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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
FILE NO. 3-16354

In the Matter of
David B. Havanich, Jr.,
Carmine A. DellaSala,
Matthew D. Welch,
Richard Hampton Scurlock, III,
RTAG Inc. d/b/a Retirement
Tax Advisory Group,
Jose F. Carrio,
Karasik & Associates, LLP
Michael J. Salovay

Respondents,
_____/

RESPONSE IN OPPOSITION OF THE DIVISON OF ENFORCEMENT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

Andre F. Regard
Regard Law Group, PLLC
269 W. Main Street, Suite 600
Lexington, KY 40507-1759
[redacted]
(859)-281-1318 Telephone
(859)-281-1319 Fax

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STATUTES AND REGULATIONS

Comes Richard Hampton Scurlock, III ("Scurlock") and RTAG Inc. ("RTAG") (collectively, the "Scurlock"), by counsel, and for their Response in Opposition of the Division of Enforcement's (the "Division") Motion for Partial Summary Disposition, states as follows:

I. Introduction

The Division's action against RTAG, Inc. and Scurlock (hereinafter both referred to as "Scurlock") is frivolous and without merit. Scurlock is not accused of any fraud or deceit. There is no claim of participating in a Ponzi scheme or misusing client's assets. The case challenges the underlying duties of an Investment Advisor, specifically when they are involved in a private placement offering. In this instance investors lost money so someone has to be blamed. However, in this case, the fact that it is a private placement should be immaterial, the question should be whether or not Scurlock has deviated from the duties of an investment advisor and the answer is clearly NO.

The undersigned counsel could not find any case law finding investment advisors guilty of acting as brokers. This is probably because the duties of an investment advisor are so broad they practically cover everything a broker can do. The Division is attempting to punish Scurlock, the only registered individual that is part of this action, for properly performing his statutory duties as a duly licensed and regulated investment advisor. The Division is overreaching in this case. The Division is attempting to use Scurlock as an example to continue to insist, in the face of contrary caselaw and the actual statutes, that transaction based compensation alone makes a person a broker. This is simply not correct. In fact, the Investment Advisors Act of 1940 clearly allows an investment advisor to receive transaction based compensation. In addition, if the Division was able to prove that Scurlock actually violated his duties as an investment advisor and was in fact a broker, the Finder's Fee exception is applicable

in this particular situation. The fact specific nature of the required inquiry in this matter makes summary disposition inappropriate at this time and Division's motion should be overruled.

II. Statement of the Facts

The general statement of fact is attached in the affidavit of Richard Scurlock. More specifically:

1. RTAG, Inc. is a registered Kentucky investment advisor. Richard Scurlock is the owner and president of RTAG, and is therefore an associated person of RTAG.[1]
2. The DEG bonds are securities.
3. Scurlock did receive transaction based compensation on the sale of the DEG bonds.[2]
4. Scurlock did disclose the compensation to his clients.[3]
5. Scurlock did conduct due diligence related to the DEG bonds.[4]
6. Scurlock did recommend the bonds to clients for purchase.[5]
7. Scurlock did not advertise the DEG bonds.[6]
8. Scurlock did not negotiate the price of the DEG bonds.[7]
9. The Kentucky Department of Financial Institutions advised Scurlock on how to proceed in this matter and Scurlock complied with their requests.[8]

III. Memorandum of Law

A. Background

RTAG and Scurlock are registered investment advisors with the Commonwealth of Kentucky.[9] An investment advisor is a person or a firm who is paid to advise others as to the

[1] Answer of Scurlock ¶3
[2] Scurlock Affidavit ¶11 and 15
[3] Id.
[4] Id at ¶4
[5] Id at ¶11
[6] Id at ¶27 and 28
[7] Id at ¶29 and 30
[8] Scurlock Affidavit ¶9 and 10

value of a security or as to the advisability of investing in, purchasing, or selling securities.[10] This is exactly what Scurlock did in this case. Scurlock, acting as an investment advisor, researched the DEG bonds and advised his clients as to the availability and suitability of the DEG bonds for them to purchase. The extensive interplay between the Exchange Act of 1934 (the "Exchange Act") and the Investment Advisor Act of 1940 (the "IAA") contemplate the exact type of activity that happened here. Scurlock conducted due diligence on the DEG Bonds because he had a fiduciary duty to do so prior to making any recommendations as to their value and the advisability of investing in or purchasing them. As part of that due diligence he did talk to DEG officials. That was his job. He did assist clients in completing paperwork, just as he does when clients purchase publically traded securities and mutual funds. And yes, Scurlock and RTAG did receive transaction based compensation, which is specifically allowed under the IAA[11]. None of this makes Scurlock liable for acting as a broker in this instance however. Furthermore, Scurlock had discussions with the Kentucky Department of Financial Institutions about his recommendations of the DEG Bonds and they told him to have an agreement in place and to disclose the compensation to his clients. Scurlock complied with both of these requirements.

B. The Division's motion for Summary Disposition should be DENIED

In this case the Division has grossly misapplied the law to the facts. Under the IAA, an investment advisor can do all of the acts that Scurlock performed. The only dispute is the Division's opinion that Scurlock was a broker. This is a legal dispute. The Division complains that Scurlock has acted outside of his allowed activities as an investment advisor. Scurlock believes he has remained within the scope of his license and regulated activity.

