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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, Retirement Tax Advisory Group, Jose F. Carrio, Dennis K. Karasik, Carrio, Karasik & Associates, LLP, and Michael J. Salovay,

Respondents.

DIVISION OF ENFORCEMENT'S PROPOSED INITIAL POSTHEARING BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. INTRODUCTION

In this combined Administrative and Cease-and-Desist Proceeding, Respondents Richard Hampton Scurlock, III and his wholly owned company, RTAG, Inc., are alleged to have violated Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") by acting as a broker with respect to the bonds of Diversified Energy Group, Inc. at a time when Respondents were neither registered with the Securities and Exchange Commission as, nor associated with, a broker-dealer.

The facts adduced at the hearing—largely stipulated or undisputed—establish the violation. Exchange Act Section 15(a)(1) requires no showing of scienter, and the evidence established that in addition to receiving nearly $444,000 in transaction-based compensation—a key factor in determining broker status—Respondents brokered sales to 50 households over a 27-month period, advised prospective investors whether or not to buy Diversified's bonds, and helped clients complete the paperwork needed make the investment. This is far more than required under the case law for a finding of broker status. While Respondents claim that their status as investment advisers precludes a finding that they were required to register as brokers, there simply is no such exemption.

With respect to the appropriate remedies, the amount of commissions represents a reasonable approximation of Respondents' improper gain for purposes of disgorgement. With respect to penalties, a one-time Second Tier penalty of $75,000 is appropriate for each respondent. A second-tier penalty is called for because Respondents acted in reckless disregard of the registration requirement. A one-time penalty (as opposed to a penalty multiplied, as permitted, by each violation) appropriately accounts for the seriousness of the violation. Finally, both a cease-and-desist order and associational and penny-stock bars are called for in light of the

recurrent nature of the violations, the harm to investors, and Respondents' continued assertion of the lawfulness of their conduct.

II. PROPOSED FINDINGS OF FACT

A. Respondents

1. Richard Hampton Scurlock, III is a 38-year-old resident of Louisville, Kentucky. Scurlock is the owner and president, and therefore an associated person of, RTAG, Inc. d/b/a Retirement Tax Advisory Group ("RTAG") a Kentucky registered investment adviser. Scurlock first registered his investment advisory business with the State of Kentucky in 2008. At all times, Scurlock operated the investment advisory business under the name Retirement Tax Advisory Group, initially through a Scurlock-owned corporation named Retirement Tax Advisory Group Inc., then, after that entity was dissolved on November 1, 2008, as a sole proprietorship, and finally through RTAG after that entity was incorporated. Between 1999 and 2005, in ascending order, Scurlock was a registered representative of SEC-registered broker-dealers IDS Life Insurance Co., Ameriprise Financial Services, Inc., Ameritas Investment Corp., and Synergy Investment Group, LLC. During this period Scurlock had his Series 6, 7, 24 or 26, 63, and 65 licenses. Neither Scurlock nor RTAG have any prior disciplinary history. (DX1 § II, ¶ 4; DX2 ¶ 3; JX1 ¶¶ 1-6; T.15:3-16:6[1])

2. RTAG is a Kentucky corporation owned and incorporated by Scurlock on February 10, 2011. RTAG is a Kentucky registered investment adviser regulated by the Kentucky Department of Financial Institutions, Securities Division ("DFI"). (DX1 § II, ¶ 4; DX2 ¶ 3; JX1 ¶¶ 2, 4)

[1]References to (a) "DX" are to the Division's hearing exhibits, (b) "JX" are to the parties' stipulation, (c) "RX" are to Respondents' hearing exhibits, and (d) "T" are to the hearing transcript.

B. Related Party

3. At all times relevant to this matter, Diversified Energy Group, Inc. ("Diversified") was a Delaware corporation with its principal place of business in Palm Beach County, Florida. According to its literature, Diversified invested in producing oil and gas wells, traded in a hedging account, and owned cattle and other businesses. Diversified's bonds were securities within the meaning of Exchange Act Section 3(a)(10). (JX1 ¶¶ 7, 18; T.21:15-24)

C. Scurlock Sells Diversified Bonds on Commission

4. As of August 2009, Scurlock's investment advisory business had about 50 households as clients, which increased to 72 households as of August 2012. (DX26; DX27; T.18:18-20:14)

5. For the first eight months of 2009, the advisory business had, approximately, $48,000 of income, $45,000 of expenses, and net income of $3,000. (DX26; T.20:15-21:8)

6. Scurlock first learned about Diversified's bonds as a potential investment in February 2009 at a TD Ameritrade-sponsored conference for independent investment advisers. (JX1 ¶ 8)

7. Scurlock heard from other attendees that the yield on Diversified's securities compared favorably to the yield on certificates of deposit. (JX1 ¶ 9)

