INITIAL DECISION RELEASE NO. 935
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16354

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	
DAVID B. HAVANICH, JR.,	:	
CARMINE A. DELLASALA, MATTHEW D. WELCH,	:	INITIAL DECISION
RICHARD HAMPTON SCURLOCK, III,	:	AS TO RICHARD
RTAG INC. d/b/a RETIREMENT TAX ADVISORY GROUP,	:	HAMPTON SCURLOCK, III,
JOSE F. CARRIO, DENNIS K. KARASIK,	:	and RTAG INC.
CARRIO, KARASIK & ASSOCIATES, LLP, and	:	January 4, 2016
MICHAEL J. SALOVAY	:	

APPEARANCES: Andrew O. Schiff for the Division of Enforcement, Securities and Exchange Commission

Andre F. Regard of Regard Law Group, PLLC, for Respondents Richard Hampton Scurlock, III, and RTAG Inc.

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision concludes that Richard Hampton Scurlock, III, and RTAG Inc. d/b/a Retirement Tax Advisory Group (collectively, Respondents) violated Section 15(a) of the Securities Exchange Act of 1934 (Exchange Act) by operating as unregistered brokers from January 2010 through March 2012. The Initial Decision orders Respondents to cease and desist from further violations, censures them, and orders them to pay disgorgement of $15,000 and a civil money penalty of $15,000.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on January 23, 2015, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b) and 21C of the Exchange Act, and Sections 203(e) and (f) of

the Investment Advisers Act of 1940 (Advisers Act).[1] The undersigned held a one-day hearing in Washington, D.C., on July 6, 2015. The Division of Enforcement (Division) called two witnesses, including Scurlock, from whom testimony was taken, and Scurlock testified in Respondents' case. Numerous exhibits were admitted into evidence.[2]

B. Allegations and Arguments of the Parties

This proceeding concerns Respondents' relationship with Diversified Energy Group, Inc. (Diversified), pursuant to a "Finder's Fee Agreement." The OIP alleges that Respondents, neither of which was registered as, or associated with, a registered broker-dealer, solicited investors and received compensation for the sale of Diversified bonds and, thus, willfully violated Section 15(a) of the Exchange Act.

The Division is seeking cease-and-desist orders, disgorgement, civil monetary penalties, and industry and penny stock bars against Respondents. Respondents argue that the charges are unproven and no sanctions should be imposed.[3]

II. FINDINGS OF FACT

A. Scurlock and RTAG

Scurlock owns RTAG. Joint Ex. 1 at 1. He has been in the financial services field for eighteen years, with no disciplinary history; between 1999 and 2005, he was a registered representative of four different broker-dealers registered with the Commission and held Series 7 and other licenses. Tr. 15-16, 79, 136. Thereafter, Scurlock began an investment advisory business under the name Retirement Tax Advisory Group, which since 2008 has been a state-registered investment advisor in Kentucky, and also provides insurance sales and tax services to clients. Tr. 17, 36, 77; Joint Ex. 1 at 1-2. The business was operated initially through Scurlock's corporation, Retirement Tax Advisory Group Inc., then as a sole proprietorship, and by 2011 through RTAG, but all were essentially the "same business," of which Scurlock is associated as the

[1] The proceeding has ended as to David B. Havanich, Jr., Carmine A. DellaSala, and Matthew D. Welch. *See David B. Havanich, Jr.*, Securities Act Release Nos. 9791, 9792, 9793; 2015 SEC LEXIS 2144, 2146, 2147 (May 26, 2015).

[2] Citations to the transcript are noted as "Tr. __." Citations to exhibits offered by the Division, by Respondents, and jointly are noted as "Div. Ex. __," "Resp. Ex. __," and "Joint Ex. 1," respectively, and citations to the parties' posthearing briefs are noted as "Div. Br. at __," "Resp. Br. at __," and "Div. Reply at __," respectively.

[3] Respondents also request that the Division be ordered to pay their legal costs. Such a request, which is premature, can only be made under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and Sections 201.31-.59 of the Commission's Rules, 17 C.F.R. §§ 201.31-.59. The EAJA and the cited Commission Rules specify the circumstances under which an award of fees and expenses will be made to a party.

owner and president. Tr. 17; Joint Ex. 1 at 1-2; Div. Ex. 2 at 2. At no time after 2005 were Scurlock or RTAG (or any related entities) registered with the Commission as broker-dealers or representatives of registered broker-dealers. Tr. 17-18. Scurlock was aware that to permissibly act as a broker, a person must either be registered as a broker-dealer or be a registered representative of one. Tr. 16.