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[9] See Scurlock Affidavit ¶ 17, Exhibit 1; Answer of Scurlock ¶3

[10] Investment Advisors Act of 1940, Section 202(a)(11)

[11] Investment Advisors Act of 1940, Section 211(g)(16)

C. Scurlock's activities are appropriate for a Registered Investment Advisor

The IAA defines an "Investment adviser" as "any person who, *for compensation,* engages in the business of *advising others*, either directly or through publications or writings, as to the value of securities or as to the *advisability of investing in, purchasing, or selling securities,* ...."[12] As previously discussed, in this case that is exactly what Scurlock did. Acting in a fiduciary duty, Scurlock did due diligence on the DEG bonds and DEG, he reviewed the offering materials, he meet with clients and advised some of them that the DEG Bond may be suitable for them, and he was paid for those services. Scurlock was not a broker. He did not negotiate the price of the DEG bonds and he did not affect the actual purchase and sale, which was done through direct paperwork between DEG and the client.

D. Compensation based on commissions or fees is acceptable for an Investment Advisor

The IAA Standard of Conduct specifically states: "*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.*"[13] Furthermore, the IAA Sec. 205 (dealing with Investment Advisory Contracts) does not state any bar to commissions or fees. Additionally Sec. 206 (Prohibited Acts) does not bar transaction based compensation. The Commission is taking a position that is directly contrary to the applicable statutes and regulations. Therefore, this motion should be denied

[12] Investment Advisors Act, Section 202(11)
[13] Investment Advisor Act of 1940, Section 211(g)(16)

E. Scurlock did not act as a Broker

1. The determination of whether a finder is required to register as a broker or dealer is fact intensive and based on a consideration of a variety of factors.

i. The Kramer Decision and Cases Relied on Therein

There are not many cases that address the issues of whether a finder or similar advisor or consultant will be treated as a broker-dealer under Section 15 of the Securities Exchange Act. One of the more recent seminal cases is *SEC v. Kramer*[14]. In that case, the Commission argued that Kramer acted as an unregistered broker when he solicited customers to purchase Skyway securities. The court first pointed out that Section 15(a)(1) of the Exchange Act provides that it is unlawful for any broker or dealer to make use of the mails, or any means or instrumentality of interstate commerce, to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless the broker or dealer is registered as such.[15]

"Broker" is defined in the Act as "any person engaged in the business of effecting transactions in securities for the accounts of others."[16] Because the Exchange Act does not define "effecting transactions" or "engag[ing] in the business," a variety of factors have been applied to determine whether a person qualifies as a broker under Section 15(a).[17] The most frequently cited factors were identified in *SEC v. Hansen,*[18] *These factors* include

> whether a person (1) works as an employee of the issuer, (2) receives a commission rather than a salary, (3) sells or earlier sold the securities of another issuer, (4) participates in negotiations between the issuer and an investor, (5) provides either advice or a valuation as

[14] 778 F. Supp. 2d 1320 (M.D. Fla. 2011)
[15] *Id.* at 1333 (citing *15 U.S.C. § 78o (2015)).*
[16] *Id.* (quoting *15 U.S.C. § 78c).*
[17] Id. at 1334 (citing *DeHuff v. Digital Ally, Inc., 2009 U.S. Dist. LEXIS 116328, 2009 WL 4908581, *3 (S.D. Miss. Dec. 11, 2009)).*
[18] *Fed. Sec. L. Rep. (CCH) P91, 426, 1984 U.S. Dist. LEXIS 17835, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984). Id. (citing Hansen, 1984 WL 2413 at *10).*

to the merit of an investment, and (6) actively (rather than passively) finds investors. [19]

The *Kramer* court further pointed out, however, that "[t]he factors articulated in *Hansen* . . . [a]re not designed to be exclusive."[20] *Moreover,* some factors are deemed more indicative of broker conduct than others, such as the "regularity of participation in securities transactions at key points in the chain of distribution."[21]

Granted, some courts, such as Nebraska federal district court in *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures,* 2006 WL 2620985 (D. Neb. Sept. 12, 2006), describe "transaction-based compensation" as "one of the hallmarks of being a broker-dealer."[22] In other words, transaction-based compensation is the hallmark of a salesperson. *Id.* However, as previously discussed, the IIA specifically allows for commissions to be paid to investment advisors.[23] The Division in this instance cannot use allowable compensation to hang Scurlock.

The *Hansen* case—long considered the seminal decision on this issue and still perhaps the most often cited—is noteworthy here because the defendant promoted and sold to the public fractional, undivided interests in various oil wells and received a fifteen percent commission for each interest that he sold.[24] The evidence in *Hansen* established that the defendant:

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[19] *Kramer*, 778 F. Supp. 2d at 1334 (citing *Hansen*, 1984 WL 2413 at *10; *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures,* 2006 U.S. Dist. LEXIS 68959, 2006 WL 2620985 (D. Neb. Sept. 12, 2006) (identifying as evidence of broker activity a person's "analyzing the financial needs of an issuer," "recommending or designing financing methods," discussing "details of securities transactions," and recommending an investment); *S.E.C. v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003), aff'd and remanded,* 94 Fed. App. 871, 2004 U.S. App. LEXIS 7956 (2d Cir. Apr. 22, 2004); *S.E.C. v. Margolin, 1992 U.S. Dist. LEXIS 14872, 1992 WL 279735 (S.D.N.Y. Sept. 30, 1992)* (finding evidence of "brokerage activity" based on the defendant's "receiving transaction-based compensation, advertising for clients, and possessing client funds and securities")).