8. Between February 2009 and December 2009, Scurlock conducted due diligence on Diversified including the following:

a. Reviewing Diversified's Regulation D filings on EDGAR;

b. Speaking with Diversified official Matthew Welch, who described Diversified's business;

c. Calling the Better Business Bureau in Florida;

d. Conducting Internet searches on Diversified;

e. Reviewing Diversified's Private Placement Memoranda, Subscription Agreements, and Confidential Information Memorandum; and

f. Speaking with other TD Ameritrade associated Investment Advisers about their experience with Diversified. (JX1 ¶ 10)

9. On December 15, 2009, Scurlock entered into a written agreement with Diversified, which contemplated that Scurlock would introduce investors to Diversified in exchange for compensation, labeled a "finder's fee," of 5% of the invested amount. At some point the fee percentage was increased to 10%. (DX14; JX1 ¶ 11)

10. Before Scurlock recommended Diversified bonds to a client, he discussed the risks of the bonds and helped determine whether the bonds were suitable for the particular investor. Scurlock would have a lengthy conversation with a prospective investor to go over the risk factors and Diversified's documentation. Scurlock assisted his clients complete the Diversified-required documentation, and in one case completed the documentation for signature by the investor. Scurlock also helped determine whether investors were accredited. On some occasions investors would provide a check to Scurlock who would forward the funds to Diversified. (JX1 ¶ 12; T.29:15-30:6, 31:12-32:23, 34:25-35:7, 74:8-75:15)

11. The investors Scurlock referred to Diversified consisted of pre-existing clients of the advisory business, pre-existing clients of his tax business, or non-clients who became advisory clients upon investing in Diversified. (T.35:20-37:3)

12. At Scurlock's request (made in April 2010), TD Ameritrade was asked to add Diversified's bonds to its platform. After conducting a review which included reviewing Diversified's Private Placement Memoranda, Subscription Agreements, Confidential Information Memorandum, and Diversified-supplied financial statements, on May 5, 2010, TD Ameritrade

approved the Diversified bonds for retirement accounts and added the Diversified bonds to its platform. Some of the investors that Scurlock introduced to Diversified made their investments through TD Ameritrade. With respect to those investors, TD Ameritrade handled the purchase transaction, forwarding the customer's funds to Diversified, providing the customer with a confirmation of the transaction, acting as custodian of the bonds, and receiving the interest payments on the customer's behalf. TD Ameritrade charged the customer a $25.00 commission for each such purchase. (JX1 ¶ 8; RX D 101-03, 106-08)

13. TD Ameritrade's agreement with Scurlock's customers with respect to Diversified provided that TD Ameritrade's sole obligation was "to hold the Investment in custody." (RX C 66, § 2(a))[2] The agreement further provided that TD Ameritrade had "no obligation to investigate or determine whether there has been any change in th[e] fair market value" of the investment." (*Id.* § 1(b)) Finally, the Client represented in the agreement that "[t]he Client has such arrangements as the Client deems appropriate to monitor the investment and to take such action with respect to the Investment as the Client deems is adequate and appropriate." (*Id.* § 1(b))

[2]The Agreement is at RX C 66 (page 1), RX C 65 (page 2), RX C 63 (page 3). A copy for a different client is at RX C 41-43, in reverse page order.

14. From approximately January 2010 through April 2012, Scurlock received the following total payments from Diversified pursuant to the Finders Agreement:

Year	Amount
2010	$126,029.14
2011	$213,140.60
2012	$8,638.90
2012 (paid to RTAG)	$95,441.09
Total	$443,249.73

(DX16; DX18; DX45; JX1 ¶ 14; T.37:4-7, 46:19-21, 47:22-48:8)

15. Scurlock introduced approximately 50 households to Diversified. (DX16; T.35:18-19)

16. In April 2012, Diversified announced to bondholders a restructuring plan, whereby it would make monthly payments for 36 months, representing 57% of the debt (at a reduced interest rate), with a final balloon payment for the remaining 43%. (DX45)

17. In July 2013, Diversified announced it could not complete the restructuring, advising that "[w]hile we are not yet able to quantify the shortfall, we know that unfortunately you will suffer a loss on your investment." (DX46)

18. In April 2014, Diversified went out of business. (DX48; DX49)

19. Diversified bond investors who cashed out prior to the restructuring announcement got paid in full; those who held the bonds as of that date lost in the neighborhood of two-thirds of their principal. (T.61:6-64:2)

20. Scurlock and RTAG made use of the mails and/or any means or instrumentalities of interstate commerce. (JX1 ¶ 19)

21. Scurlock was aware that to act as a broker of securities, he either had to be registered himself or a registered representative of a registered broker-dealer. (T.16:20-25)

22. Neither Scurlock nor RTAG were registered with the Commission as broker-dealers or as registered representatives of registered broker-dealers. (T.17:2-18:5)

D. Scurlock's Interactions With DFI

23. DFI conducts examinations of investment advisers for the purpose of determining whether they are in compliance with the Kentucky Securities Act. (T.159:17-22)