From August 2009 until August 2012, RTAG had between fifty and seventy-two household clients, comprised of "mostly individuals, some trusts, estates, charities and pension plans." Tr. 19-20; Div. Ex. 26 at 3; Div. Ex. 27 at 2. RTAG's advisory business generally involves financial planning for clients, including reviewing risks of investments and making recommendations on "a pretty broad spectrum" of securities. Tr. at 69-71. Scurlock and RTAG have discretionary authority over client accounts, but also advise clients that carry out their own transactions. Tr. 71, 73.

B. Finder's Fee Agreement Between Scurlock and Diversified

In February 2009, Scurlock attended a conference for independent investment advisers, during which he learned about Diversified and its securities. Tr. 80-81; Joint Ex. 1 at 2. Diversified, a Delaware corporation with its principal place of business in Florida, invested in oil and gas wells and "had a . . . hedging account and other cattle and other offshoot businesses." Tr. 21; Joint Ex. 1 at 2. Between February and December 2009, Scurlock performed due diligence on Diversified as an investment. Joint Ex. 1 at 2; Tr. 81-83, 92-93.

In December 2009, Scurlock entered into a written agreement, titled "Finder's Fee Agreement," with Diversified to find investors for its bonds. Tr. 21-22, 92-94; Joint Ex. 1 at 3; Div. Ex. 14; Resp. Ex. A. The Finder's Fee Agreement provided that in exchange for introducing investors to Diversified, Scurlock would receive a "[f]inder's fee" of five percent of amounts invested by those he introduced. Tr. 22; Joint Ex. 1 at 3; Div. Ex. 14; Resp. Ex. A.[4] At some point, this fee increased to ten percent. Tr. 22, 93; Joint Ex. 1 at 3. The Finder's Fee Agreement was non-exclusive: it provided that Scurlock "acknowledges and agrees that . . . [Diversified] shall be free to engage such other finders, brokers, consultants or agents as it shall deem necessary." Div. Ex. 14 at 2; Resp. Ex. A at 2.

C. Scurlock and RTAG Find Investors for Diversified and Receive Commissions

From January 2010 through March 2012, Scurlock introduced approximately fifty investors to Diversified; some were preexisting clients of RTAG while others Scurlock considered to have become RTAG clients upon his referring them to Diversified. Tr. 35-37, 46-48; Div. Ex. 16. Scurlock and RTAG used the mails and instrumentalities of interstate commerce in performing these activities. Joint Ex. 1 at 4. During this period and pursuant to the Finder's Fee Agreement, Diversified paid Scurlock and RTAG $443,249.73 in finder's fees as a result of investments made by those Scurlock referred to Diversified. Tr. 37; Joint Ex. 1 at 3; Div. Exs. 16, 18. In the first few months of 2012, Diversified paid $95,441.09 of these fees to RTAG rather than Scurlock. Tr. 47-

[4] The Finder's Fee Agreement is found at both Division Exhibit 14 and Respondent Exhibit A.

48; Div. Ex. 18. According to Scurlock, although most of the money was paid to him individually, all of it actually "came in to [RTAG]." Tr. 47. RTAG's usual "management fee" for discretionary accounts did not apply to the Diversified bonds in which clients invested. Tr. 77-78.

Throughout the relevant time period, Respondents had a relationship with broker TD Ameritrade.[5] Tr. 32-33; Joint Ex. 1 at 3. After entering the Finder's Fee Agreement, Scurlock asked TD Ameritrade to carry Diversified bonds on its platform. Tr. 85-86; Joint Ex. 1 at 3; Resp. Ex. D at 101-08. In May 2010, after conducting a review of Diversified's materials, TD Ameritrade added the bonds to its platform and approved them for retirement accounts. Tr. 86-87, 110, 114; Joint Ex. 1 at 3; Resp. Ex. D at 106. Thereafter, some investors whom Scurlock introduced to Diversified made their investments through TD Ameritrade, which would handle the purchase transaction, including forwarding the customer funds to Diversified, providing transaction confirmation to the customer, acting as custodian of the bonds, and receiving interest payments on the customer's behalf. Tr. 33-34, 108-09; Joint Ex. 1 at 3. Other of Scurlock's clients simply sent their money directly to Diversified or provided Scurlock a check, which he in turn would forward to Diversified. Tr. 35.

