

NICK MAZANEC
Office of the Montana State Auditor,
Commissioner of Securities and Insurance (CSI)
840 Helena Avenue
Helena, MT 59601
406-444-2040
nmazanec@mt.gov

Attorney for the CSI

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

| | | |
|------------------|---|-----------------------------------|
| IN THE MATTER OF |) | CASE NO.: SEC-2014-157 |
| |) | |
| ZACHARY BERKEY, |) | NOTICE OF PROPOSED AGENCY |
| |) | ACTION AND OPPORTUNITY FOR |
| Respondent |) | HEARING |
| |) | |

The Office of the Montana State Auditor, Commissioner of Securities and Insurance (CSI), pursuant to the authority of the Securities Act of Montana, Mont. Code Ann. § 30-10-101 et seq. (the Act), is proposing to the Commissioner of Securities and Insurance, Office of the Montana State Auditor (Commissioner), that she take specific action against Zachary Berkey (Respondent) for violations of the Act. The Commissioner has authority to take such action under the provisions of §§ 30-10-102, 30-10-107, 30-10-201, 30-10-301, 30-10-304, 30-10-305, and 30-10-309. Service of process is pursuant to § 30-10-107(8).

REASONS FOR ACTION

There is reasonable cause to believe that the following facts will be proven true and justify disciplinary action against Respondent.

ALLEGATIONS OF FACT

1. Respondent was formerly a CSI registered salesperson, CRD #2884767. He is not currently registered with the CSI in any capacity.
2. Four Points Capital Partners LLC (Four Points) is a CSI registered broker dealer firm, CRD #43149.
3. Four Points employed Respondent as a securities salesperson from April of 2013 until January of 2015.
4. At the time Respondent was hired by Four Points, Respondent had several disclosure items noted on the Financial Industry Regulatory Authority's (FINRA) Central Registration Depository (CRD). These items included allegations of churning, misrepresentation and unauthorized trading.
5. On February 20, 2014, CSI staff reviewed the CRD and noted a disclosure update for Respondent. Specifically, Respondent's Form U-4 was amended to reflect a complaint alleging churning, short selling, and unsuitable recommendations contrary to the complainant's level of investment sophistication. The conduct was alleged to have occurred prior to Respondent's employment with Four Points.
6. On April 2, 2014, the CSI requested documentation from Four Points relating to Respondent's and the firm's sales activities in Montana.
7. The documentation Four Points provided showed that Four Points had eight Montana clients. Berkey was the salesperson for three of the clients, including M.L. He shared those clients with another salesperson, Gregory Patterson, CRD #2654095.
8. A CSI analysis of all documentation relating to M.L.'s account revealed the following occurred between April of 2013 and March of 2014:

- a. M.L. invested \$93,490.61 with Four Points;
- b. Four Points' investor profil for M.L. showed an objective of "speculation";
- c. Berkey initiated 99 transactions in the account in 30 different securities;
- d. Of the 99 trades, 96 were marked as solicited, and three were marked unsolicited;
- e. The total of all trades resulted in \$1,334,449.75 in purchases and \$1,344,522.45 in sales, with corresponding Looper¹ turnover rates of 23.93 and 24.11 respectively;
- f. The average hold period for a securities position in M.L.'s account was 23 days;
- g. Four Points, Berkey, and Patterson charged commissions totaling \$42,932.61 and fees totaling \$1,661.94;
- h. M.L.'s account lost \$46,162.34.

9. The CSI interviewed M.L. regarding his experience with Respondent. M.L. told the CSI the following:

- a. M.L. disagreed strongly with the notion that his investment objective was "speculation." M.L. characterizes himself as a moderate to conservative investor.
- b. M.L. specifically advised Respondent that he intended to build a house with the funds invested at Four Points.
- c. Other than one conversation with a Four Points supervisor, Respondent was the only person at Four Points with whom M.L. discussed his account.

¹ The Looper turnover rate generally calculates the total dollar amount of purchases during a time period divided by the average account equity and then annualized. There are a number of approaches used by regulators in computing turnover, but the most common technique is the Looper Formula. *See In re Looper & Co.*, 38 S.E.C. 294 (1958). The rule of thumb concerning turnover is often referred to as the "2-4-6 Rule. :

- Twice a year turnover is "suggestive" of excessive trading;
- Four times a year turnover is "indicative" of excessive trading; and
- Six times a year turnover is "conclusive" of excessive trading.

d. Respondent would contact M.L. at least once a month to solicit trades. Although M.L. repeatedly expressed concern to Respondent over the frequency of trades, Respondent was insistent and would convince M.L. to enter into the transactions.