24. On February 10, 2011, DFI conducted its first examination of Scurlock subsequent to his entering into the Finders Agreement. (DX28, at 1; JX1 ¶¶ 11, 15)

25. During the morning of the examination, DFI discovered Scurlock's relationship with Diversified through a review of trade confirmations and discussions with Scurlock. (DX28, at 7; T.163:15-18)

26. At the conclusion of the examination, the DFI examiners conducted an exit interview of Scurlock. The subject of the sale of Diversified bonds was again discussed, including the due diligence Scurlock had performed and the need for the examiners to see the subscription agreements. (DX28, at 36)

27. The February 2011 examination was the first DFI had learned of Scurlock's relationship with Diversified.[3]

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[3]Scurlock asserts that prior to entering into the Finders Agreement, he orally discussed with DFI whether he could permissibly sell the bonds. The Division submits that this testimony should not be credited. First, Scurlock introduced no documents from either his files or those of DFI that tend to show that such a conversation took place. Second, during his investigative testimony, Scurlock could not recall who he spoke with at DFI, while at the hearing he came up with two names as possibilities. (T.23:6-25:25) Third, Scurlock's ADV form prior to the examination answered "no" to the question of whether he or his business was "paid cash by or receives some economic benefit (including commissions . . .) from a non-client in connection with giving advice to clients?" and made no mention of his relationship with Diversified. (RX G-1) Third, DFI's record of its February 2011 examination does not reflect Scurlock having mentioned any prior communication with DFI on the subject—a time when it would have been logical for him to have done so. (DX28 at 7, 36). Significantly, when Scurlock was recalled to testify after the DFI witness's testimony, Scurlock never claimed that he had mentioned during the February 2011 examination the alleged prior conversation with DFI nor did he proffer an explanation as to why he had not done told the examiners about it.

28. On June 2, 2011, Scurlock received an email from DFI Compliance Branch manager Carmen Bishop (the "DFI Email"), which states as follows (original emphasis):

> 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.

(JX1 ¶ 16, DX25)

29. In January 2011, Scurlock filed a Form ADV with DFI, which made no disclosures with respect to Diversified. (RX G-1)

30. In March 2011, after the DFI exam, Scurlock amended the January 2011 form to disclose that "Mr. Scurlock also can receive a finders fee from Diversified Energy Group as outlined in their offering memorandum. These assets will not be counted as assets managed and will not be subject to management fees." (RX G-2)

31. On June 30, 2011, after receiving the DFI Email, Scurlock revised RTAG's Form ADV, disclosing that Scurlock had "an arrangement with Diversified . . . that compensates him for finding investors for their private placements." The Form goes on to state the fee is 10%, there is no management fee for Diversified investments, which would not be

suitable for all clients, and Diversified bonds were "a private placement in an oil/energy company." (DX15)

32. Scurlock continued to refer investors to Diversified after receiving the DFI Email. (DX16; DX18)

33. Scurlock did not rely on the DFI Email as a basis for his decision to continue referring investors to Diversified.[4]

III. LEGAL DISCUSSION

A. Scurlock and RTAG Violated Exchange Act Section 15(a)(1)

1. Exchange Act Section 15(a)(1) makes it "unlawful for any broker [either entity or natural person] 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 such broker . . . is registered in accordance with [Exchange Act Section 15(b)]."

2. Section 15(a)(1) is a strict liability offense with no scienter requirement. *See Anthony Fields*, AP File No. 3-14684, 2015 WL 728005, *17 (Feb. 20, 2015) (Commission Opinion); *Gualario & Co.*, AP File No. 3-14340, 2012 WL 627198, *9, *14 (Feb. 14, 2012)

[4]Scurlock testified he believed his continued sale of Diversified bonds was in compliance with option "2" of the email. (T.97:6-22) This testimony should not be credited. First, in a May 2013 DFI interview, when asked about the DFI Email, Scurlock did not claim that he relied on it. To the contrary, he stated—incorrectly—that he had not received it. (T.167:7-169:6) At the July 6 hearing, when Scurlock testified subsequent to the DFI witness, he did not challenge the DFI witness's testimony on this key point. Second, the email makes clear DFI's position that Scurlock's conduct to date had not been in compliance with Kentucky law, but that DFI was giving him a "pass" as a matter of discretion for that prior conduct. Option 2 required that Scurlock: (1) "[o]perate as a solicitor for the issuer with a solicitor's agreement in place," (2) "make full disclosure of the . . . solicitor arrangement," and (3) "comply with all solicitor requirements." The only agreement Scurlock had with Diversified was the Finders Agreement, and thus under Scurlock's interpretation, the Finders Agreement was the equivalent of a "solicitor's agreement," and the DFI email meant, in effect, that he could keep engaging in the exact conduct DFI said was a violation as long as he disclosed it, thus reading the reference to a "solicitor's" agreement and "solicitor requirements" out of the email. Scurlock did not testify about what he thought was meant by these other requirements, he provided no evidence he complied with them, and it is clear his supposed reliance on the DFI email is nothing more than a post-hoc justification.