Before clients invested in Diversified bonds, Scurlock reviewed the bonds in detail with them and assisted with transactions. This included the following: discussing Diversified's offering materials, including its private placement memorandum and information about how Diversified would use the invested funds and the interest the bonds would pay, Tr. 28-31, 110-11; reviewing risk factors—including the fact that the bonds were illiquid and non-publicly traded, Tr. 28-29, 88; answering questions about Diversified or referring clients to Diversified to answer questions, Tr. 28-29; assisting with the paperwork necessary to invest in Diversified, Tr. 31-32, 90, 101; and helping determine whether Diversified's bonds were suitable for clients and whether clients were accredited, Tr. 32; Joint Ex. 1 at 3. Scurlock testified that this review process was "very similar" to that used for other investments, but that the Diversified bonds carried "different risks." Tr. 74-75, 88-90. Respondents disclosed the Finder's Fee to clients by "hav[ing] a list on the front page" of the offering or private placement memorandum, stating it verbally, "writ[ing] it down on a note pad" when "going over different options," and eventually listing it on RTAG's Form ADV. Tr. 75.

D. State Regulatory Examination of RTAG

In February 2011, Kentucky's Department of Financial Institutions (DFI) conducted an examination of RTAG. Tr. 48-49; Joint Ex. 1 at 3. DFI conducts such examinations to "determine compliance with [the] Kentucky Securities Act." Tr. 159. Scurlock and DFI examiners discussed the Finder's Fee Agreement and whether it necessitated some form of registration. Tr. 49, 97. In March 2011, following the DFI exam, Scurlock amended RTAG's January 2011 Form ADV to disclose that Scurlock "can receive a finders fee from Diversified . . . as outlined in their offering memorandum" and that "[t]hese assets will not be counted as assets managed and will not be subject to management fees." Tr. 125-26; Resp. Ex. G-2 at 8.

[5] TD Ameritrade was one of a number of custodians and trading platforms that RTAG used generally. Tr. 71.

On June 2, 2011, Scurlock received an email from DFI Compliance Branch Manager Carmen Bishop; she had "received an opinion" that if Scurlock "continue[ed] to effect purchases and sales of private placements and receive a Finder's fee from [Diversified]" then he would be required to "register[] as an issuer agent." Joint Ex. 1 at 4; Div. Ex. 25. According to the email, this left Scurlock with four options: (1) "[b]ecome registered as an agent of the issuer"; (2) "[o]perate as a solicitor for the issuer with a solicitor's agreement in place"; (3) "recommend the private placement to a client but accept no compensation from the issuer"; or (4) "[s]top effecting purchases and sales of private placements." *Id.* The email noted that if Scurlock chose either of the first two options, he would "need to make full disclosure of the agent registration or solicitor arrangement." *Id.* Lastly, the email stated that DFI would "not take action at this time for the earlier sales although [Scurlock was] conducting activity without being registered as an issuer agent." *Id.* The email did not address the question of whether federal law required Scurlock to register as a broker. *Id.*; Tr. 50-51. Following the email from DFI, RTAG amended its Form ADV to include a summary and a more detailed description of Scurlock's Finder's Fee Agreement. Tr. 51, 53-54; Joint Ex. 1 at 4; Div. Ex. 15 at 2, 5, 10.[6]

E. Investor Losses on Diversified Bonds

In the fall of 2011, Scurlock requested and received from Diversified updated financials showing $4.1 million in negative shareholder equity and a $2 million loss for the first three quarters of 2011. Tr. 40-41; Div. Ex. 9. This information "surprised" him, as he believed Diversified "had been doing better" based on its literature and what people at the company had told him. Tr. 41-42. After receiving the financials, Scurlock continued to recommend Diversified to a number of clients, but believed "it wasn't a good fit for all [RTAG's] investment clients." Tr. 42.

