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Office of the Commissioner of Securities and  
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Attorney for the CSI

**BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE  
MONTANA STATE AUDITOR  
STATE OF MONTANA**

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IN THE MATTER OF	)	
	)	
ROBERT L. SHERRY,	)	CASE NO.: SEC-2011-239
	)	
Respondent.	)	<b>NOTICE OF PROPOSED AGENCY</b>
	)	<b>DISCIPLINARY ACTION AND</b>
	)	<b>OPPORTUNITY FOR HEARING</b>
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Staff of the Office of the Commissioner of Securities and Insurance, Montana State Auditor (CSI), by and through counsel, and pursuant to the authority of the Securities Act of Montana, Title 30 Chapter 10, Parts 1-3 (Act) and the Montana Insurance Code, Mont. Code Ann. § 33-1-101, et seq. (Code), is proposing the Commissioner of Securities and Insurance, Montana State Auditor (Commissioner) take specific action against the above-named Respondent for violating the Code and the Act. The Commissioner has authority to take such action under the provisions of Mont. Code Ann. §§ 30-10-102, 30-10-103(22)(a)-(b), 30-10-103(11)(a)-(b), 30-10-107, 30-10-110, 30-10-201(3), 30-10-301(1)(b), 30-10-301(1)(c), 33-1-102, 33-1-311, 33-1-314, 33-1-317, 33-17-1001.

Specifically, staff is proposing, pursuant to Mont. Code Ann. § 33-1-317, that the Commissioner impose a fine not to exceed \$5,000.00 for each violation of the Code for the Respondent, in addition to all other penalties imposed by the laws of Montana. Additionally, staff is proposing that the Commissioner impose a fine not to exceed \$5,000 per each violation of the Act in addition to all other penalties imposed by law. Moreover, staff is proposing, pursuant to Mont. Code Ann. § 30-10-309, that the Respondent make restitution for all financial losses sustained by any person resulting from each violation of Mont. Code Ann. § 30-10-301 together with ten percent annual interest on the amount of restitution from the date of the violation. Finally, staff is proposing, pursuant to Mont. Code Ann. § 33-17-1001, that the Commissioner suspend or revoke the Respondent's insurance producer license.

#### **REASONS FOR ACTION**

There is probable cause to believe that the following facts, if true, justify and support such specific action.

#### **ALLEGATIONS OF FACT**

1. Robert L. Sherry (Respondent) is a licensed life insurance producer (License #727635) who transacts insurance business from Kalispell, Montana.
2. At material times, Respondent was appointed with Allianz Life Insurance Company of North America (Allianz).
3. Respondent was not, at material times, licensed as a securities salesperson or investment adviser representative in Montana.
4. On or about December 9, 2010, Respondent met with E.C. and K.C. (collectively

referred to herein as the “victims”), husband and wife, at the Kalispell Mall. The victims made the appointment in response to a marketing gimmick utilized by Respondent on how to save money on income taxes.

5. On or about December 13, 2010, Respondent met with the victims at their home in Swan Lake, Montana, regarding their annuities. The Respondent spent hours reviewing the victims’ John Hancock and Sun America variable annuities, and recommended that they liquidate these variable annuities for the purpose of purchasing the Allianz equity-indexed annuities that he was selling. On December 16, 2010, Respondent again came to the victims’ home to complete the paperwork to liquidate the variable annuities for the equity-indexed annuities.

6. The victims were in their 70’s and had reservations about liquidating their existing annuities to purchase new annuities, but the Respondent convinced the victims to complete the paperwork to switch annuities. The victims specifically instructed Respondent not to submit the paperwork until they reviewed his recommendations and made a decision on whether to go through with the transaction.

7. Instead of waiting for the victims’ permission, Respondent submitted the paperwork to liquidate the variable annuities shortly after leaving the victims’ home. Respondent told the victims that they had a 30-day window within which to decline the equity-indexed annuities, that his premature submission would cause them no harm, and that they could undo the transactions.

8. On December 20, 2011, K.C.’s Sun America variable annuity, valued at approximately \$85,032, was liquidated and the equity-indexed annuity Allianz Contract #70876599 was issued. K.C. subsequently declined the Allianz Contract and instructed Allianz to return the funds to Sun America. On the “Replacement Comparison Form” required by

Allianz is the question “[w]ho initiated the sale of this [Sun America variable] annuity,”

Respondent marked the box identified as “agent.”