CONCLUSIONS OF LAW

1. The Montana State Auditor is the Commissioner of Securities and Insurance (Commissioner) pursuant to §§ 30-10-107, 2-15-1901, and 2-15-1903.
2. The Commissioner has jurisdiction over this matter pursuant to §§ 30-10-102, 30-10-107, 30-10-301, 30-10-304, 30-10-305, and 30-10-307.
3. The Commissioner administers the Act, pursuant to §§ 2-15-1901 and 30-10-107.
4. The Commissioner shall administer the Act to protect the investor, persons engaged in securities transactions, and the public interest, pursuant to § 30-10-102(1).
5. At all times relevant to this action, Respondent was a registered salesperson pursuant to § 30-10-201.
6. A person may not, in connection with the offer or sale of a security in or into Montana, engage in any act, practice, or course of business that operates or would operate as a fraud or deceit under any person. § 30-10-301(1)(c).
7. For purposes of § 30-10-301, “fraudulent and unethical practices” are further defined by Administrative Rule of Montana 6.10.401.
8. It is a fraudulent and unethical practice to induce trading in a customer’s account which is excessive in size or frequency in view of the financial resources and character of the account. Admin. R. Mont. 6.10.401(1)(b).
9. It is a fraudulent and unethical practice for a salesperson to make a transaction or recommendation without grounds to believe that the transaction or recommendation is suitable

for the customer based upon reasonable inquiry into information relevant to the determination.
Admin. R. Mont. 6.10.401(1)(c).

10. It is a fraudulent and unethical practice to charge unreasonable and inequitable fees for services performed. Admin. R. Mont. 6.10.401(1)(k).

11. Respondent violated Admin. R. Mont. 6.10.401(1)(b) when he effected transactions in M.L.'s account at a Looper turnover rate in excess of 23.

12. Respondent violated Admin. R. Mont. 6.10.401(1)(c) when he engaged in excessive trading and traded in a manner contrary to M.L.'s investment objectives.

13. Respondent violated Admin. R. Mont. 6.10.401(1)(k) when he charged commission of \$42,932.61 out of the \$93,490.61 M.L. initially invested.

14. Each of Respondent's violations of Admin. R. Mont. 6.10.401 constitutes an act, practice, or course of business that operated as a fraud upon M.L. As such, each violation of Admin. R. Mont. 6.10.401 constitutes a separate violation of § 30-10-301(1)(c).

RELIEF REQUESTED

WHEREFORE, the CSI seeks the following relief:

1. That the Commissioner fine Respondent in an amount not to exceed \$5,000 for each identifiable violation of the Act, pursuant to § 30-10-305(3).
2. Such other relief as the Commissioner deems necessary and appropriate.

STATEMENT OF RIGHTS

You are entitled to a hearing to respond to this notice, and to 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, § 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 wish to contest the proposed action under the jurisdiction of the Commissioner, you must advise the Commissioner within 21 days of the date you receive this notice. You must advise the Commissioner of your intent to contest the proposed action by **writing** to Nick Mazanec, Office of the Montana State Auditor, Commissioner of Securities and Insurance, 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 § 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. Should you request a hearing on the matters raised in this Notice, a hearing must be held within a reasonable period of time unless postponed by mutual consent of the parties, pursuant to § 30-10-305.

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, and *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200.

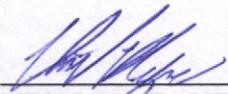
CONTACT WITH COMMISSIONER'S OFFICE

If you have questions or wish to discuss this matter, please contact Nick Mazanec, legal counsel for the CSI, by telephone at (406) 444-2040, or by email at nmazanec@mt.gov. If an attorney represents you, please make any contacts with the CSI through your attorney.

POSSIBILITY OF DEFAULT

Failure to give notice or to advise of your demand for a hearing or informal procedure within 21 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 27th day of January, 2016.



NICK MAZANEC
Attorney for CSI