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Colorado securities commissioner's qualifications, enforcement record called into question

By Monica Vendituoli, Reporter, Denver Business Journal
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My stories investigating the appointment of the Colorado securities commissioner led to the commissioner's resignation and changes to the appointment process. This is one of eight stories I wrote on the matter.

Colorado’s securities board is preparing for an unprecedented emergency meeting next week at which it will vote on calling for an investigation by independent counsel hired by the Colorado Attorney General’s Office of the hiring of Securities Commissioner Chris Myklebust, the state’s top securities regulator.

Currently, the Colorado Attorney General’s Office represents Myklebust, the Colorado Division of Securities and the Securities Board, which Securities Board Vice Chairman Kent Lund and board member Steven Price have called a conflict of interest.

Price and former securities commissioner Phil Feigin said investors are being put at risk every day that Myklebust remains in office. They and others say questions about the legality of the appointment of Myklebust, a civil servant governed by state personnel board rules, could lead to legal challenges to the work he's done, including enforcing violations of the Colorado Securities Act, which protects investors from fraud.

Marguerite Salazar, former executive director of the Colorado Department of Regulatory Agencies (DORA) did not post the job or interview other candidates, but rather "reinstated" Myklebust into the position, one he had never held before.

Price added that he is concerned that members of the Colorado Attorney General’s Office haven’t taken his and Lund’s concerns seriously. The Colorado Attorney General’s Office has declined to comment on Price's concerns, but the office's attorneys have asserted at previous securities board meetings that they have ruled that Myklebust's hiring should stand.

“I believe the Attorney General’s role in this matter should be an important focus,” Price said. “Rather than investigating and upholding the laws of the state, the AG has taken a position of advocacy."

The Denver Business Journal reviewed more than 100 pages of documents obtained through public records requests and government websites and spoke with two former securities commissioners and several top securities attorneys for this story.

The reporting raises questions about Myklebust's possible lack of qualifications for the commissioner position, given previous standards posted for the job, had the job been posted. Additionally, the reporting shows that the Colorado Division of Securities’ enforcement action record under Myklebust so far is pacing far below what enforcement action numbers for the division have been previously.

There are five members of the securities board.

Lund, who is on vacation, declined to comment for this story. Securities board members Keith Olivia and Nilsa G. Mahon either declined comment or could not be reached. Securities Board Chairman Tom Kenning referred questions to the Colorado Division of Securities, which referred questions to its “parent” organization, DORA.

Myklebust has not addressed the criticisms and did not respond to DBJ’s requests for comment, including written questions. Marguerite Salazar, who is now superintendent of the New Mexico Licensing and Regulation Department, did not respond to written questions, but provided a statement defending Myklebust's appointment after this story was published on Tuesday.

“The state of Colorado required a strong leader who not only knew the inner workings of finance in the state but someone who could navigate the state and federal systems including the SEC,” Salazar said in the statement. “Chris [Myklebust], as someone who had [worked] and been licensed as a securities broker, someone who had Executive Leadership experience as Banking commissioner and Financial Services Director for the state of Colorado, exceeded the criteria to perform the duties of that role."

Patty Salazar, executive director of DORA (no relation to Marguerite Salazar), declined to answer written questions, but provided a statement, saying that DORA's role is to “protect Colorado investors and maintain the integrity of the marketplace.”

“Keeping at the forefront our mission to protect Colorado investors and maintain the integrity of the marketplace, I continue to welcome meaningful, strategic and performance-based suggestions for the Division of Securities as we move forward,” she said.

Reinstatement concerns

Securities board vice chair Lund and member Price first questioned Myklebust’s appointment at the board’s December meeting. The Colorado Securities Act says that the Colorado securities commissioner is appointed by the executive director of DORA, under the guidance of both the state constitution and the securities board.

But the securities board wasn’t consulted.

Deputy Colorado Attorney General Christopher Beall told the securities board at the board’s June meeting that while the state’s constitution and Colorado Securities Act conflict with one another, his office has taken the position that the state constitution’s mandate that only the executive director of DORA has the power to appointment commissioners trumps the Colorado Securities Act. But he added that a judge in the end might have to have the final say on which law takes precedent.

The Colorado Attorney General’s Office acknowledged in July that it is currently reviewing how similarly conflicting laws could impact the role of at least two other boards that regulate the state’s airports and its $3 billion livestock industry.

Beall also said that the job wasn’t posted because former executive director Marguerite Salazar classified Myklebust’s appointment as a reinstatement, which allowed her under state law to not have to post the job or consider other candidates, as mandated in the state constitution regarding civil servant jobs.

Myklebust previously served as the state financial services commissioner from 2006 to 2015 and served as the banking and financial services commissioner between April 2017 and November 2017.

But Gerald Rome, a former securities commissioner, said regulating banks and credit unions is different from regulating securities.

"It's a highly technical, complex area, securities law," Rome previously told DBJ. "Hiring a securities commissioner that doesn't have that necessary background or experience is like hiring a chief of police who has no background in law enforcement."

