

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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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
PREHEARING BRIEF WITH RESPECT
TO RESPONDENTS RICHARD
HAMPTON SCURLOCK, III, AND
RETIREMENT TAX ADVISORY GROUP**

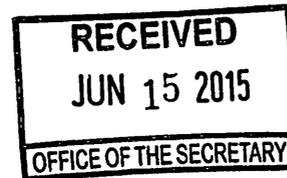


TABLE OF CONTENTS

	<u>Page</u>
I. Statement of Facts.....	1
II. Scurlock and RTAG Violated Exchange Act Section 15(a)(1)	4
A. Use of Mails/Interstate Commerce	4
B. The Diversified Bonds Were Securities	5
C. Respondents Were Not Registered.....	5
D. Respondents Acted as Brokers.....	5
III. Remedies.....	10
A. Monetary Sanctions.....	10
1. Disgorgement and Prejudgment Interest.....	10
2. Civil Penalties	12
B. Cease-and Desist Orders are Appropriate	14
C. Industry Bars are Appropriate	15

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Eric J. Brown</i> , Admin. Proc. File No. 3-13532, 2012 WL 625874 (Feb. 27, 2012)	12
<i>Ralph Calabro</i> , Admin. Proc. File No. 3-15015, 2015 WL 3439152 (May 29, 2015).....	11
<i>CFTC v. Levy</i> , 541 F. 3d 1102 (11 th Cir. 2008).....	13
<i>Terence Michael Coxon</i> , Admin. Proc. File No. 3-9218, 2003 WL 21991359 (Aug. 21, 2003)11	11
<i>Anthony Fields</i> , Admin. Proc. File No. 3-14684, 2015 WL 728005 (Feb. 20, 2015)	passim
<i>John P. Flannery</i> , Admin. Proc. File No. 3-14081, 2014 WL 7145628 (Dec. 15, 2014)	9, 12
<i>Larry C. Grossman</i> , Admin. Proc. File No. 3-15617, 2014 WL 7330327 (Dec. 23, 2014)	8
<i>Gualario & Co.</i> , Admin. Proc. File No. 3-14340, 2012 WL 627198 (Feb. 14, 2012)	4, 6
<i>S.W. Hatfield, CPA</i> , Admin. Proc. File No. 3-15012, 2014 WL 6850921 (Dec. 14, 2014)	11
<i>Hughes v. SEC</i> , 147 F.2d 969(D.C. Cir. 1949).....	7, 8
<i>Donald L. Koch</i> , Admin. Proc. File No. 3-14355, 2014 WL 1998524 (May 16, 2014).....	15
<i>Francis V. Lorenzo</i> , Admin. Proc. File No. 3-15211, 2015 WL 1927763 (Apr. 29, 2015)13, 15	13, 15
<i>Kenneth C. Meissner</i> , Admin. Proc. File No. 3-16175, 2015 W: 1534398 (Apr. 7, 2015)passim	passim
<i>Montford & Co.</i> , Admin Proc. File No. 3-14536, 2014 WL 1744130 (May 2, 2014).....	13
<i>SEC v. Gagnon</i> , 2012 WL 994892 (E.D. Mich. Mar. 22, 2012)	7
<i>SEC v. George</i> , 426 F. 3d 786 (6 th Cir. 2005).....	6
<i>SEC v. Kramer</i> , 778 F. Supp. 2d 1320 (M.D. Fla. 2011).....	9, 10
<i>SEC v. Lazare Indus., Inc.</i> , 294 Fed. App'x. 711 (3d Cir. 2008).....	13
<i>SEC v. Pentagon Capital Management</i> , 725 F.3d 279 (2d Cir. 2013)	12
<i>SEC v. Sky Way Global LLC.</i> , No. 11-12510 (Dec. 2, 2011)	9
<i>SEC v. Stratocomm Corp.</i> , 2 F. Supp. 3d 240 (N.D.N.Y. 2014)	6
<i>Steadman v. SEC</i> , 603 F. 2d 1126 (5 th Cir. 1979).....	15
<i>UBS Asset Management Inc. v. Woody Gundy Corp.</i> , 914 F. Supp. 66 (S.D.N.Y. 1996).....	7
<i>United States v. Kunzman</i> , 54 F.3d 1522 (10 th Cir. 1995)	4
<i>United States v. Rudi</i> , 902 F. Supp. 452 (S.D.N.Y 1995).....	5
 <u>STATUTES AND REGULATION</u>	
Section 3(a)(4)(A) of the Exchange Act of 1934	4, 5
Section 3(a)(10) of the Exchange Act of 1934.....	5