(Initial Decision) (regulatory official's alleged verbal approval of sales by unregistered broker "is not a defense to the registration violation").

3. Exchange Act Section 3(a)(4)(A) defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others." "The phrase 'engaged in the business' means a level of participation in purchasing and selling securities involving more than a few isolated transactions; there is no requirement that such activity be a person's principal business or the principal source of income." *Fields*, 2015 WL 728005, *18 (quotations and alterations omitted). Indications 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." *Id.* The receipt of "transaction-based compensation is one of the hallmarks of being a broker-dealer." *Gualario*, 2012 WL 627198, *14.

4. Scurlock and RTAG violated Exchange Act Section 15(a)(1):

a. The elements of use of the mails and/or instruments of interstate commerce, the sale of a "security," and the non-registered status of Scurlock and RTAG are either stipulated or not disputed.

b. With respect to the issue of acting as a broker, Scurlock satisfies the test for broker conduct. The sales were regular and not isolated: approximately 50 households over a 27-month period. By his own admission, Scurlock solicited potential investors, had detailed conversations with them to determine their accredited investor status and whether the Diversified bonds were suitable investments, helped his clients prepare the necessary documents, on occasion handled client funds, had extensive discussions with Diversified, and received $444,000 in transaction-based compensation. *See Fields*, 2015 WL 728005, *18

(finding respondent violated Section 15(a)(1) where he held himself out as a broker, "repeatedly attempted to induce transactions in securities for other individuals by soliciting potential investors and arranging transactions on their behalf," and "expected to receive a commission if the sale went through"); *Gualario*, 2012 WL 627198, *14 (respondents who received $31,000 in "transaction-based fees for facilitating the investments" in several different issuers, "made valuations and gave investment advice to clients" found to be brokers); *see also SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005) (affirming summary judgment for Commission on Section 15(a)(1) claim; defendant's arguments that he was not employed by the issuer and suffered a net loss in the scheme were insufficient "to counter the SEC's proof that [defendant] was regularly involved in communications with and recruitment of investors for the purchase of securities"); *SEC v. Stratocomm Corp.*, 2 F. Supp. 3d 240, 262-63 (N.D.N.Y. 2014) (issuer's employee who solicited investors, advised them of the terms of the transaction, handled the documentation, and received transaction-based compensation found to be broker); *SEC v. Gagnon*, 2012 WL 994892, *11 (E.D. Mich. Mar. 22, 2012) (summary judgment entered against defendant who solicited purchase of securities, acted "as the link between the issuer and the investor," and received transaction-based compensation).

c. RTAG likewise acted as a broker. In 2012 it directly received $95,441.09 in commissions over a 3-4 month period. Moreover, as early as February 2011, a year when Scurlock received more than $200,000 in commissions, RTAG was the entity through which Scurlock operated the business, and the investors in question either were pre-existing clients of the advisory business, or became clients upon investing in Diversified.

5. RTAG's status as a state-registered investment adviser and Scurlock's status as an associated person of RTAG does not impact the requirement that Respondents comply with the Exchange Act's broker-registration requirements. Exchange Act Section 15(a)(1) makes it unlawful "for *any* broker" to "induce or attempt to induce the purchase or sale" of securities "unless such broker . . . is registered" in accordance with Exchange Act Section 15(b) (emphasis added). Under Section 15(a)(2), the Commission may exempt from the registration requirement "any broker or dealer or class of brokers or dealers . . . ." Respondents have the burden of establishing an exemption. *See UBS Asset Management (New York) Inc. v. Wood Gundy Corp.*, 914 F. Supp. 66, 70 (S.D.N.Y. 1996). Respondents have identified no such exemption, and the only exemption for investment advisers is not applicable here. *See* Exchange Rule 3a4-1(c)(1)(iv) (exempting registered investment adviser affiliated with registered investment company that is issuing a security); *see also* C. Kirsch, *Broker-Dealer Regulation*, § 2:2.7 (2014) ("There is no general exemption for investment advisers from federal broker-dealer registration.").

6. Respondents assert that investment advisers may permissibly receive transaction-based compensation. However, the fact that receipt of such compensation might not violate the Investment Advisers Act of 1940 ("Advisers Act") does not exempt an investment adviser who acts as a broker from having to comply with the Exchange Act's registration requirements. *See Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949) ("[A] registered broker-dealer [cannot] immunize himself [from Exchange Act violations] merely by acquiring registration under the . . . Advisers Act. It is perfectly obvious that Congress contemplated no such result when it enacted that Act."); Release No. 34-69013, at 26 n.34 (Mar. 1, 2013), 78 Fed. Reg. 14848, 14855 n.34 (Mar. 7, 2013) ("[N]othing in Section 206(1) and 206(2) of the Advisers

Act prohibits the receipt of transaction-based compensation, such as commissions. A person engaged in the business of effecting transactions in securities for the account of others, would however, absent an available exemption, be required to register as a broker-dealer."); *Fields*, 2015 WL 728005, *17-18 (finding investment adviser had violated Exchange Act Section 15(a)(1); *Larry C. Grossman*, AP File No. 3-15617, 2014 WL 7330327, *35 (Dec. 23, 2014) (Initial Decision) (principal of registered investment adviser "knowingly acted as a broker when he recommended [a security to the advisory firm's] clients and received referral fees and a portion of the investment management fee for making those recommendations").