9. On December 20, 2011, E.C.’s John Hancock variable annuity, valued at approximately \$132,526, was liquidated and equity-indexed annuity Allianz Contract #70876635 was issued. E.C. subsequently declined the Allianz Contract and instructed Allianz to return the funds to John Hancock.

10. On the “Replacement Comparison” form required by Allianz was the question “[w]ho initiated the sale of this [John Hancock variable] annuity?” Respondent marked the box identified as “agent.”

11. The Respondent included a summary for the reason for the replacement that read, “[v]ariable annuity; since May 2007, there has been no growth in market volatility (sic) actually showing losses even after suppl (sic) income distribution has been calculated. Applicant wants safety of principal while having possible market growth – wants to eliminate ‘risk.’” The “Replacement Comparison” form was dated December 16, 2010. There was a 5 percent surrender cost on the variable annuity.

12. The victims lodged a complaint with the CSI. Respondent responded to the victims’ complaint. In the Respondent’s response, he clearly articulated that he reviewed the victims’ variable annuities, analyzed specific riders within the annuities, and reached conclusions regarding the suitability of the victims liquidating the variable annuities for the purpose of purchasing the equity-indexed annuities he was recommending.

13. Although Allianz reimbursed the surrender costs for the liquidation of the victims’ variable annuities, the victims incurred substantial deferred sales charges and lost benefit riders which provided guaranteed lifetime monthly income. The loss of the benefit riders adversely

affected their retirement income streams in the amount of \$130.02 per month for E.C. and \$117.45 per month for K.C., or a total of \$247.47 in lost joint monthly income.

### CONCLUSIONS OF LAW

1. The State Auditor is the Commissioner of Securities and Insurance pursuant to Mont. Code Ann. §§ 2-15-1901, 2-15-1903, 30-10-107.

2. The Commissioner is responsible for the enforcement of laws governing the issuance, sale, and other transactions relative to securities pursuant to Mont. Code Ann. § 30-10-107.

3. The CSI has jurisdiction over this matter. Mont Code Ann. §§ 30-10-107, 33-1-311.

4. The CSI administers the Securities Act to protect investors and the Insurance Code to protect insurance consumers. Mont. Code Ann. §§ 30-10-102, 33-1-311.

5. Generally, annuity contracts are life insurance products, are governed by the Code, and may be sold by insurance producers. *Estate of Miles v. Miles*, 2000 MT 41 (Mont. 2000), Mont. Code Ann. § 33-17-214, Mont. Code Ann. § 33-20-101.

6. However, a variable annuity is a security. Mont. Code Ann. § 30-10-103(22)(a), *Estate of Miles v. Miles*, 2000 MT 41 (Mont. 2000).

7. An investment adviser is a person who, for compensation, engages in the business of advising others, either directly or indirectly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. Mont. Code Ann. § 30-10-103(11)(a), (b).

8. It is unlawful for a person to transact business in this state as an investment adviser or as an investment adviser representative unless the person is registered under 1 through 3 of the Act. Mont. Code Ann. § 30-10-201(3).

9. Respondent violated Mont. Code Ann. § 30-10-201(3) by recommending to the

victims herein that they liquidate their variable annuities in order to purchase equity-indexed annuities from him without being registered as an investment advisor.

10. It is unlawful for any person, in connection with the offer, sale or purchase of any security in, into, or from this state to make any untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. Mont. Code Ann. § 30-10-301(1)(b).

11. Respondent violated Mont. Code Ann. § 30-10-301(1)(b) by leading the victims to believe that they would be in a better position by liquidating their variable annuities with guaranteed benefit riders and purchasing the equity-indexed annuities he was selling.

12. It is unlawful for any person, in connection with the offer, sale or purchase of any security in, into, or from this state to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person. Montana Code Ann. § 30-10-301(1)(c).

13. Respondent violated Montana Code Ann. § 30-10-301(1)(c) by recommending to the victims that they sell their variable annuities in order to purchase equity-indexed annuities from him without the requisite licensure, skill, and knowledge to ascertain whether the sales of their variable annuities and the purchase of equity-indexed annuities was suitable for them.