In April 2012, a number of RTAG clients that had invested in Diversified began receiving letters from the company announcing that it was under Commission investigation, that it would be restructuring its debt to reduce interest rates paid on its bonds, and that fifty-seven percent of the bonds' principal would be paid over thirty-six months, with the remaining forty-three percent to be paid at the end of that period. Tr. 54-55; Div. Ex. 45. Scurlock stopped offering Diversified bonds after seeing these letters, though it is not clear any such bonds were being issued by then. Tr. 55, 80, 129, 149. Subsequent letters sent by Diversified in July 2013 stated that the debt restructuring failed and that investors would suffer a loss. Tr. 58; Div. Ex. 46. Investors holding Diversified's bonds as of April 2012 lost at least a portion of their principal, and some of Scurlock's clients lost "close to . . . two-thirds" of their investment, while others lost less. Tr. 61, 63.

---

[6] Scurlock testified that he called DFI prior to signing the Finder's Fee Agreement and inquired about "anything we need[ed] to do just in general terms of [being] a state registered investment advisor," and was told verbally that broker registration was not required. Tr. 23, 26-27, 28, 82-83. Nothing indicates this purported discussion related to federal law. *See id.* Indeed, DFI's record of its February 2011 examination of RTAG noted that Scurlock was not "registered as an issuer agent or broker dealer, which is required to accept transaction-based compensation as a finder's fee has been deemed transaction-based," and does not reflect Scurlock's having mentioned any prior guidance from DFI that broker registration was not required. Div. Ex. 28. at 7; *see* Tr. 165-66.

III. CONCLUSIONS OF LAW

The OIP charges that Respondents violated Exchange Act Section 15(a), the broker-dealer registration provision. Specifically, the OIP charges that they willfully violated Exchange Act Section 15(a) by effecting transactions in, or attempting to induce the purchase of, Diversified bonds while neither was registered as a broker-dealer or associated with a registered broker-dealer. As discussed below, it is concluded that Respondents violated Exchange Act Section 15(a).

A. Broker-Dealer Registration Provision

Section 15(a)(1) of the Exchange Act makes it unlawful for any entity to effect transactions in securities, by jurisdictional means, without registering as a broker or dealer. 15 U.S.C. § 78*o*(a)(1). "Broker" is defined in Section 3(a)(4) of the Exchange Act as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4). Scienter is not required to establish a violation of this provision. *SEC v. Montana*, 464 F. Supp. 2d 772, 785 (S.D. Ind. 2006).

Activities of a broker are characterized by "a certain regularity of participation in securities transactions at key points in the chain of distribution." *Mass. Fin. Servs., Inc. v. Secs. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd*, 545 F.2d 754 (1st Cir. 1976). Other relevant factors include whether the alleged broker: "1) is an employee of the issuer; 2) received commissions as opposed to salary; 3) is selling, or previously sold, the securities of other issuers; 4) is involved in negotiations between the issuer and the investor; 5) makes valuations as to the merits of the investment or gives advice; and 6) is an active rather than passive finder of investors." *SEC v. Zubkis*, No. 97-cv-8086, 2000 WL 218393, at *9 (S.D.N.Y. Feb. 23, 2000) (quoting *SEC v. Hansen*, No. 83-cv-3692, 1984 WL 2413 at, *10 (S.D.N.Y. Apr. 6, 1984)). However, "transaction-based compensation" is "one of the hallmarks of being a broker-dealer." *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011) (quoting *Cornhusker Energy Lexington, LLC v. Prospect Street Ventures*, No. 8:04-cv-586, WL 2620985, at *6 (D. Neb. Sept. 12, 2006)).

1. Willfulness

Respondents are charged with *willful* violations of Exchange Act Sections 15(a). A finding of willfulness does not require an intent to violate, but merely an intent to do the act which constitutes a violation. *See Steadman v. SEC*, 603 F.2d 1126, 1135 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965).

2. Corporate Liability

RTAG is accountable for the actions of its responsible officers, including Scurlock. *See C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir. 1988) (citing *A.J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977)). A company's scienter is imputed from that of the individuals controlling it. *See SEC v. Blinder, Robinson & Co.*, 542 F. Supp. 468, 476 n.3 (D. Colo. 1982) (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972)). Scurlock, as RTAG's owner, was an associated person of the investment adviser (as well as being an investment adviser himself). *See* Section 202(a)(11) and (17) of the Advisers Act. As an

associated person of an investment adviser, Scurlock's conduct and scienter are also attributed to the investment adviser. *See* Section 203(e) of the Advisers Act.

B. Violation

Scurlock and RTAG made no attempt to comply with the broker registration requirements yet were clearly "in the business of effecting transactions in securities for the accounts of others," in violation of Section 15(a)(1) of the Exchange Act. The undisputed facts show that their conduct satisfied numerous indicia of broker activity.

