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ADMINISTRATIVE PROCEEDING  
FILE NO. 3-3815

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of  
DAVID B. McEWAN  
(8-13633)

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**FILED**  
**APR 17 1973**  
SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

Edward B. Wagner  
Administrative Law Judge

Washington, D. C.  
April 17, 1973

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APPEARANCES: Willis H. Riccio and Allan R. Campbell of the Boston  
Regional Office for the Division of Enforcement.

David B. McEwan, pro se.

BEFORE: Edward B. Wagner, Administrative Law Judge

These proceedings were instituted by the Commission on July 12, 1972 under an Order for Public Proceedings ("Order") pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether allegations of the Division of Enforcement that David B. McEwan ("Registrant") willfully violated certain provisions of the Exchange Act are true, to afford respondent an opportunity to establish any defense to the Division's charges, and to determine what, if any, remedial action is appropriate in the public interest.

The Order charged Registrant with having willfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in that Registrant failed to file with the Commission a report of his financial condition for the calendar year 1970 within the time required by that Rule and failed to file a report for calendar year 1971 as required by said Rule.

An evidentiary hearing was held in Boston, Massachusetts on February 22, 1973. Registrant appeared pro se. The Division filed proposed findings, conclusions and a supporting brief. Registrant filed a reply to the Division's filing. The Division elected not to file a reply brief, and Registrant has made no further filing.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witness.

#### Violations of Rule 17a-5

David B. McEwan is a sole proprietor who became registered

with the Commission as a broker-dealer in securities pursuant to Section 15(b) of the Exchange Act on January 20, 1968. As stipulated, Registrant failed to file reports of financial conditions for the calendar years 1970 and 1971 in accordance with the requirements of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder.<sup>1/</sup> The report for 1970 was filed 29 days late. The report for 1971 has never been filed. The record reflects that Registrant was informed of the filing requirements for reports of financial condition and of the concern of the Commission with respect to tardy filings of reports. Registrant's testimony indicates that he was aware that he failed to file a report for 1971, and the record further indicates that he knew his report for 1970 was not timely.

Under the above circumstances, it is clear that Registrant's violations were committed "willfully" in the sense used in the Exchange Act. Evil motive, an intent to violate the law or knowledge that the law is being violated are not required. All that is necessary is that Registrant acted intentionally in the sense that he was aware of what he was doing.<sup>2/</sup>

Registrant stated at the hearing that he was ill at the time the report for 1971 was due, that he was relatively inactive as a broker-dealer, and that his attention was distracted by his life

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<sup>1/</sup> The parties stipulated that the allegations contained in the Order were to be deemed true with the exception of the word "willfully".

<sup>2/</sup> Hughes v. Securities and Exchange Commission, 174 F. 2d 969, 977 (D.C. Cir. 1949); Thompson Ross Securities Company, 6 S.E.C. 1111 (1940).

insurance business.<sup>3/</sup> However, the major illness, pneumonia, to which Registrant testified, occurred almost two months after the 1971 report was due, and Registrant's contention that his illness was nevertheless an excuse, because "I counted on the extension and before that time had expired I was incapacitated"<sup>4/</sup> has little persuasiveness when no extension of time was in fact ever sought by Registrant. Further, the reporting requirements of the Exchange Act are applicable whether or not any business is being done by a registered broker-dealer.<sup>5/</sup> Registrant's business distractions similarly furnish him with no excuse.

It appears from Registrant's testimony and his reply that his failure to comply with the reporting requirements stems from his resentment of the requirements, from his belief that such requirements are inappropriate and unnecessary for the business he has carried on and intends to carry on and, particularly, from his objection to having to pay an accountant for services in connection with the certification of his financial statements. Registrant

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3/ Registrant also testified that the Regional Administrator of the Boston Office had told him that the Staff "didn't want" the report for 1971, but this conversation took place after Registrant had received notice of these proceedings in July 1972 - some 5 months after the report should have been filed (Tr. 22). In a letter, dated December 13, 1972, to the Secretary of the Commission Registrant had earlier stated, "He [the Regional Administrator] advised me that it was too late to file my 1971 report of financial condition and that it would be necessary for me to appear at a public hearing".

4/ Registrant's reply.

5/ H. B. Block and Company, 40 S.E.C. 375, 376 (1960).

argues that the reporting requirements should not apply to the type of business he intends to conduct, i.e., the sale of mutual funds and variable life insurance, and that a separate reminder notice should be sent to each registrant of the obligation to file. Registrant cannot, however, be permitted to disobey those regulations with which he disagrees.

### Public Interest

The Division points out that Registrant has stated his intention actively to engage in the sale of securities to the public in the future and that this "potential for doing business presents a danger to the public in light of respondent's past attitude and conduct."<sup>6/</sup> The Division recommends revocation. Registrant contends in his reply that the Division is in error in concluding that a danger exists, since Registrant's operation is or will be a "life insurance sales office handling only mutual funds and no customers money"; and that, in the event the variable life insurance field is entered by registrant, "with all checks directly payable to the companies issuing the contracts, the requirement of financial reporting and policing of all honest representatives without complaints from customers, adds much useless administrative procedure to an already complicated business." Although the usual

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<sup>6/</sup> It is noted in this connection that in 1971 a District Business Conduct Committee of the National Association of Securities Dealers fined Registrant \$100 for conduct charged to be in violation of the Rules of Fair Practice of the Association involving failure to compute monthly trial balances, failure to compute monthly net capital and aggregate indebtedness, and failure to maintain written supervisory procedures.

transaction in these areas may not involve handling customers' money, there is no guarantee that cash and other transactions may not occur in which customers' money is handled. Further, Registrant's broker-dealer registration carries with it the right to engage in other areas of the securities business. He also contends in his reply that a published rule is not sufficient notice "to an insurance man new to the securities business" who should "receive a notification by mail of the due date." Registrant's arguments are essentially contentions that he should be permitted to ignore applicable regulations when he deems them inappropriate and are indicative of an attitude which will lead to further regulatory difficulty if remedial action is not taken.

In light of the foregoing and the repetition of the violations involved, it is concluded that it is necessary to impress upon registrant the need for strict compliance in the future with applicable regulations and that a 90-day suspension of Registrant's registration as a broker-dealer will serve that purpose.<sup>7/</sup>


Accordingly, IT IS ORDERED that the registration of Registrant David B. McEwan as a broker-dealer is hereby suspended for 90 days.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

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<sup>7/</sup> All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

  
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Edward B. Wagner  
Administrative Law Judge

Washington, D. C.  
April 17, 1973