Section 15(a) of the Exchange Act of 1934	14, 15
Section 15(a)(1) of the Exchange Act of 1934.....	passim
Section 15(a)(2) of the Exchange Act of 1934.....	7
Section 15(b) of the Exchange Act of 1934	4, 7
Section 15(b)(6) of the Exchange Act of 1934	8
Section 21B of the Exchange Act of 1934.....	10, 12
Section 21C of the Exchange Act of 1934.....	14
Section 21C(a) of the Exchange Act of 1934	10
Section 21C(e) of the Exchange Act of 1934	10
Section 206(1) and 206(2) of the Advisers Act	8
Section 211(g)(1) of the Advisers Act.....	8
15 U.S.C. § 78o(a)(1).....	4,7,12
15 U.S.C. § 78o(a)(2).....	7
15 U.S.C. § 78c(a)(4)(A)	4,5
15 U.S.C. § 78c(a)(17)	4
15 U.S.C. § 78u-3(e).....	10
15 U.S.C. § 78u-2(b)	12
15 U.S.C. § 78u-2(b)(2).....	12
15 U.S.C. § 78u-2(b)(3)(A).....	12
15 U.S.C. § 78u-2(c).....	13
15 U.S.C. § 78u-3(a).....	14
26 U.S.C. § 6621(a)(2)	11

RULES

17 C.F.R. § 201.100412

17 C.F.R. §§ 201.1001-1004.....12

17 C.F.R. § 201.100512

17 C.F.R. § 240.3a4-1(c)(1)(iv).....7

The Division of Enforcement (“Division”) submits the following Prehearing Brief with Respect to Respondents Richard Hampton Scurlock, III and RTAG, Inc.

I. Statement of Facts

At the hearing, the Division anticipates proving the following:

Richard Hampton Scurlock, III is a 37-year-old resident of Lexington, 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. Between 1999 and 2005, in ascending order, Scurlock was a registered representative of SEC-registered broker-dealers IDS Life Insurance Company (“IDS Life”), Ameriprise Financial Services, Inc., Ameritas Investment Corp., and Synergy Investment Group, LLC. Neither Scurlock nor RTAG have any prior disciplinary history.

As of August 2009, RTAG had approximately 50 households as clients, and for the first eight months of that year, the business’s total income was \$48,350. During this same general time frame, Scurlock was exploring the possibility of entering into an arrangement with Diversified Energy Group, Inc., which Scurlock had learned about at a TD Ameritrade-sponsored conference for independent investment advisers. Scurlock heard from other attendees that the yield on Diversified’s securities compared favorably to the yield on certificates of deposit. Scurlock then researched Diversified by checking with the Commission and the Better Business Bureau, “Googling,” and speaking with Diversified, primarily respondent Matthew Welch, who described Diversified’s business in detail. Scurlock talked to Welch because he “just wanted to be certain before we put my money or any client’s money with [Diversified],” and they spoke “multiple, multiple times before we decided to move forward.” Diversified also sent Scurlock its brochure and private placement memorandum (“PPM”).

On December 15, 2009, Scurlock entered into a written agreement with Diversified, which contemplated that Scurlock would introduce investors to Diversified in exchange for a commission, labeled a “finder’s fee,” of 5% of the invested amount. However, at some point the 5% became 10%. As Respondents put it in a form RTAG filed with the State of Kentucky, Scurlock had “an arrangement with Diversified . . . that compensates him for finding investors . . .” The investments in question were Diversified bonds.

