerman when it allowed him to induce trading in Complainant's IRA which was excessive in size or frequency in view of the financial resources and character of the account;

11. Raymond James Financial Services violated § 30-10-201 (13) (b), MCA, by refusing to provide information requested by the Department.

RELIEF SOUGHT

1. Order Respondents Westerman and RJFS to pay restitution to the Montana Complainant who was harmed by their actions in violation of the Montana Securities Act, including 10% interest from the date of the wrongdoing, pursuant to § 30-10-309, MCA;
2. Order Respondent Westerman to pay fines not to exceed \$5,000 for each identifiable violation of § 30-10-301, MCA, pursuant to § 30-10-305(3), MCA;
3. Order Respondent Westerman to pay fines not to exceed \$5,000 for each identifiable violation of § 30-10-201 (13) (g), MCA, and ARM § 6.10.126, pursuant to §§ 30-10-201 (18) and 30-10-305(3), MCA;
4. Order Respondent RJFS to pay fines not to exceed \$5,000 for each identifiable violation of § 30-10-201 (13) (k), MCA, and ARM § 6.10.126, pursuant to §§ 30-10-201 (18) and 30-10-305(3), MCA;
5. Order Respondent RJFS to pay fines not to exceed \$5,000 for each identifiable violation of § 30-10-201 (13) (b), MCA, and ARM § 6.10.126, pursuant to §§ 30-10-201 (18) and 30-10-305(3), MCA;
6. Order Respondents Westerman and RJFS to pay a fine not to exceed \$5,000 for violating § 30-10-201, MCA, pursuant to § 30-10-201 (18), MCA; and
7. Any other such relief allowed by law or required by justice.

PUBLIC INTEREST

For any and all of the reasons set forth above, it is in the public interest and will protect Montana investors to:

1. Issue a cease and desist order barring Westerman from further violations of the Act;

2. Order Respondents Westerman and RJFS to pay administrative fines in an amount and upon such terms and conditions as supported by the evidence and determined at hearing of this matter;

3. Order Respondents Westerman and RJFS to pay restitution to their Montana Complainant harmed by the Respondents' actions in violation of the Montana Securities Act in an amount and upon such terms and conditions, including the statutory 10% per annum interest on the losses incurred, as supported by the evidence and determined at hearing of this matter; and

4. Take such other actions which may be in the public interest and necessary and appropriate for the protection of Montana investors.

STATEMENT OF RIGHTS

You are entitled to a hearing to respond to this notice, present evidence and arguments on all issues involved in this case. You have a right to be represented by an attorney at any and all stages of this proceeding. You may demand a formal hearing before a hearing examiner appointed by the Commissioner pursuant to the Montana Administrative Procedure Act, sections 2-4-601, MCA, and following, including Section 2-4-631, MCA. If you demand a hearing, you will be given notice of the time, place and the nature of the hearing.

If you want to contest the proposed action under the jurisdiction of the Commissioner, you must advise the Commissioner within fifteen (15) days of the date you receive this notice. You must advise the Commissioner of your intent to contest the proposed action by writing to Roberta Cross Guns, Special Assistant Attorney General, State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601. Your letter must clearly indicate whether you demand a hearing, or whether you waive formal proceedings and, if so, what informal proceedings you prefer for disposition of this case. Pursuant to Section 2-4-603(2), MCA, you may not request to

proceed informally if the action could result in suspension, revocation or any other adverse action against a professional license.

Should you request a hearing, you have the right to be accompanied, represented, and advised by counsel. If the counsel you choose has not been admitted to practice law in the state of Montana, he or she must comply with the requirements of *Application of American Smelting and Refining Co.*, (1973), 164 Mont. 139, 520 P.2d 103.

CONTACT WITH SECURITIES COMMISSIONER'S OFFICE

If you have questions or wish to discuss this matter, please contact Roberta Cross Guns, legal counsel for the State Auditor, at 840 Helena Avenue, Helena, MT, 59601, (406)-444-2040 or, within Montana, (800)-332-6148. If an attorney represents you, please make any contacts with this office through your attorney.

POSSIBILITY OF DEFAULT

Failure by Respondents to give notice or to advise of Respondents' demand for a hearing or informal procedure within fifteen (15) days, will result in the entry of a default order imposing the disciplinary sanctions against Respondent, without further notice to Respondent, pursuant to 6.2.101, Administrative Rules of Montana and the Attorney General's Model Rule 10, 1.3.214.

DATED this 31st day of May 2007.

JOHN MORRISON
State Auditor and ex-officio
Commissioner of Securities

By: Roberta Cross Guns
Roberta Cross Guns
Special Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that on this 31st day of May, 2007, a copy of the foregoing was served upon the following persons by depositing a copy of the action in the U.S. Mail, certified, return receipt requested, postage prepaid, addressed to:

Raymond James Financial Services
880 Carillon Parkway
St. Petersburg, FL 33716

Richard Westerman
4912 S. Helena
Spokane, WA 99223



State Auditor's Office