[20] Id. (quoting *S.E.C. v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010)).

[21] Id. In *SEC v. Bravata*, 2009 U.S. Dist. LEXIS 64609, 2009 WL 2245649 (E.D. Mich. July 27, 2009), for instance, the court described "[t]he most important factor in determining whether an individual or entity is a broker" as the "regularity of participation in securities transactions at key points in the chain of distribution." Kramer, 778 F. Supp. 2d at 1334

[22] *Kramer*, 778 F. Supp. 2d at 1334 (explaining that "[t]he underlying concern has been that transaction-based compensation represents a potential incentive for abusive sales practices that registration is intended to regulate and prevent.").

[23] Investment Advisors Act of 1940, Section 211(g)(16)

[24] *See Kramer*, 778 F. Supp. 2d at 1335 (discussing *Hansen*).

(1) prepared letters that "extolled the virtues" of the investment;

(2) advertised in newspapers;

(3) sponsored seminars and social events;

(4) distributed gifts, bumper stickers, and "other promotional items";

(5) participated in a financial symposium called "The Money Show" at the New York Coliseum; and

(6) hired employees and provided prepared scripts for the employees' telephone calls to prospective investors.[25]

The defendant in *Hansen* engaged in these promotional activities despite a permanent injunction against violating the anti-fraud provisions of the securities laws (obtained by the SEC over fifteen years earlier), the defendant's earlier and unsuccessful application for broker registration, and an explicit prohibition by several states against the defendant's engaging in the sale of securities without registering as a broker.[26] Citing the lack of "extensive judicial interpretation," the *Hansen* court concluded that the defendant violated Section 15(a) because he (1) worked as a consultant rather than an employee of the issuer; (2) received a commission based on his sale of each oil well interest; (3) actively and aggressively sought investors; (4) provided frequent and extensive advice on the merit of the investment; (5) sold the securities of another issuer in the past; and (6) sought and failed to obtain broker registration because of securities law violations.[27]

The instant case is totally different. In this case Scurlock is a register investment advisor. This is the single most important fact. He does not work for DEG. He does not solicit and aggressively seek investors, he has never been involved in prior sales of private placements, he was not previously barred. For all of these reasons, the Motion of the Division should be denied.

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[25] *Id*
[26] *Id.*
[27] *Id.*

In another key decision cited by the *Kramer* court, *SEC v. Corporate Relations Group, Inc.*[28], the Commission alleged that a "stock promotion firm" violated Section 15(a) because it "published investment-related material ranging from one-page faxes to the monthly full-color magazine, Money World," and agreed, for a fee, to (1) promote a security in one of the firm's publications, (2) forward an investor inquiry about the security to a registered broker, and (3) direct the firm's "broker relations executives" ("BREs") to contact the registered broker and encourage the broker to sell the security. [29]According to two former BREs, the BREs in *Corporate Relations* also counseled inquiring investors to purchase a security featured in the firm's publications. If a BRE submitted proof that the investor purchased the security from a broker, the BRE received a commission from the firm based on the sale. The court held that the stock promotion firm (not the individual BREs) acted as an unregistered broker in violation of Section 15(a), because the firm "actively sought investors, . . . recommended securities to investors through registered [brokers], and . . . [paid] transaction-based compensation for stock sales."[30] This case does not control the actions of Scurlock because, as an investment advisor, he is allowed to recommend securities and get transaction-based compensation. Furthermore, Scurlock did not actively seek investors.

In yet another case discussed by the *Kramer* court, *S.E.C. v. M & A West, Inc.*[31], by contrast, the court granted summary judgment in favor of the defendant on the SEC's Section 15(a) claim, where the facts established that the defendant facilitated and participated in reverse mergers. *Id.* at 1335-36. Specifically, the defendant worked with the shareholders of a private company to (1) identify "suitable public shell companies," (2) prepare documents for the reverse merger, and (3) coordinate the parties to the reverse merger. Upon successful completion of a reverse merger, the

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[28] 2003 U.S. Dist. LEXIS 24925, 2003 WL 25570113 (M.D. Fla. Mar. 28, 2003)
[29] *Id.*
[30] *Id.*
[31] 2005 U.S. Dist. LEXIS 22452, 2005 WL 1514101 (N.D. Cal. June 20, 2005

defendant received compensation in cash and securities. The court rejected the Commission's argument that the defendant's conduct amounted to broker activity, finding that the Commission's factual recitation shed no light on why the defendant's activities—which were commonly associated with paralegals (who draft documents), lawyers (who draft documents and orchestrate transactions), businesspersons (who identify potential merger partners), and opportunists (who like to take a small cut of a big transaction), none of whom is commonly regarded as a broker—added up to the defendant's being a broker in the *M & A West* case. Of particular note were the facts that no assets were entrusted to the defendant, and that there was no evidence that the defendant was authorized to transact business "for the account of others"; that is, although the defendant was in the business of facilitating securities transactions among other persons, the Commission cited no authority for the proposition that this equated to "effecting transactions in securities for the account of others."[32]

This case is important because Scurlock, as an investment advisor, did perform the jobs that he is normally associated with, such as conducting due diligence, evaluating the bond, advising clients about the bond, and being compensated on a commission basis. Therefore, Scurlock is not a broker, he is an investment advisor.