Although the “finder’s” agreement states on its face that Scurlock would merely provide Diversified with the names and addresses of prospects, in reality, the relationship worked differently. In fact, Scurlock would provide prospective investors with Diversified’s PPM and brochure and would discuss with them the merits of the investment “in pretty good detail,” including the “risk factors”; with many clients he discussed “multiple issues Sometimes at quite a bit of length.” After Scurlock learned in November 2011 that Diversified was in worse shape than he thought, he limited his recommendation of Diversified bonds to the “small minority” of his clients who “ha[d] the money and were willing to kind of take that risk.”

Scurlock would help investors complete the Diversified-required forms, and at least once he completed the paperwork for the client to sign. Scurlock would also determine whether his clients were accredited and thus eligible to invest. Sometimes investors would send checks directly to Diversified; sometimes Scurlock would forward a client’s check to Diversified. With respect to some of his clients who had accounts at TD Ameritrade, that company handled the funds and held the bonds on the clients’ behalf.

In addition to Scurlock, RTAG had two associated advisers who sold Diversified bonds to a total of 2 or 3 investors. Diversified paid the commissions from these sales to either

Scurlock or RTAG, which passed through 100% of the funds to one of the advisers and approximately 50% to the other.

During the period January 2010 through March 2012, Scurlock successfully solicited at least 46 investors, more than half of whom were Scurlock's advisory or tax clients. All but one were from Kentucky. Diversified was a Delaware corporation with its place of business in Tequesta, Florida and it deposited investor funds in Regions Bank. During this period, Diversified paid commissions to Scurlock and RTAG totaling, respectively, \$352,808.64 and \$95,441.09. Assuming a 10% commission rate, this would mean Scurlock's clients purchased more than \$4 million in Diversified bonds.

In February 2011, RTAG was examined by its Kentucky regulator, and the examiners "discover[ed] a finder's fee agreement for the sale of Diversified Energy private placements."¹ On March 21, 2011 Scurlock met with Carmen Bishop, a Compliance Branch Manager, to discuss the exam findings, which had included several issues in addition to the sale of Diversified bonds. On June 2, 2011, Bishop sent Scurlock an email stating:

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

¹Scurlock has testified that at the time he entered into his arrangement with Diversified, he telephoned the Kentucky regulator, spoke with a person he cannot identify, who advised him he did not need to register. However, nothing in the report of the February 2011 examination shows Scurlock mentioning this prior conversation at the time the examiners discovered his involvement with the sale of Diversified securities.

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.

In Scurlock's "ADV" form filed as of June 30, 2011, he disclosed that he was receiving commissions from Diversified. He continued to refer clients to Diversified through March 2012. Neither he nor RTAG registered as brokers with the Commission.

II. SCURLOCK AND RTAG VIOLATED EXCHANGE ACT SECTION 15(a)(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)]." 15 U.S.C. § 78o(a)(1). 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." 15 U.S.C. § 78c(a)(4)(A). Section 15(a)(1) is a strict liability offense with no requirement of scienter. *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) (Initial Decision) (regulatory official's alleged verbal approval of sales by unregistered broker "is not a defense to the registration violation").

A. Use of Mails/Interstate Commerce

The Exchange Act defines interstate commerce to include both "trade, commerce, transportation, or communication among the several States" and "intrastate use" of telephonic or other interstate means of communication and any other interstate instrumentality. 15 U.S.C. § 78c(a)(17); *see United States v. Kunzman*, 54 F.3d 1522, 1527 (10th Cir. 1995) (requirement

satisfied in part by “numerous checks drawn and deposited in banks involved in interstate commerce”). Here, as noted above, 46 of Scurlock’s clients, all but one in Kentucky, bought millions of dollars worth of bonds of Diversified, a Delaware corporation located in Florida, with \$448,000 in commissions flowing back to Respondents in Kentucky. Scurlock “probably” mailed checks to Diversified on behalf of clients and he knew that clients mailed their own checks to Diversified, which deposited their funds into Regions Bank, a large bank doing business in many states. Scurlock also had telephone conference calls with his clients and a representative of Diversified, which would mail Scurlock packets of information. Under these circumstances, the requirement of the use of interstate commerce and the mails is clearly satisfied.