First, it is undisputed that Scurlock and RTAG received transaction-based compensation—the broker "hallmark." *See Kramer*, 778 F. Supp. 2d at 1334. Under his Finder's Fee Agreement with Diversified, Scurlock received finder's fees (*i.e.*, commissions) of five percent—and later, ten percent—of amounts invested by those he introduced to Diversified. These fees were plainly "transaction-based," as they depended on introduced persons completing investment transactions in Diversified, and were wholly distinct from the advisory management fees usually charged to Scurlock's clients. Both Scurlock and RTAG received these commissions directly from Diversified, the issuer, altogether totaling $443,249.73 over a twenty-seven month period.

Second, in recommending Diversified's bonds to his clients, Scurlock made "valuations as to the merits of the investment [and gave] advice." *Zubkis*, 2000 WL 218393 at *9. He indisputably "advised his clients as to the availability and suitability of [Diversified's] bonds for them to purchase." As a matter of course, he discussed the merits of the investment with clients in detail, which included going through Diversified's offering materials and the terms of its bonds. He reviewed risks of the investment and answered client questions, or referred questions to Diversified.

Third, Scurlock was "an active rather than passive finder of investors" in Diversified. *Zubkis*, 2000 WL 21893, at *9. From January 2010 through March 2012, Scurlock introduced approximately fifty clients to Diversified, actively carrying out the express goal of the Finder's Fee Agreement by recommending the bonds to a large majority of his client base. In so doing, he helped facilitate transactions by determining whether the clients were accredited, whether the bonds were a suitable investment, and assisting with paperwork necessary to buy the bonds. Scurlock took custody of some clients' checks, which he forwarded to Diversified.

This pattern of activity reflects "a certain regularity of participation in securities transactions at key points in the chain of distribution." *Mass. Fin. Servs., Inc.*, 411 F. Supp. at 415. Indeed, Scurlock materially participated in numerous key points of his clients' transactions in Diversified bonds, from "finding" the clients initially, to advising them on the merits of the investment, to shepherding them through the steps necessary to execute the transaction. *See Kramer*, 778 F. Supp. 2d at 1336 (identifying "discussing the details of the transaction[] and recommending an investment" as key points in the chain of distribution). Scurlock thus acted as a broker. RTAG also acted as a broker; Scurlock controlled RTAG and acted through it, and RTAG directly received nearly $100,000 in transaction-based compensation from the Diversified bond transactions. It is undisputed that when these activities occurred, neither Scurlock nor RTAG were registered with the Commission as broker-dealers or representatives of registered broker-dealers.

Respondents assert two defenses—that these activities were "within the scope of a Registered Investment Adviser," and that Scurlock was acting as a mere "[f]inder . . . not required to register as a broker." Resp. Br. at 1, 5-15. Both defenses are unavailing.

Though Scurlock was associated with RTAG, a state-registered investment adviser in Kentucky, and though it is possible their conduct may not have violated Kentucky law or the Advisers Act, neither fact compels the conclusion that broker registration was unnecessary under the Exchange Act, as Respondents suggest.[7] Although brokers may be exempt from registering as investment advisers if their advisory activity is "solely incidental" to their brokerage business, investment advisers are not similarly exempt from registering as brokers when, in connection with their advisory business, they act as brokers. *Compare* 15 U.S.C. § 80b-2(a)(11) (defining "investment adviser") *with* § 78c(a)(4) (defining "broker") and § 78*o*(a)(1)-(2) (governing broker registration); *see also* 17 C.F.R. § 240.3a4-1 (inapplicable broker registration exemption); *Anthony Fields, CPA*, Exchange Act Release No. 74344, 2015 SEC LEXIS 662, at *75 (Feb. 20, 2015) (noting that "there is no requirement . . . that [broker] activity be a person's principal business or the principal source of income," and that indicators of broker activity "include holding oneself out as a broker-dealer, recruiting or soliciting potential investors, handling client funds and securities, negotiating with issuers, and receiving transaction-based compensation").