2. The Finder's Fee exception

Following the decision in *M & A West*, a series of later cases identified a limited "finder's exception" to the broker-dealer registration requirement that permits a person or entity to "'perform a narrow scope of activities without triggering the b[r]oker/dealer registration requirements.'" [33] A "'finder' may perform a narrow scope of activities without triggering broker/dealer registration

[32] *Id.* at 1336
[33] *Id.*

requirements."[34] To the extent that this Court may believe that Scurlock was acting outside of his scope then the Finder's Fee exception applies.

"Merely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough" to trigger the broker registration requirement under Section 15(a).[35] Instead, the evidence must demonstrate involvement at "key points in the chain of distribution," like participating in the negotiation, analyzing the issuer's financial needs, discussing the details of the transaction, and recommending an investment.[36] Even when the "finder" receives a fee "in proportion to the amount of the sale"—i.e., a percentage of the total payment rather than a flat fee—the SEC (in a series of "no-action" letters) has found that there was no need for registration.[37]

Despite the number of cases reviewed by the *Kramer* court, the court still observed that the distinction between a finder and a broker remained largely unexplored at the time of its 2011 decision.[38] Both the case law and the Commission's informal "no-action" letters were (and indeed still are) highly dependent on the facts of a particular arrangement.[39] Turning to the facts in that case, the Commission argued that Kramer's conduct qualified as broker activity subject to Section 15(a) because Kramer:

> (1) received transaction-based compensation,
>
> (2) actively solicited investors (by distributing promotional material and directing people to Skyway's [the issuer's] web site),

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[34] *DeHuff v. Digital Ally, Inc.*, 2009 U.S. Dist. LEXIS 116328, *12-13 (S.D. Miss. Dec. 11, 2009); "The distinction drawn between the broker and the finder or middleman is that the latter 'bring[s] the parties together with no involvement on [his] part in negotiating the price or any of the other terms of the transaction."

[35] *Id.*

[36] *Id.* (quoting *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 WL 2620985 (D. Neb. Sept. 12, 2006)

[37] *Id.* (citing David A. Lipton, 15 Broker-Dealer Regulation § 1:18 (further explaining, however, that payment of a flat fee "does not *insure* that the payment will be regarded as non[-]commission compensation") (emphasis added).

[38] *See id.*

[39] *See id.* at 1336-37

(3) advised investors about Skyway (by telling people that Skyway was a good company and suggesting that people read Skyway's press releases),

(4) used a "network" of associates to promote Skyway,

(5) demonstrated a regularity of participation (through the money that Kramer earned and the two years over which the conduct occurred),

(6) promoted the shares of other issuers, and

(7) earned commissions rather than a salary as a Skyway employee.[40]

In response, Kramer countered that he (1) never *sold* a share of stock; (2) never "engaged in the business of effecting securities transactions for the accounts of others"; (3) merely talked about investments the same way that people talk about sports or politics; (4) talked to only some of his relatives and close friends about Skyway; (5) acted as a finder by introducing an investor to Skyway; and (6) reported purchases of Skyway shares to Baker because Baker requested the information, and because Baker agreed to pay Kramer (with Baker's Skyway shares) for collecting the information.[41]

The court agreed that the evidence showed that Kramer had told a small but close group about Skyway and opined that Skyway seemed like a good investment.[42] According to the Commission, the nature of Kramer's relationship with each person was irrelevant to the broker analysis under Section 15(a). However, the court explained, the broker analysis under Section 15(a) (as developed in *Hansen*, *Martino*, and other cases) permits examination of a wide array of factors. The nature of a person's relationship with another, although not determinative, may support either the absence or the presence of broker activity. Ultimately, the court sided with the defendant in *Kramer*

[40] *Id.* at 1337.
[41] *Id.* at 1337-38
[42] *Id.* at 1339.

and determined that the Commission failed to show by a preponderance of the evidence that Kramer "engaged in the business of effecting transactions in securities for the accounts of others."[43]

In this case, Scurlock while acting appropriately as an investment advisor, similar to Kramer, was not engaged in the business of effecting transactions in securities for the accounts of others.

a. Post-Kramer Decisions

The *Kramer* decision is noteworthy for its rejection of "the SEC's transaction-based compensation approach as well as the SEC's attempt to impose on the courts its own no-action letters as interpretative guidance on the broker-dealer registration requirements."[44] In the last few years, the inquiry has remained fact-intensive, and courts continue to apply essentially the same tests as set out in earlier precedent. In *SEC v. Offill*,[45] for instance, the court noted that "[t]he distinction drawn between the broker and the finder or middleman is that the latter bring[s] the parties together with no involvement on [his] part in negotiating the price or any of the other terms of the transaction."[46] The court further noted "A finder, however, will be performing the functions of a broker-dealer, triggering registration requirements, if activities include: analyzing the financial needs of an issuer, recommending or designing financing methods, involvement in negotiations, discussion of details of securities transactions, making investment recommendations, and prior involvement in the sale of securities."[47] As previously discussed, Scurlock performs many of these acts as an investment advisor. Scurlock did not analyze the financial needs of DEG, recommend or design financing methods for DEG, or was involved in negotiations related to the DEG Bonds.