B. The Diversified Bonds Were Securities

The Diversified bonds qualify as securities under Exchange Act Section 3(a)(10), which includes a “bond” within the list of instruments constituting securities. 15 U.S.C. § 78c(a)(1); *see United States v. Rudi*, 902 F. Supp. 452, 457 (S.D.N.Y. 1995) (“The [Exchange] Act . . . defines a ‘security’ to include a bond.”).

C. Respondents Were Not Registered

As detailed in the statement of facts, at the time of the Diversified sales neither Scurlock nor RTAG were registered as brokers or dealers with the Commission.

D. Respondents Acted as Brokers

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.” 15 U.S.C. § 78c(a)(4)(A). “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." *Anthony Fields*, AP File No. 3-14684, 2015 WL 728005, *18 (Feb. 20, 2015) (Commission Opinion) (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 & Co.*, AP File No. 3-14340, 2012 WL 627198, *14 (Feb. 14, 2012) (Initial Decision).

Scurlock and RTAG clearly satisfy the test for broker conduct. The sales were regular and not isolated: 46 clients over a 27-month period. By his own admission, Scurlock solicited potential investors, had detailed conversations with them to determine 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 \$448,000 in transaction based compensation. Under these facts, Scurlock and RTAG acted as brokers. *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).²

²*See also SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005) (affirming summary judgment for Commission on § 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) (granting summary judgment against issuer's employee who solicited investors, advised them of the terms of the transaction, handled

Respondent's proffered defenses to the Section 15(a)(1) charge should be rejected. To the extent they rely upon their status as investment advisers, the Exchange Act clearly 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). 15 U.S.C. § 78o(a)(1) (emphasis added). Exchange Act Section 15(a)(2) authorizes the Commission, by "rule or order," to exempt from the registration requirement "any broker or dealer or class of brokers or dealers" 15 U.S.C. § 78o(a)(2). However, Respondents have the burden of establishing such an exemption,³ they identify none, and the only exemption pertaining to investment advisers is not even remotely applicable here.⁴

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") in no way exempts 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 Investment Advisers Act. It is perfectly obvious that Congress contemplated no such result when it enacted that Act.").

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).

³*See UBS Asset Management (New York) Inc. v. Wood Gundy Corp.*, 914 F. Supp. 66, 70 (S.D.N.Y. 1996).

⁴*See* Exchange Rule 3a4-1(c)(1)(iv) [17 C.F.R. § 240.3a4-1(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.").

Respondents' reliance on Advisers Act Section 211(g)(1), 15 U.S.C. § 80b-11(g)(1), is misplaced. That provision, added by the Dodd-Frank Act, Pub. L. No. 111-203, § 913(g)(2), authorizes the Commission to issue rules imposing upon brokers a standard of conduct no less stringent than the standard applicable to investment advisers under Advisers Act Sections 206(1) and 206(2) when providing personalized investment advice about securities. In a request for data relating to that potential rulemaking, the Commission noted

that nothing 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.

Release No. 34-69013, at 26 n.34 (Mar. 1, 2013), 78 Fed. Reg. 14848, 14855 n.34 (Mar. 7, 2013). Thus, the statutory scheme is clear: an investment adviser may permissibly engage in broker conduct, but if he does, he subjects himself to the Exchange Act's regulatory scheme, including Section 15(a)(1)'s registration requirement. *See Hughes*, 174 F.3d at 977 (“[W]hen a person is registered under both the Securities Exchange Act and the Investment Advisers Act he or she is amenable to regulation under both statutes.”).⁵ Accordingly, nothing in the Advisers Act gives Respondents a “pass” from the duty to register. *See 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 the Battoo Funds to [the investment advisory firm’s] clients and received referral fees and a portion of the investment management fee for making those recommendations”).