14. Respondent violated Mont. Code Ann. § 30-10-301(1)(c) by submitting the paperwork to liquidate the variable annuities shortly after leaving the victims' home when they had asked him to wait for their decision and permission to submit the paperwork .

15. The CSI may require a person found to have committed a violation of Mont. Code Ann. § 30-10-301 to make restitution for all financial losses sustained by a person as a result of the violation. The CSI may further require a person found to have violated Mont. Code Ann. §

30-10-301 to pay 10 percent annual interest on the amount of the restitution from the date of the violation, reasonable attorney fees, and costs associated with bringing the administrative action. Mont. Code Ann. § 30-10-309.

16. The CSI may impose a fine not to exceed \$5,000 per violation upon a person found to have engaged in any act or practice constituting a violation of any provision of the Act. Mont. Code Ann. § 30-10-305.

17. The CSI may suspend, revoke, or refuse to renew an insurance producer's license and/or levy a civil penalty in accordance with Mont. Code Ann. § 33-1-317, or may choose any combination of actions when an insurance producer has, in the conduct of the affairs under the license, used fraudulent, coercive, or dishonest practices or the licensee or applicant is incompetent, untrustworthy, financially irresponsible, or a source of injury or loss to the public. Mont. Code Ann. § 33-17-1001(1)(f).

18. Respondent used fraudulent, coercive, or dishonest practices in his conduct with the victims herein and was a source of injury and loss to them by leading them to believe that they would be in a better position by liquidating their variable annuities and purchasing equity-indexed annuities from him which cause them pecuniary loss.

19. The CSI may impose a fine not to exceed the sum of \$5,000 upon an insurance producer found to have violated a provision of the Code. Mont. Code Ann. § 33-1-317.

### **RELIEF REQUESTED**

WHEREFORE, the CSI seeks the following relief:

1. Pursuant to Mont. Code Ann. § 30-10-309, the Commissioner may require the Respondent to make restitution for all financial losses sustained by the victims as a result of each of the violations of Mont. Code Ann. § 30-10-301, together with 10 percent annual interest

from the date of the violations, reasonable attorney fees, and costs associated with bringing the administrative action.

2. Pursuant to Mont. Code Ann. § 30-10-305, the imposition of a fine upon the Respondent not to exceed \$5,000 per each violation of the Act.

3. Pursuant to Mont. Code Ann. § 33-1-317 and § 33-17-1001, the imposition of a fine upon the Respondent not to exceed the sum of \$5,000 per violation.

4. Pursuant to Mont. Code Ann. § 33-17-1001, the suspension or revocation of the Respondent's insurance producer's license.

### **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, Mont. Code Ann. § 2-4-601, et seq., including § 2-4-631. 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, you must advise the Commissioner within 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 Mike Winsor, Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena Avenue, Helena, Montana 59601. The matter shall then be promptly set for hearing. 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 Mont. Code Ann. § 2-4-603(2), you may not request to proceed informally if the action could result in suspension, revocation or any other

adverse action against a professional license. If you request a hearing, you will be given notice of the date, time, and place of the hearing.

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.*, 164 Mont. 139, 520 P.2d 103(1973), and *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200.

**CONTACT WITH COMMISSIONER'S OFFICE**

If you have questions or wish to discuss this matter, please contact Mike Winsor, legal counsel for the CSI, at 840 Helena Avenue, Helena, MT, 59601, 406-444-2040. If an attorney represents you, please make any contacts with this office through your attorney.

**POSSIBILITY OF DEFAULT**

Failure to give notice or to advise of your demand for a hearing or informal procedure within 15 days will result in the entry of a default order imposing the disciplinary sanctions against you without further notice to you, pursuant to Mont. Admin. R. 6.2.101, and the Attorney General's Model Rule 10, Mont. Admin. R. 1.3.214.

DATED this 16<sup>th</sup> day of March, 2012.



**MIKE WINSOR**  
Attorney for CSI

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served on the 16 day of March, 2012, by U.S. mail, certified first-class postage paid, to the following:

Robert L. Sherry  
432 E. Idaho St. C-268  
Kalispell, MT 59901

Robert L. Sherry  
804 8<sup>th</sup> Avenue West  
Kalispell, MT 59901

Dana Sautter