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[43] *Id.* at 1341.

[44] *See generally* Ernest E. Badway & Daniel A. Schnapp, *Is the Tide Turning Against the SEC in Favor of Finders?* (Am. Bar Ass'n Securities Litig. Sec. Nov. 17, 2011).

[45] Fed. Sec. L. Rep. (CCH) P96,723, 2012 U.S. Dist. LEXIS 9369, 2012 WL 246061 (N.D. Tex. Jan. 26, 2012)

[46] *Id* at 2012 WL 246061 at *31 (quoting *Salamon v. Teleplus Enters.*, 2008 WL 2277094 at *13).

[47] *Id.* (quoting *Cornhusker, 2006 WL 2620985 at *6); see also Couldock & Bohan, Inc. v. Societe Generale Sec. Corp.*, 93 F. Supp. 2d 220, 229 *(D. Conn. 2000)* (holding that the plaintiff was a dealer because it was "not merely matching buyers and sellers, but rather was placing itself squarely in the middle of each transaction in order to reap the profits from . . . the price difference between the buy and sell sides of the transactions, for its own account")).

Courts, in considering whether a violation of the broker registration requirements had occurred, also observed that some courts have considered the meaning of the term "broker" by looking to whether a person regularly participates in securities transactions at key points in the distribution scheme.[48] In other words, some courts have held that regularity of participation "is the primary indicia of being 'engaged in the business'" for the purposes of the broker definition.[49]

The *Landegger* court did not focus on that element alone, however, and found the *Hansen* factors useful in determining whether a person's activities give rise to broker status.[50] The court did note that the factors of transaction-based compensation and regularity of participation should be afforded heightened weight in the calculus. These two factors must not be weighted so heavily so as to subsume the others in the analysis; that is, they "should not swallow what is ultimately a fact-intensive definition—and one as to which the SEC Commission has been unwilling to create the necessary guidance in order to provide clarity."[51] This is good guidance and should be applied here to overrule the Division's motion.

Conclusion

The Division wants the ALJ to dismiss all prior precedent on these issues by casually stating that the ALJ is not bound by Court decisions.[52] While this may carry some weight with the Commission, ultimately the judicial precedent will control. In this case it is clear the Division fails to make the case that Scurlock is a broker. Scurlock is an investment advisor. He did not negotiate the purchase price of the DEG bonds. Scurlock merely told his clients what was available, his recommendation on the suitability of the bond, and assisted his clients with the

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[48] *Landegger v. Cohen*, 2013 U.S. Dist. LEXIS 140634, 2013 WL 5444052 (D. Colo. Sept. 30, 2013), 2013 WL 5444052 at *13

[49] *Id.* at *17

[50] *Id.* at *19.

[51] *Id.*

[52] Commission Motion for Partial Summary Disposition at 8.

same ministerial functions that investment advisors do everyday for clients. For all reasons stated herein, the Division's Motion should be DENIED.

Respectfully submitted,

Andre F. Regard
Regard Law Group, PLLC
269 W. Main Street, Suite 600
Lexington, KY 40507-1759
[redacted]
(859)-281-1318 Telephone
(859)-281-1319 Fax

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served in the manner provided upon the following persons on this 29th day of May, 2015:

The Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-9303
Facsimile: (202) 777-1031
Email: [redacted]
VIA FACSIMILE TRANSMISSION AND NON-FACSIMILE ORIGINAL WITH MANUAL SIGNATURE CONTEMPORANEOUSLY
VIA US MAIL

Shelly-Ann A. Springer-Charles, Esq.
Senior Counsel
Andrew Schiff, Esq.
Eric R. Busto, Esq.
Regional Director
Securities and Exchange Commission
801 Brickwell Avenue, Suite 1800
Miami, Florida 33131
Email: [redacted]
Email: [redacted]
Email: [redacted]
VIA ELECTRONIC MAIL

Cornelius J. Carmody, Esq.
P.O. Box 302
Monkton, MD 21111-0302
Email [redacted]
Counsel for Respondents Carrio, Karasik & Associates, LLP Jose F. Carrio, Dennis K. Karasik
VIA US MAIL

Mr. Michael J. Salovay
1444 McFarland Road, Apartment 2
Pittsburgh, PA 15216
Email: [redacted]
VIA US MAIL

Carl F. Schoeppl, Esq.
Schoeppl & Burke, P.A.
4651 North Federal Highway
Boca Raton, Florida 33431-5133
[redacted]
Counsel for David B. Havanich, Jr., Carmine A. DellaSala, and Matthew D. Welch
VIA US MAIL

Andre F. Regard

EXHIBIT 1

ADMINISTRATIVE PROCEEDING
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UNITED STATES OF AMERICA
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Karasik & Associates, LLP
Michael J. Salovay

Respondents,
_____/

AFFIDAVIT OF RICHARD H. SCURLOCK, III

Comes Richard Hampton Scurlock, III ("Scurlock"), and after being duly sworn states the following:

1. My name is Hampton Scurlock.
2. I was first introduced to the Diversified Energy Gas, Inc. ("DEG") bonds in February 2009 at a TD Ameritrade Meeting in Florida.
3. I entered into the Finders Fee Agreement with DEG in December 2009.
4. Between the period of February 2009 and December 2009 I conducted due diligence on the DEG bond offering by taking the following steps:
    a. Review the Regulation D filing on the SEC Website;
    b. Calling Matt Welch to discuss DEG business;
    c. Calling the Better Business Bureau in Florida;

d. Internet searches on the DEG;

e. Reviewing the Private Placement Memorandums. Subscription Agreements and the Confidential XX and other materials produced by DEG;

f. Speaking to other TD Ameritrade representatives about their experience with DEG.

5. Discussed the DEG bonds with representatives of TD Ameritrade, including John Warnock, so TD Ameritrade could put them on their custodial platform, which they did.

6. I did not discover any information during my due diligence that caused me to question the bona fides of DEG and the bond offering that they were making.

7. As a registered and regulated investment advisor, I believed in good faith that I can be paid compensation for advising clients as to value of securities.

8. I contacted the Kentucky Department of Financial Institutions in the Spring of 2011 to get an opinion on an investment advisor recommending the DEG investment to clients and potential clients.

9. On June 2, 2011, I received from Carmen M. Bishop, Compliance Branch Manager, Division of Securities, Kentucky Department of Financial Institutions, the email attached as Exhibit A in response to my inquiry (the "DFI email").

10. In accordance with the DFI email, I revised my filed ADV to reflect the finder's fee of 10% that I and RTAG received for recommending the DEG investment. The pertinent part of the ADV is attached as Exhibit B. See page 5 for the required disclosure.

11. At all times that I recommended DEG bonds to a client as an option for investment, I disclosed to them that I was to paid a 10% commission.

12. At all times I disclosed to my clients the risks associated with the DEG bonds, including the risk of a loss of capital.

13. There were clients that I did not recommend the DEG bond to because it was not suitable for their investment objectives.

14. I had a Finder's Fee Agreement in place at the time. The Finder's Fee Agreement is attached as Exhibit C.

15. The Finder's Fee was originally 5% but was later increased to 10% by DEG. The 10% was disclosed on my ADV and directly to the clients by me.

16. Based on the fact that I had a Finder's Fee Agreement in place and I disclosed the 10% on my ADV, which I provided to my clients and made available online, I had complied with the direction from the Kentucky Department of Financial Institutions as indicated in option 2 of the DFI email.

17. I am regulated by the Kentucky Department of Financial Institutions. I acted in good faith by relying on the correspondence from the Kentucky Department of Financial Institutions, which clearly states that the DFI was not going to take any action on the earlier sales and that future sales were in acceptable if I complied with the outlined requirements, which I did.

18. I did not act in any willful manner to violate the 1934 Exchange Act or the 1940 Investment Advisors Act.

19. Prior to my involvement with the DEG bonds, I had no prior experience with a private placement of corporate bonds. Previously I was involved in non-traded REIT when I worked at American Express.

20. I relied in good faith on the representations that my clients made to me that they were accredited investors.

21. For the unaccredited investors, I relied in good faith on the representations of DEG that the clients were purchasing available bonds that complied with the Regulation D requirements.

22. I relied in good faith on the Regulation D filings that DEG did with the SEC and believed that the filings we appropriately done. Prior to this proceeding I did not know what an "Integrated Offering" was or understand the potential problems that could occur if there were overlapping Regulation D offerings.

23. I did not take possession of any bonds on behalf of my advisory clients. In many instances the bonds were delivered and held by TD Ameritrade. In some instances my clients had TD Ameritrade send money to DEG and then DEG would send the bonds to TD Ameritrade.

24. In some instance my investment advisor clients simply rolled their bond purchases over to a new bond purchase.

25. In some instances my clients did not even contact me prior to purchasing bonds.

26. I provided all contact information for DEG to the clients and encouraged them to call DEG with any questions that they had about the bonds.

27. I did not do any general solicitation of advertising related to the DEG bonds.

28. I did not conduct any seminars to solicit, discuss, promote, or recommend the DEG bonds.

29. I did not determine the price of the DEG Bonds.

30. I did not negotiate on behalf of any client the purchase price of any DEG bond

Richard H. Scurlock

Richard H. Scurlock III, Affiant

COMMONWEALTH OF KENTCUKY)
)
COUNTY OF FAYETTE)

The foregoing instrument was sworn, subscribed to and acknowledged before me by Richard H. Scurlock, III on May 27, 2015.

My commission expires: 9/19/2016

Jennifer Moore #475052

Notary Public

Bishop, Carmen (PPC)

From: Bishop, Carmen (PPC)
Sent: Thursday, June 02, 2011 3:46 PM
To: 'Retirement Tax'
Cc: Womack, Michelle (PPC); Berry, Simon (PPC)
Subject: Finder's Fee

Importance: High

Mr. Scurlock,
I have finally received an opinion regarding the sale of private placements for a Finder's Fee. If you continue to effect purchases and sales of private placements and receive a Finder's fee from the issuer you must be registered as an issuer agent. You have four options:

1. Become registered as an agent of the issuer
2. Operate 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
4. Stop effecting purchases and sales of private placements

Please remember that if you choose option 1 or 2, you will need to make full disclosure of the agent registration or solicitor arrangement in the Part 2 Brochure and disclose the compensation arrangements as well. If you choose option 2, you will also have to comply with all solicitor requirements.