⁵The *Hughes* court stated that “[t]he situation would be otherwise if the Commission had sought to have revoked petitioner’s investment adviser registration because of violations of the Securities and Securities Exchange Acts” *Id.* However, the Dodd-Frank Act authorized an investment adviser associational bar as a permissible sanction for a willful violation of the Exchange Act. *See* Pub. L. No. 111-203, § 925(a)(1) (amending Exchange Act Section 15(b)(6)).

Finally, Respondents' reliance on a "finders" exemption—an exemption discussed in a few district court opinions that exists neither in the statute nor any regulation—is misplaced. As an initial matter, the concept of a finder that is 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 Law Judge is of course bound by the decisions of the Commission notwithstanding any contrary district court authority. *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). Here, as discussed above, the factors set out in the Commission's recent *Fields* opinion strongly favor a finding that Respondents acted as brokers. Therefore, the "finder" issue need not be reached.

Even if Law Judge were to consider the finders issue, the concept has no application here. 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),⁶ the only case holding against the SEC on this issue, 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* 778 F. Supp. 2d 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

⁶The dismissal was based on the non-finality of the district court order; the court did not reach the merits of the Commission's appeal.

he and RTAG were compensated directly by, Diversified. Moreover, the majority of Scurlock's "solicitees" were 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*, and the Law Judge should find that Respondents violated Exchange Act Section 15(a)(1).

III. Remedies

A. Monetary Sanctions

Pursuant to Exchange Act Section 21B, the Commission may (i) enter an order requiring disgorgement from a respondent, including reasonable interest; and (ii) impose a civil penalty if the respondent has willfully violated any provision of, among others, the Exchange Act, and a penalty is in the public interest.

1. Disgorgement and Prejudgment Interest

As discussed above, the facts at the final hearing will show Respondents violated the federal securities laws, with Scurlock receiving \$352,808.64 directly and \$95,441.09 through his wholly owned entity RTAG. Under the circumstances, an order of disgorgement and prejudgment interest is appropriate.

In any cease-and-desist proceeding under Exchange Act Section 21C(a) . . . [the Commission] "may enter an order requiring . . . disgorgement, including reasonable interest." [Exchange Act Section 21C(e), 15 U.S.C. § 78u-3(e)] 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). Commissions received from unlawful sales can provide the required reasonable approximation of a respondent's ill-gotten gains. *Id.* at *44, *45. Business expenses incurred in connection with the commissions are not properly offset against the disgorgement amount. *Id.* at 44 n.233. Persons or entities who collaborate or have a close relationship in connection with the violation are appropriately held jointly and severally liable for disgorgement. *S.W. Hatfield, CPA*, AP File No. 3-15012, 2014 WL 6850921, *11 & n.60 (Dec. 14, 2014) (Commission Opinion).

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 (March 2012) to the date of the decision.

Here, the Commission can demonstrate a reasonable approximation of the ill-gotten gains, namely, the commissions received by the Respondents. Given Scurlock's control of RTAG, he should be jointly and severally liable with RTAG for the Commissions it received. Moreover, there are no “unique and compelling” circumstance that would counsel against an award of prejudgment interest. Therefore, disgorgement and prejudgment interest should be awarded against Scurlock and RTAG.