The cases on which Respondents rely largely undercut their argument rather than bolster it. *See, e.g., Kramer*, 778 F. Supp. 2d at 1336 (most important factors for determining broker activity are receiving transaction-based compensation and participating in "key points in the chain of distribution," which includes "discussing the details of the transaction[] and recommending an investment"); *Hansen*, 1984 WL 2413, at *10 (listing relevant indicia of broker activity, many of which Respondents satisfy).[8]

As to Respondents' "finder's" defense, the concept of a finder exempt from the Exchange Act's registration requirement does not exist in any decision of the Commission, the Supreme Court, or any federal court of appeals. Moreover, the district court decisions recognizing the finder concept indicate that it would be inapplicable here. *See Kramer*, 778 F.2d at 1336 (finder exception pertains to "a narrow scope of activities" and broker registration is required for "involvement at key points in the chain of distribution such as . . . discussing the details of the transaction, and

[7] *See* David A. Lipton, *A Primer on Broker-Dealer Registration*, 36 Cath. U. L. Rev. 899, 933 (1987) (collecting No-Action letters on the topic, and noting that "[r]egistration of investment advisers under the provisions of the Investment Advisers Act of 1940 does not resolve the issue whether registration is also required pursuant to section 15(a) of the 1934 Act").

[8] Respondents point to Section 211(g)(1) of the Advisers Act, which authorizes the Commission to promulgate standards for brokers, dealers, and investment advisers to act in the best interest of retail customers receiving personalized investment advice, and provides: "The receipt of compensation based on commission or fees shall not, in and of itself be considered a violation of such standard applied to a broker, dealer, or investment adviser." However, that is irrelevant. The issue in this proceeding is not whether Respondents violated conflict of interest standards. Rather, it is whether Respondents violated Exchange Act Section 15(a)(1) by acting as unregistered brokers.

recommending the investment") (internal quotation marks and citations omitted); *DeHuff v. Digital Ally, Inc.*, No. 3:08-cv-327, 2009 WL 4908581, at *4 (S.D. Miss. Dec. 11, 2009) (finder concept is only applicable in "certain limited circumstances" and activities "triggering [broker-dealer] registration requirements . . . include . . . discussion of details of securities transactions [and] making investment recommendations").

Respondents' defense is also undercut by the Finder's Fee Agreement itself, which likens Scurlock's finder activity to that of a broker by providing that Diversified "shall be free to engage such other finders, *brokers*, consultants or agents as it shall deem necessary."

In sum, it is concluded that Respondents violated Section 15(a)(1) of the Exchange Act.

IV. SANCTIONS

The Division requests cease-and-desist orders; disgorgement of ill-gotten gains, by Scurlock of $443,249.73 and by RTAG of $95,441.09, respectively, plus prejudgment interest; civil penalties of $75,000 against each Respondent; and industry and penny stock bars.

As discussed below, the following will be ordered: cease-and-desist orders; disgorgement, jointly and severally by Respondents of $15,000 plus prejudgment interest; civil penalties, jointly and severally, against Respondents of $15,000; and a censure.

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the [respondent's] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondent's] assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the [respondent's] occupation will present opportunities for future violations.

Steadman, 603 F.2d 1126, 1140 (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35-36 & n.46 (Jan. 31, 2006). As the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. *See Christopher A. Lowry*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. *See Leo Glassman*, Exchange Act Release No. 11929, 1975 SEC LEXIS 111, at *7 (Dec. 16, 1975).

B. Cease and Desist

Exchange Act Section 21C authorizes the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of the Exchange Act or who "is, was, or would be a cause of the violation." 15 U.S.C. § 78u-3(a). Whether there is a reasonable likelihood of such violations in the future must be considered. *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *101, *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002). Such a showing is "significantly less than that required for an injunction." *Id*. at *114. In determining whether a cease-and-desist order is appropriate, the Commission considers the *Steadman* factors quoted above, as well as the recency of the violation, the degree of harm to investors or the marketplace, and the combination of sanctions against the respondent. *See WHX Corp. v. SEC*, 362 F.3d 854, 859-61 (D.C. Cir. 2004); *KPMG*, 2001 SEC LEXIS 98, at *116.

Respondents' conduct in operating as unregistered brokers was recurrent over more than two years. The violation was relatively recent, occurring through early 2012. Although scienter is not an element of the violation, Respondents were at least reckless. Scurlock has been associated with broker-dealers, has held securities licenses, and is aware of the broker-dealer registration requirements. Respondents' occupations provide opportunities for future violations. Scurlock has been in the financial services field for the last eighteen years, and he still has opportunities to interact with clients, including RTAG's tax and insurance clients. Additionally, investors suffered losses on Diversified bonds sold as a result of the unlawful broker activity. Further, Respondents' disregard of broker-dealer registration requirements caused harm generally to the marketplace, which those requirements are intended to protect.