7. Respondents' assertion that they were "finders" rather than brokers lacks support. 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 even any federal Court of Appeals, and the decisions of the Commission are binding on the Law Judge notwithstanding any contrary district court authority. *See Sands Brothers Asset Management, LLC*, AP File No. 3-16223, 2015 WL 2229281, *5 n.22 (May 13, 2015) (Commission Order) (noting Law Judge's recognition that Commission decision "was binding precedent"); *cf. John P. Flannery*, AP File No. 3-14081, 2014 WL 7145625, *11, *13, *14, *22 (Dec. 15, 2014) (Commission Opinion) (noting that Commission's holdings were inconsistent with decisions of district courts), *petitions for review filed*, No. 15-1080 (1st Cir. Jan. 14, 2015).

8. Even if applicable, the only district court case finding against the Commission in reliance on the finders concept does not support a conclusion that Respondents did not have to comply with the Exchange Act's broker registration requirements. In *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011), *appeal dismissed sub nom. SEC v. Sky Way*

Global LLC, No. 11-12510 (Dec. 2, 2011),[5], the court relied on the fact that the issuer (Skyway) never retained the alleged broker (Kramer), who was paid by a firm that Skyway had retained to obtain financing. *See id.* at 1338-40. The court also focused on the "nature of [the] relationship" between Kramer and the persons he introduced to Skyway, noting they were "each susceptible to description as either a friend or an intimate," and that Kramer's "advice to or solicitation of" these people consisted merely of Kramer's "sharing his opinion that Skyway was a good company and a good investment" and "directing [their] attention to Skyway's web site and press releases." *Id.* at 1339, 1340. Here, by contrast, Scurlock had a contractual relationship with, and he and RTAG were compensated directly by, Diversified. Moreover, Scurlock's "solicitees" were (or became) his advisory clients, not "friends and intimates." Finally, rather than just providing investors with a quick recommendation that he thought Diversified was a good company, Scurlock had detailed discussions with his clients to determine the investment's suitability. Thus, this case is fundamentally different from the situation at issue in *Kramer.*[6]

9. The other district court cases Respondents cite either find registration was required,[7] or find only that summary judgment could not be granted.[8]

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[5]The dismissal was based on the non-finality of the district court order; the court did not reach the merits of the Commission's appeal.

[6]The only other case Respondents cite that holds against the Commission on the broker issue does not rely on the finder concept and is also distinguishable. In *SEC v. M&A West, Inc.*, 2005 WL 1514101 (N.D. Cal. June 20, 2005), the court found that the activities of an individual who arranged reverse mergers between public "shell" companies and privately held operating companies fell outside the scope of "effecting transactions." *See* 2005 WL 1514101, *9-10. Here, by contrast, Respondents' activities—conducting due diligence, obtaining retail investors, determining with them the investment's suitability, and receiving commissions from the issuer—fall squarely within the core of broker conduct, and registration was required.

[7]*See SEC v. Offill*, 2012 WL 246061, *6-9 (N.D. Tex. Jan. 26, 2012); *SEC v. Martino*, 255 F. Supp. 2d 268, 283-84 (S.D.N.Y. 2003), *remanded on other grounds*, 94 F. App'x 871 (2d Cir. Apr. 22, 2004) (summary order); *SEC v. Corporate Relations Group, Inc.*, 2003 WL 25570113, *17-19 (M.D. Fla. Mar. 28, 2003); *SEC v. Hansen*, 1984 WL 2413, *4-6 (S.D.N.Y. Apr. 6, 1984); *see also SEC v. Benger*, 697 F. Supp. 2d 932, 943-45 (N.D. Ill. 2010) (denying defendants' motion to dismiss registration violation claim); *SEC v. Bravata*, 2009 WL 2245649, *2-3 (E.D. Mich. July 27, 2009) (SEC had established

B. Remedies

1. Monetary Sanctions

a. Disgorgement and Prejudgment Interest

10. Under Exchange Act Sections 21B(e) and 21C(e), "the Commission may enter an order requiring accounting and disgorgement, including reasonable interest."