We will not take action at this time for the earlier sales although you were conducting activity without being registered as an issuer agent. If you have any questions, please do not hesitate to contact me.
Thank you

Carmen M. Bishop
Compliance Branch Manager
Division of Securities
1025 Capital Center Drive
Frankfort, KY 40601
800-223-2579, Ext. 284

[redacted]

Please note that my hours are Monday-Thursday 7:00 am until 5:30 pm EST

SEC-DFI-E-0000102

EXHIBIT A

Part 2A of Form ADV: Firm *Brochure*

Item 1 Cover Page

Firm and Contact Information:
RTAG dba Retirement Tax Advisory Group
160 Moore Drive, Suite 201
Lexington, KY40503
859.233.1083
Richard Hampton Scurlock, III
[redacted]
www.retirementtag.com
Date of brochure: June 30, 2011

This brochure provides information about the qualification and business practices of RTAG. If you have any questions about the contents of this brochure, please contact us at 859.233.1083 or hampton@retirementtag.com. The information in this brochure has not been approved or verified by the United States Securities and Exchange Commission or by any state securities authority.

Additional information about RTAG also is available on the SEC's website at www.adviserinfo.sec.gov.

RTAG is a registered investment adviser. Please note, registration does not imply a certain level of skill or training.

Hampton Scurlock is a CERTIFIED FINANCIAL PLANNER (R) and information on this designation, training, education, ethics, and additional requirements can be found at www.cfp.net

EXHIBIT B

Item 5 Fees and Compensation

RTAG offers investment advisory services for compensation by: (1) A percentage of assets under management
(2) Hourly charges or
(3) Fixed fees (not including subscription fees)

RTAG will, after consultation, recommend that you maintain and/or establish accounts into which you can deposit funds and/or securities (taxable and tax-favored), trusts, stock options, retirement plans, managed bank accounts, IRA's, custodial accounts, investment real estate partnerships, limited partnerships, and variable insurance products. "Managed Assets" does not include: Clients's personal use assets (residences/properties & vehicles), collectibles, defined benefit retirement plans, unmanaged bank accounts, fixed/traditional insurance products, social security benefits, and closely held businesses.

Registrant provides these asset management services subject to the following annual fee schedule: Managed Assets 1st $500,000=1%, next $500,000=0.8%, next $1,000,000=0.6%, assets > $2,000,000=negotiable. Fees are payable quarterly and in arrears with clients paying their personal investment related expenses. Example: $100,000 under management would be billed 0.25% each quarter or $250. In accordance with the documents executed at the custodian, you will grant us the limited authority to bill our fee to your account. Client may terminate agreement within five days of execution without penalty and receive a full refund. Client fees are deducted from account.

Clients with managed assets greater than $100,000 will be entitled to ongoing consultations (and financial plan reviews, if applicable) with no additional fees from RTAG (other than managed assets fee or tax services chosen by client). RTAG has a $100,000 minimum requirement that can be waived by RTAG for clients that agree to invest systematically.

RTAG can also provide services per consultation/project subject to a flat fee or per hour basis ($150 per hour, billed in 15 minute increments). An additional fee (based on clients's financial situation/complexity) can be charged if a written financial plan is to be prepared. This fee, not to exceed $10,000, is agreed upon and paid in advance before the preparation of a personal financial plan and includes consultations (up to one a quarter) for the period of one year. For fees over $500 services are to be provided within 6 months.

RTAG can waive fees for employees, employee family members, independent contractors, and independent contractor family members upon approval of Richard Hampton Scurlock, III. Fees can be, but are typically not negotiated. Payment arrangements other than those outlined here can be done only if agreed to in writing by all parties and all legal, regulatory, and other requirements are met.

Clients who invest with Diversified Energy Group do not pay a management fee to RTAG. RTAG receives a 10% finders fee payable from Diversified Energy Group. This is disclosed fully in the Diversified Energy Group literature. See the Offering Memorandum for specifics and risks. This investment would not be suitable for all clients and carries various risks. This is a private placement in an oil/energy company.

Clients may incur brokerage and other transaction costs at a rate dependent on the investment company, custodian, investment choice, and possibly other factors. Clients have the option to purchase investment products that RTAG recommends through other brokers or agents that are not affiliated with RTAG. RTAG may also receive commissions on the sale of insurance products, but clients are not obligated to purchase such products. If they decide to purchase such products they are free to use other licensed insurance agencies/agents if they choose that are not affiliated with RTAG.
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EXHIBIT B

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FINDER'S FEE AGREEMENT

THIS FINDER'S FEE AGREEMENT (the "Agreement") is made and entered into this 15th day of December 2009, by and between Hampton Sherlock, having its principal place of business at 160 Moore Drive #201 Lexington, KY 40503 ("Finder"), and DIVERSIFIED ENERGY GROUP, INC., a corporation duly organized and existing under the laws of Delaware, having its principal place of business at 140 Intracoastal Pointe Dr, Suite 211, Jupiter, FL 33477 ("DEG").