Accordingly, a cease-and-desist order against Respondents is appropriate.

C. Disgorgement

Exchange Act Section 21C(e) authorizes disgorgement of ill-gotten gains, including reasonable interest, in cease-and-desist proceedings.[9] 15 U.S.C. § 78u-3(e). Disgorgement of ill-gotten gains is "an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Montford & Co. v. SEC*, 793 F.3d 76, 84 (D.C. Cir. 2015) (quoting *SEC v. First City Fin. Corp*., 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

Respondents received a total of $443,249.73 ($347,808.64 paid to Scurlock and $95,441.09 paid to RTAG) in commissions from their operation as unregistered brokers. Accordingly, $443,249.73 of ill-gotten gains is subject to disgorgement. Since Scurlock owns 100% of RTAG, joint and several liability for disgorging this amount plus prejudgment interest is appropriate, before taking into consideration ability to pay. However, the financial information Respondents submitted

[9] The OIP also authorizes disgorgement pursuant to Exchange Act Section 21B(e), a similarly worded provision.

shows that they are not able to pay the full amount in addition to penalties.[10] *See* Section 21B(d) of the Exchange Act;[11] 17 C.F.R. § 201.630(a).[12] Nonetheless, it is concluded that Respondents are able to pay a nominal amount of $15,000, and disgorgement of $15,000 plus prejudgment interest will be ordered against Respondents.

D. Civil Money Penalty

Exchange Act Section 21B authorizes the Commission to impose civil money penalties against a person who violated, or was the cause of the violation of, any provision of the Exchange Act, or rules thereunder, where such penalties are in the public interest. 15 U.S.C. § 78u-2(a). In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud or deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. *See* Section 21B(c) of the Exchange Act; *New Allied Dev. Corp.*, Exchange Act Release No. 37990, 1996 SEC LEXIS 3262, at *30 n.33 (Nov. 26, 1996); *First Sec. Transfer Sys., Inc.*, Exchange Act Release No. 36183, 1995 SEC LEXIS 2261, at *9 (Sept. 1, 1995); *see also Jay Houston Meadows*, Exchange Act Release No. 37156, 1996 SEC LEXIS 1194, at *25-27 (May 1, 1996), *aff'd*, 119 F.3d 1219 (5th Cir. 1997); *Consol. Inv. Servs., Inc.*, Exchange Act Release No. 36687, 1996 SEC LEXIS 83, at *22-24 (Jan. 5, 1996).

---

[10] The Division argues that Respondents did not address their inability to pay in post-hearing briefing and that such claim should be rejected because their back-up submissions – over 1200 pages of account statements, as well as tax returns – "did not [include] all [such documents] going back to 2010, the beginning of the violation." Div. Reply Br. at 3. However, Respondents asserted an inability to pay at the hearing, Tr. 132-43, and submitted statements of financial condition. Moreover, the Division does not explain with any specificity why the missing back-up documents might render Respondents' statements of financial condition inaccurate, and when cross-examining Scurlock on the tax returns he provided, did not ask him about those that were missing. Tr. 138-42.

[11] Exchange Act Section 21B authorizes the Commission to impose a civil penalty in a proceeding, such as this one, instituted pursuant to Exchange Act Section 15(b). Section 21B(d) provides:

> In any proceeding in which the Commission . . . may impose a penalty under this section, a respondent may present evidence of [his] ability to pay such penalty. The Commission . . . may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

[12] "The [Administrative Law Judge] may, in . . . her discretion, consider evidence concerning ability to pay in determining whether disgorgement . . . or a penalty is in the public interest." 17 C.F.R. § 201.630(a).

Fraud and previous violations are absent from the instant case. However, Respondents' violations involved a reckless disregard of a regulatory requirement and resulted in unjust enrichment and harm to others. Deterrence also requires penalties.