11. "Disgorgement is intended primarily to prevent unjust enrichment. Although the amount of disgorgement should include all gains flowing from the illegal activities, calculating that amount requires only a reasonable approximation of profits causally connected to the violation. Once the Division shows that its disgorgement figure reasonably approximates the ill-gotten gains, the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation. Thus, exactitude is not a requirement; so long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Ralph Calabro*, AP File No. 3-15015, 2015 WL 3439152, *44 (May 29, 2015) (Commission Opinion) (footnotes, quotations, and alterations omitted).

12. Commissions received from unlawful sales can provide the required reasonable approximation of a respondent's ill-gotten gains. *Id.* at *44, *45.

13. Business expenses incurred in connection with the commissions are not properly offset against the disgorgement amount. *Id.* at 44 n.233.

14. Persons or entities who collaborate or have a close relationship in connection with the violation are appropriately held jointly and severally liable for disgorgement.

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likelihood of success Exchange Act Section 15(a)(1) claim); *SEC v. Margolin*, 1992 WL 279735, *5 (S.D.N.Y. Sept. 30, 1992) (same).

[8] *See Landegger v. Young*, 2013 WL 5444052, *4-8 (D. Colo. Sept. 30, 2013); *DeHuff v. Digital Ally, Inc.*, 2009 WL 4908581, *3-4 (S.D. Miss. Dec. 11, 2009); *Salamon v. Teleplus Enterprises, Inc.*, 2008 WL 2277094, *8-9 (D.N.J. June 2, 2008); *see also Couldock & Bohan, Inc. v. Societe Generale Securities Corp.*, 93 F. Supp. 2d 220, 229-30 (D. Conn. 2000) (court found party acted as unregistered dealer and did not determine broker status).

S.W. Hatfield, CPA, AP File No. 3-15012, 2014 WL 6850921, *11 & n.60 (Dec. 14, 2014) (Commission Opinion).

15. Accordingly, the appropriate amount of disgorgement for Scurlock is $443,249.73, representing all the commissions paid by Diversified. The amount for RTAG is $95,441.09, which, in light of Scurlock's control of RTAG, would be joint and several with Scurlock.

16. Prejudgment interest should be awarded on the amount of disgorgement. *See Terence Michael Coxon*, AP File No. 3-9218, 2003 WL 21991359, at *14 (Aug. 21, 2003) (Commission Opinion) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005). Prejudgment interest should be calculated in accordance with the delinquent tax rate established by the Internal Revenue Service, 26 U.S.C. § 6621(a)(2), and assessed on a quarterly basis from the date the Respondents last received a commission (April 2012) to the date of the decision. As of August 5, 2015, the amount of interest would be $45,225.47 for Scurlock and $9,738.00 for RTAG.[9]

b. Civil Penalties

17. Exchange Act Sections 21B(a)(1)(A) and 21B(a)(2)(A) authorize the imposition of civil penalties upon a finding that a respondent "willfully violated any provision of," among others, the Exchange Act.

18. "[A] willful violation . . . simply means that the person charged with the duty knows what he is doing. It is sufficient that the actor intentionally or voluntarily committed the act that constitutes the violation; he need not also be aware that he is violating one of the

[9]Prejudgment interest calculations for Scurlock and RTAG are attached respectively as Exhibits A and B.

securities law or rules promulgated thereunder." *Francis V. Lorenzo*, AP File No. 3-15211, 2015 WL 1927763, *12 (Apr. 29, 2015) (Commission Opinion) (footnotes, alterations, and quotations omitted); *see Kenneth C. Meissner*, AP File No. 3-16175, 2015 WL 1534398, *8 (Apr. 7, 2015) (Initial Decision) ("[Unregistered broker's] actions were unquestionably willful because he affirmatively acted as a broker by, for example, submitting orders, finding investors, and handling investor funds.").

19. Exchange Act Section 21B(b) establishes a tiered system of penalties. Under the first tier, the maximum penalties per violation are $7,500 for a natural person and $75,000 for an entity. *See* 17 C.F.R. § 201.1005.[10] Under the second tier, which requires a showing of, as pertinent here, a "deliberate or reckless disregard of a regulatory requirement," the penalties for an individual and an entity are, respectively, $75,000 and $375,000. *See* 17 C.F.R. § 201.1005.[11]

20. Under Section 21B(b) a penalty can be imposed for "each act or omission" constituting a violation, so in a case involving acting as an unregistered broker, the maximum total penalty would be maximum for the applicable tier multiplied by the number of transactions "effected," "induced" or "attempted to [be] induced." Exchange Act Section 15(a)(1); *see Eric J. Brown*, AP File No. 3-13532, 2012 WL 625874, *17 & n.59 (Feb. 27, 2012) (Commission Opinion) ("Regarding the number of 'acts or omissions' against which to apply the maximum second-tier penalty, we believe that imposing a penalty for each defrauded customer is appropriate."); *see also SEC v. Pentagon Capital Management*, 725 F.3d 279, 288 n.7 (2d Cir.