The Colorado Division of Banking regulates 11 trust companies, 57 banks and 92 money transmitters such as Western Union and Venmo and the Colorado Division of Financial Services regulates 40 credit unions, five savings and loans associations, seven life care institutions and 12 public depositories.

In comparison, the Colorado Division of Securities regulates 1,986 brokerage firms, 207,000 stockbrokers, 804 licensed investment advisory firms and 14,503 investment adviser representatives licensed to do business in the state.

Former deputy securities commissioner Rich Djokic, who also served as a member of the state personnel board, which regulates civil servants in the state, from 2006 to 2013, agreed that regulating securities and banks and credit unions were completely different jobs. He added that he recalled only hearing a few reinstatement proceedings while on the state personnel board.

"Reinstatements were very rare," Djokic said.

He added that while he was on the state personnel board, the board only heard reinstatements after a comparative analysis of multiple candidates took place. That is, even when the state was considering reinstatements they usually sought other candidates, which didn't happen with Myklebust's hiring.

At the June securities board meeting, Beall, the deputy attorney general said "I don't know" when Price asked him whether former DORA executive director Marguerite Salazar's reinstatement of Myklebust followed state laws regarding civil servant hiring. He said he would have to talk with the state personnel board.

Price said the Colorado Attorney General's Office has yet to answer multiple questions posed by the securities board about reinstatement rules.

Qualifications

The securities commissioner job was last posted in early 2014, after longtime securities commissioner Fred Joseph retired. The 2014 job posting's minimum qualification for the securities commissioner position was that applicants must have a minimum of six years of securities industry experience at the management level.

Myklebust's time in the securities industry spanned from 1997 and 2004, though he only served as a Series 65-registered financial advisor from 2002 until 2004, according to his FINRA records. His other roles included serving as an account services representative and as a marketing director. FINRA, or the Financial Industry Regulatory Authority Inc. is a private corporation that acts as a self-regulatory organization for financial advisors. DBJ obtained his FINRA records, which are kept by DORA and other state agencies nationwide, via a public records request.

Price said he felt Myklebust's work experience highlighted in his FINRA filing would not have qualified him for the position based on the 2014 job posting qualifications.

"I know many individuals in the state that would have qualified for consideration in a comparative process," Price said. "While Mr. Myklebust has a background in banking, he appears to have served in mostly entry-level or operational securities industry positions and to have held those positions for a limited period of time."

Cynthia King, who practices securities law in Colorado and Arizona for CLK and Associates, also highlighted that regulatory records show that Myklebust does not appear to have received licenses for working as a manager of an investment firm such as a as having a Series 24 or a Series 27, which are the credentials most associated with investment firm management experience.

“The securities commissioner, in order to be effective, needs to have a deep understanding of the securities industry… I would expect him to at least have had a Series 24 [license],” King said.

And Price said he wishes that he could have asked Myklebust about his time working for Integrity Financial Solutions, which was owned by Brad Hawkins, for just under two years. Both the firm and Hawkins later lost their SEC licenses after being accused by the Colorado Division of Securities of violating securities rules between 2009 and 2013, according to SEC documents. Myklebust, however, was not implicated in the violations.

“The question about working for [Integrity Financial Solutions] would have been important from a diligence standpoint to give Chris the opportunity to explain why it shouldn’t be an issue and give the state’s investors comfort that the issue was vetted,” Price said.

One of the most important parts of the securities commissioner’s job is stopping investment managers from violating the state’s securities act.

One measure of that work is the number of enforcement actions filed by the securities commissioner against investment firms. In previous fiscal years, the commissioner has filed around 70 enforcement actions annually. The division has only filed 14 in the first nine months of this year.

“I strongly believe that what is essential to achieving the Division's mission of protecting all investors is to have in place a vigorous enforcement program,” former securities commissioner Rome said. But John Eckstein, who has been a securities lawyer for the past 40 years, said it’s too early to tell whether enforcement actions have slackened.

“A partial first year is not enough time to make firm conclusions,” he said.

Some are also concerned that Myklebust’s 14 enforcement actions as commissioner against bad investment actors could be reversed should his appointment be found to have occurred illegitimately. Feigin, who served as the Colorado securities commissioner between 1988 and 1998, said he worries that all of Myklebust’s actions could be overturned due to this ruling.

“Is any broker-dealer, sales representative, investment adviser or IA representative license he has [purportedly] granted since Commissioner Rome left lawful? Is any order he's signed lawfully issued?” Feigin said.

Price said he resents that the securities board is even having to ask for independent counsel given the circumstances. He and others, including Feigin, plan on voicing their concerns during the Aug. 30 meeting.

“Colorado rose from the ashes of a securities version of 'Gangland Chicago' in the '80s to become one of the premier enforcement and regulatory agencies in the country through the efforts of four very capable experienced commissioners since 1981, terrific, hardworking staff and a lot of very hard work,” Feigin said in an email. “It drives me nuts to see it all risked ..."

The meeting, which is open to the public, will be held at 9 a.m. in the Colorado Department of Regulatory Agencies’ conference room 100D at 1560 Broadway in downtown Denver.