Penalties in addition to the other sanctions ordered are in the public interest. Pursuant to Exchange Act Section 21B(b)(1), for each violative act or omission after March 3, 2009, and before March 6, 2013, the maximum first-tier penalty is $7,500 for a natural person and $75,000 for any other person. 17 C.F.R. § 201.1004, Subpt. E, Table IV. A second-tier penalty is appropriate when a respondent's violative acts involved a deliberate or reckless disregard of a regulatory requirement. Exchange Act Section 21B(b)(2). Under that provision, for each violative act or omission during the same time period, the maximum second-tier penalty for each violation for a natural person is $75,000 and for any other person is $375,000. 17 C.F.R. § 201.1004, Subpt. E, Table IV.

The provisions, like most civil penalty statutes, leave the precise unit of violation undefined. *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1440-41 (1979).

The events at issue will be considered as one course of action – Respondents' operations as an unregistered broker-dealer from 2010 to 2012. A second-tier civil penalty of $15,000 is appropriate because Respondent's conduct involved a reckless disregard of a regulatory requirement and takes into account Respondents' ability to pay. *See* Exchange Act Section 21B(b)(2), (d). The penalty will be imposed jointly and severally on Respondents. Combined with the other sanctions ordered, these penalties are in the public interest.

E. Exchange Act Section 15(b)(4), (6) and Advisers Act Section 203(e), (f) Sanctions

The Division requests industry and penny stock bars. However, a lesser sanction than a bar – a censure – is appropriate. No Commission opinion in a litigated administrative proceeding has imposed a bar on a respondent solely for operating as an unregistered broker-dealer. Such a sanction is found where the respondent has also violated, or aided and abetted violation of, the antifraud provisions. *See David F. Bandimere*, Securities Act Release No. 9972, 2015 SEC LEXIS 4472 (Oct. 29, 2015) (violation of antifraud, broker-dealer registration, and securities registration provisions); *Maria T. Giesige*, Exchange Act Release No. 60000, 2009 SEC LEXIS 1756 (May 29, 2009); *Paul Carroll Ferguson*, Exchange Act Release No. 6009, 1959 SEC LEXIS 549 (July 7, 1959) (violation of antifraud, broker-dealer registration, and other provisions; respondent's registration as a broker-dealer revoked); *Gregory & Co.*, Exchange Act Release No. 5680, 1958 SEC LEXIS 251 (Apr. 18, 1958) (violation of antifraud, broker-dealer registration, and other provisions; respondent's application for registration as a broker-dealer denied); *The Whitehall Corp.*, Exchange Act Release No. 5667, 1958 SEC LEXIS 246 (Apr. 2, 1958) (violation of antifraud, broker-dealer registration, and other provisions; respondent's application for registration as a broker-dealer denied).

Accordingly, in combination with the other sanctions ordered, a censure of Scurlock and of RTAG is in the public interest.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on October 20, 2015.

VI. ORDER

IT IS ORDERED that, pursuant to Section 21C of the Securities Exchange Act of 1934, RICHARD HAMPTON SCURLOCK, III, and RTAG INC. d/b/a RETIREMENT TAX ADVISORY GROUP CEASE AND DESIST from committing or causing any violations or future violations of Section 15(a) of the Exchange Act.

IT IS FURTHER ORDERED that, pursuant to Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, RICHARD HAMPTON SCURLOCK, III, and RTAG INC. d/b/a RETIREMENT TAX ADVISORY GROUP, JOINTLY AND SEVERALLY, DISGORGE $15,000 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), prejudgment interest is due from April 1, 2012, through the last day of the month preceding which payment is made.

IT IS FURTHER ORDERED that, pursuant to Section 21B of the Securities Exchange Act of 1934, RICHARD HAMPTON SCURLOCK, III, and RTAG INC. d/b/a RETIREMENT TAX ADVISORY GROUP, JOINTLY AND SEVERALLY, PAY A CIVIL MONEY PENALTY OF $15,000.

IT IS FURTHER ORDERED that, pursuant to Section 15(b)(4) and (6) of the Securities Exchange Act of 1934 and Section 203(e) and (f) of the Investment Advisers Act of 1940, RICHARD HAMPTON SCURLOCK, III, and RTAG INC. d/b/a RETIREMENT TAX ADVISORY GROUP ARE CENSURED for violating Exchange Act Section 15(a).

Payment of disgorgement, prejudgment interest, and civil penalties shall be made no later than twenty-one days following the day this Initial Decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission.

Any payment by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order shall include a cover letter identifying the Respondent[s] and Administrative Proceeding No. 3-16354, and shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

_____

Carol Fox Foelak
Administrative Law Judge