[10]Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, the statutory penalty amounts are adjusted to account for inflation, based on violation dates. 17 C.F.R. §§ 201.1001-1004, Tbl. II-IV to Subpt. E. The amounts set forth in the text apply because the violations occurred after the adjustment date of March 3, 2009 but before the adjustments that took place in March 2013. *See* 17 C.F.R. § 201.1004, Tbl. IV to Subpt.

[11]The Division does not seek third-tier penalties.

2013) ("[W]e find no error in the district court's methodology for calculating the maximum penalty by counting each late trade as a separate violation."); *SEC v. Lazare Indus., Inc.*, 294 Fed. App'x. 711, 715 (3d Cir. 2008) (unpublished) (affirming imposition of $500,000 civil penalty because the statutes "provide for a maximum penalty of $100,000 for individuals for *each* violation (i.e., each of Harley's at least 54 sales of stock)") (emphasis in original); *CFTC v. Levy*, 541 F.3d 1102, 1111 (11th Cir. 2008) (holding, where regulation authorized $120,000 civil penalty "for each such violation," that "after finding that Levy had committed at least five violations of the Commodity and Exchange Act, the district court properly multiplied the maximum civil penalty of $120,000 by five").

21. In assessing the appropriate penalty, the Commission considers "whether there was fraudulent misconduct; harm to others or unjust enrichment, taking into account any restitution; whether the respondent had previous violations; the need for deterrence of such persons; and such other matters as justice may require." *Montford & Co., Inc.*, AP File No. 3-14536, 2014 WL 1744130, *24 (May 2, 2014) (Commission Opinion); *see* 15 U.S.C. § 78u-2(c) (statutory factors).

22. Because Respondents acted willfully, in that they intentionally committed the acts that give rise to the Exchange Act Section 15(a)(1) violation, a civil penalty is appropriate.

23. The "second tier" maximums are applicable here. Respondents acted with at least reckless disregard of the registration requirement. Scurlock was previously a registered representative, was aware of the registration requirement, and proceeded to sell Diversified's bonds without making any inquiry about the need to register as a broker. Even if Scurlock's version of events were credited, he never got an opinion about whether he was required to

register as a matter of *federal* law, he relied at the outset solely on a phone discussion with a DFI staff member, and he relied subsequently on the DFI Email but did not comply with its terms.

24. The appropriate civil penalty is $75,000 for each respondent, representing the maximum penalty for an individual, but without multiplying that amount by the number of sales. Registration violations—even "standalone" violations where fraud is not alleged—are serious, and warrant a significant penalty. Respondents' conduct occurred over an extended period, and investors suffered losses when Diversified could not repay its debts in full. The violations are relatively recent, and, as described above, were committed at least recklessly. A penalty will also deter future violations by Respondents and others. Finally the penalty is significantly less than Respondents' pecuniary gain and the amount that could be imposed if the penalty were calculated on a per-sale basis. *See Kenneth C. Meissner*, AP File No. 3-16175, 2014 WL 7330318, *5 (Dec. 23, 2014) (settled order finding violation of Exchange Act Section 15(a) and imposing $48,000 civil penalty, the approximate amount of commissions respondent received); *see also id.*, 2015 WL 1534398, *11-12 (Apr. 7, 2015) (Initial Decision) (finding second-tier penalty appropriate for registration violation but declining to impose due to inability to pay).[12]

2. Non-Monetary Relief

a. A Cease and Desist Order is Appropriate

25. Exchange Act Section 21C(a) empowers the Commission to order a person found to have violated the Exchange Act to cease and desist from committing such violations and any future violations.

[12]Ability to pay "may be considered, but it is only one factor. Considering it is also discretionary . . . ." *Johnny Clifton*, AP File No. 3-14266, 2013 WL 3487076, *16 n.116 (July 12, 2013) (Commission Opinion). Respondents "bear[] the burden of demonstrating inability to pay," *Craig Berkman*, AP File No. 3-15249, 2014 WL 2089917, *3 (May 19, 2014) (quotation and citation omitted) (Initial Decision), and the Division will address Respondents' arguments on this point in its reply brief.

26. In considering whether a cease-and-desist order is appropriate, the Commission considers:

(i) the egregiousness of the respondent's actions;

(ii) the degree of scienter involved;

(iii) the isolated or recurrent nature of the infraction;

(iv) the respondent's recognition of the wrongful nature of his or her conduct;

(v) the sincerity of any assurances against future violations; and

(vi) the likelihood that the respondent's occupation will present opportunities for future violations.

Donald L. Koch, AP File No. 3-14355, 2014 WL 1998524, *20 (May 16, 2014) (footnote omitted) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)). The Commission also considers "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *Koch*, 2014 WL 1998524, *21 (quotation and footnote omitted).

27. In considering the risk of future violations, "[a]lthough some risk is necessary, it need not be very great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation." *Id.* (quotation and footnote omitted).

28. The Commission's "inquiry into ... the public interest is a flexible one, and no one factor is dispositive." *Id.* at 20 (quotation and footnote omitted).