2. Civil Penalties

Civil penalties “are intended to punish, and label defendants wrongdoers.” *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013). Penalties also serve to deter both the violator and “others in similar positions from engaging in future violations.” *John P. Flannery*, AP File No. 3-14081, 2014 WL 7145625, *41 (Dec. 15, 2014) (Commission Opinion), *petitions for review filed*, No. 15-1080 (1st Cir. Jan. 14, 2015). Section 21B of the Exchange Act establishes a tiered system of penalties. *See* 15 U.S.C. § 78u-2(b). 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. § 201.1005.⁷ 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* 15 U.S.C. § 78u-2(b)(2); 17 C.F.R. § 201.1005. Under the third tier, which requires additionally a showing of substantial losses, a significant risk of substantial losses, or substantial pecuniary gain to the offender, 15 U.S.C. § 78u-2(b)(3)(A), the maximums are \$150,000 (individuals) and \$725,000 (entities).

Under Section 21B 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.” 15 U.S.C. § 78o(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*

⁷Under 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.

Capital Management, 725 F.3d 279, 288 n.7 (2d Cir. 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”).

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).

In this case, a civil penalty is appropriate. As an initial matter, the Division has satisfied its light burden of establishing willfulness. *See Francis V. Lorenzo*, AP File No. 3-15211, 2015 WL 1927763, *12 (Apr. 29, 2015) (Commission Opinion) (“[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 securities law or rules promulgated thereunder.”) (footnotes, alterations, and quotations omitted); *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.”).

Registration violations—even “standalone” violations where fraud is not alleged—are serious, and warrant a civil penalty. Scurlock’s conduct occurred over an extended period resulting in millions invested. The evidence will show there was harm to investors when Diversified could not pay the bonds in full. Scurlock continues to contend his conduct was lawful, and his position as an investment adviser presents continuing opportunities to sell securities without being registered. The violations are relatively recent, and Scurlock was formerly a registered representative and therefore was aware of the registration requirement. While he may have received ambiguous advice on this issue from the Kentucky regulator in June 2011, he had already received substantial commissions before then, and should have determined from the outset whether or not his conduct complied with the *federal* securities laws. Accordingly, a civil penalty is appropriate, in an amount (and based on a tier) to be determined after the hearing. *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).

B. Cease-and-Desist Orders are Appropriate

Exchange Act Section 21C 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. *See* 15 U.S.C. § 78u-3(a).

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). 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). 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). These factors are similar to those considered in whether to impose a civil penalty, and for the same reasons support a cease-and-desist order. *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).

C. Industry Bars Are Appropriate

The same factors described above apply to the consideration of industry and penny stock bars. *Francis V. Lorenzo*, AP File No. 3-15211, 2015 WL 1927763, *12 (Apr. 29, 2015)

(Commission Opinion). These factors support an associational bar, with the appropriate length to be determined after the hearing. *See Meissner*, 2015 WL 1534398, *10 (imposing permanent associational and penny stock bars based on broker registration violations).

June 12, 2015

Respectfully submitted,



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SECURITIES AND EXCHANGE COMMISSION
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CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served by U.S. Mail, on this 12th day of June 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

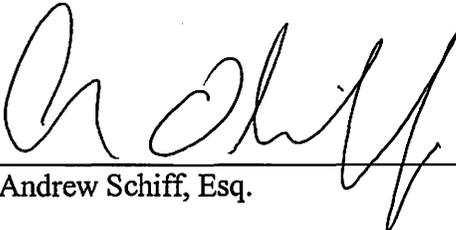
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Office Memorandum

SECURITIES AND EXCHANGE COMMISSION

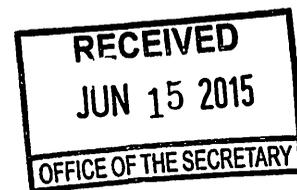
Miami Regional Office

DATE: June 12, 2015

TO: OFFICE OF THE SECRETARY

FROM: Andrew Schiff, Esq.
By: Jessica Benitez-Perellada, Paralegal

RE: **In the Matter of the Havanich, et al.**
Adm. Proceeding No. 3-16354



Enclosed please find the original and three copies of the Division of Enforcement's Prehearing Brief with Respect to Respondents Richard Hampton Scurlock, III and Retirement Tax Advisory.

Thank you.