WHEREAS, DEG acknowledges that Finder may introduce DEG to potential investors, for the purpose of potential investors extending financing to DEG; and

WHEREAS, subject to the terms and conditions of this Agreement, DEG is willing to pay to Finder a finder's fee in the event a transaction is consummated with the potential investors.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, and for other good and valuable consideration, the receipt of which are hereby acknowledged, the parties hereto agree as follows:

WITNESSETH

1. Term. This Agreement shall be effective for a period of one year commencing on the date first written above.

2. Finder's Fee. In consideration of the Introducing Agent services, the Company hereby agrees to pay to Introducing Agent upon closing of each transaction with an investor introduced to the Company by the Introducing Agent a fee equal to 5 percent (5%) of the aggregate value of all cash, securities (whether debt or equity), and other property paid or payable in the Placement (the "Fee"). Each Fee is payable within five business days of Company receiving cleared funds from the investor. Each fee shall be based upon the amount of that particular investment alone. Introducing Agent agrees to pay its own expenses.

3. Introduced Parties. In order to prevent any conflicts of interest, Finder shall notify in writing DEG of the names, address, and telephone number of any prospects that may have an interest in DEG. DEG shall non-circumvent finder in the event that one of their prospects shall contact DEG directly. Finder will not negotiate the transaction between their investor and DEG. In the event that Finder becomes involved in the negotiation of the transaction, DEG will be prohibited from providing a fee to Finder.

4. Termination. This Agreement may be terminated by either party, with or without cause. upon fifteen (15) days prior written notice to the other party. In the event that this Agreement terminates, Introducing Agent will be entitled to fees set forth in Section 2 (above) of the Agreement ("Finders Fees") with respect to any financing transaction (whether equity, debt, or a combination) with investors or prospective investors introduced to the Company by Introducing Agent, provided that the transaction is consummated within 12 months following the termination of the Agreement.

EXHIBIT C

5. **Non-Exclusive Relationship**. Finder acknowledges and agrees that engagement as provided herein shall be on a non-exclusive basis, and DEG shall be free to engage such other finders, brokers, consultants or agents as it shall deem necessary in its sole and absolute discretion.

6. **Governing Law**. This Agreement shall be governed by and construed and enforced in accordance local laws of the State of Florida applicable to agreements made and to be performed within the State, without regard to conflict of laws principles thereof; venue shall be in Palm Beach County, Florida.

7. **Binding Effect**. This Agreement shall inure to the benefit of, and is binding upon, the parties hereto and their respective principals, shareholders, heirs, officers, representatives, successors and assigns.

8. **Waiver**. No waiver of any provision hereof shall be valid unless it is in writing signed by the person against whom it is charged. No waiver of any provision herein shall constitute a waiver of any other provision hereof, or of the provision at any other time.

9. **No Joint Venture**. This is an agreement between separate legal entities and neither is the agent or employee of the other for any purpose whatsoever. The parties do not intend to create a partnership or joint venture between themselves. Neither party shall have the right to bind the other to any agreement with a third party or to inure any obligation or liability on behalf of the other party. Each party shall be obligated to pay their own taxes in connection with any fees earned in connection with this Agreement and no taxes shall be withheld from any fee paid to Finder.

10. **Complete Agreement**. This Agreement contains the whole agreement between the parties concerning the subject matter hereof and there are no collateral or precedent representation, agreements or conditions not specifically set forth herein.

11. **Modification or Amendment**. Any modification or amendment of any provision of this Agreement must be in writing, signed by the parties hereto and dated subsequent to the date hereof.

IN WITNESS WHEREOF, the parties hereto have executed this Finder's Agreement on the day, month and year first written above.

[COMPANY]	DIVERSIFIED ENERGY GROUP, INC., a Delaware corporation
By: _____	By: _____
Name: Hampton Scurlock	Name: David B Hayrick JR
Title: Consultant	Title: President
[redacted]	

EXHIBIT C

REGARD LAW GROUP, PLLC
ATTORNEYS AT LAW

269 WEST MAIN STREET
SUITE 600
LEXINGTON KY 40507-1759

859-281-1318
FAX 859-281-1319
www.regardlaw.com

May 29, 2015

Via Facsimile No. (703)-813-9793 & (202)-777-1031 on 5/29/2015
And United States Mail

The Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-9303

Re: File No. 3-16354
In the Matter of: David B. Havanich, Jr., Carmine A. DellaSala, Matthew D. Welch, Richard Hampton Scurlock, III, RTAG Inc. d/b/a Retirement Tax Advisory Group, Jose F. Carrio, Dennis K. Karasik, Carrio, Karasik & Associates, LLP, and Michael J. Salovay

Dear Judge Foelak,

Please find the attached Response in Opposition of the Division of Enforcement's Motion for Partial Summary Disposition of Defendants Richard H. Scurlock and RTAG, Inc. A copy of this document was sent via fax for filing and the original plus three copies were concurrently sent via US Mail in connection with the above-captioned matter on May 29, 2015.

Thank you for your attention to this matter. Please contact me with any questions or should you require further information.

Sincerely,

Andre F. Regard

AFR/reg