29. A cease-and-desist order is appropriate here: the violations were recurrent, Respondents do not recognize the wrongfulness of their conduct—indeed, in light of

their position that what they did was lawful, there can be no assurance against future violations, and Respondents have given no indication they intend to voluntarily exit the investment advisory business. Even with an industry bar, Scurlock's continuation in business as a tax preparer and insurance salesman puts him in a position to interact with customers concerning their financial affairs. Therefore, a cease-and-desist order will be entered. *See Kenneth C. Meissner*, AP File No. 3-16175, 2015 WL 1534398, *10 (Apr. 7, 2015) (Initial Decision) (imposing cease-and-desist order based on Exchange Act Section 15(a) violations).

b. Industry and Penny Stock Bars Are Appropriate

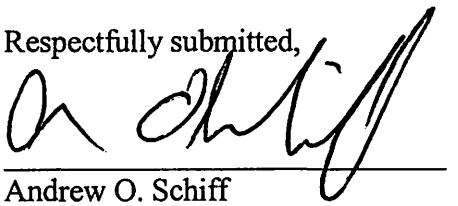
30. The same factors described above apply to the consideration of industry and penny stock bars pursuant to Exchange Act Section 15(b) and Advisers Act Sections 203(e), and 203(f), *see Francis V. Lorenzo*, AP File No. 3-15211, 2015 WL 1927763, *12 (Apr. 29, 2015) (Commission Opinion), and these same factors support the imposition of permanent industry and penny stock bards in this matter. *See Meissner*, 2015 WL 1534398, *10 (imposing permanent associational and penny stock bars based on broker registration violations).

IV. CONCLUSION

For the foregoing reasons, the Law Judge should find Respondents violated Exchange Act Section 15(a) and impose the sanctions described herein.

August 5, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing has been served by e-mail and UPS overnight mail, on this 5th day of August 2015, on the following persons entitled to notice:

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

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(Counsel for Richard Hampton Scurlock, III and RTAG, Inc.)

Andrew O. Schiff

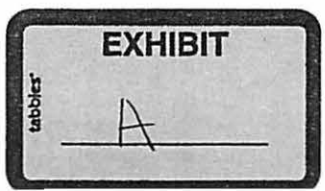
U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$443,249.73
05/01/2012-06/30/2012	3%	0.5%	$2,216.25	$445,465.98
07/01/2012-09/30/2012	3%	0.75%	$3,359.25	$448,825.23
10/01/2012-12/31/2012	3%	0.75%	$3,384.58	$452,209.81
01/01/2013-03/31/2013	3%	0.74%	$3,345.11	$455,554.92
04/01/2013-06/30/2013	3%	0.75%	$3,407.30	$458,962.22
07/01/2013-09/30/2013	3%	0.76%	$3,470.51	$462,432.73
10/01/2013-12/31/2013	3%	0.76%	$3,496.75	$465,929.48
01/01/2014-03/31/2014	3%	0.74%	$3,446.60	$469,376.08
04/01/2014-06/30/2014	3%	0.75%	$3,510.68	$472,886.76
07/01/2014-09/30/2014	3%	0.76%	$3,575.80	$476,462.56
10/01/2014-12/31/2014	3%	0.76%	$3,602.84	$480,065.40
01/01/2015-03/31/2015	3%	0.74%	$3,551.17	$483,616.57
04/01/2015-06/30/2015	3%	0.75%	$3,617.19	$487,233.76
07/01/2015-07/31/2015	3%	0.25%	$1,241.44	$488,475.20

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
05/01/2012-07/31/2015	**$45,225.47**	**$488,475.20**



U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$95,441.09
05/01/2012-06/30/2012	3%	0.5%	$477.21	$95,918.30
07/01/2012-09/30/2012	3%	0.75%	$723.32	$96,641.62
10/01/2012-12/31/2012	3%	0.75%	$728.77	$97,370.39
01/01/2013-03/31/2013	3%	0.74%	$720.27	$98,090.66
04/01/2013-06/30/2013	3%	0.75%	$733.66	$98,824.32
07/01/2013-09/30/2013	3%	0.76%	$747.27	$99,571.59
10/01/2013-12/31/2013	3%	0.76%	$752.92	$100,324.51
01/01/2014-03/31/2014	3%	0.74%	$742.13	$101,066.64
04/01/2014-06/30/2014	3%	0.75%	$755.92	$101,822.56
07/01/2014-09/30/2014	3%	0.76%	$769.95	$102,592.51
10/01/2014-12/31/2014	3%	0.76%	$775.77	$103,368.28
01/01/2015-03/31/2015	3%	0.74%	$764.64	$104,132.92
04/01/2015-06/30/2015	3%	0.75%	$778.86	$104,911.78
07/01/2015-07/31/2015	3%	0.25%	$267.31	$105,179.09

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
05/01/2012-07/31/2015	**$9,738.00**	**$105,179.09**

EXHIBIT
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