

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
HAROLD E. WINTERHALTER
d/b/a HAROLD E. WINTERHALTER COMPANY
File No. 8-6717

FILED

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SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

Samuel Binder
Hearing Examiner

Washington, D.C.
January 19, 1965

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BEFORE: Samuel Binder, Hearing Examiner.

APPEARANCES: John A. Santospirito, Robert M. Laprade, and
Haig Casparian, Esqs., for the Division of
Trading and Markets.

Harold E. Winterhalter, d/b/a Harold E. Winterhalter
Company, pro se.

This is a proceeding under Section 15(b) and 15A of the Securities Exchange Act of 1934 ("Act") to determine whether Harold E. Winterhalter, doing business as Harold E. Winterhalter Company ("registrant"), a registered broker-dealer and a member of the National Association of Securities Dealers ("NASD"), a national securities association registered pursuant to Section 15A of the Act, wilfully failed to file a report of financial condition for the year 1963 as required by Section 17(a) of the Act and Rule 17a-5 (17 CFR 240.17a-5) thereunder, and if so, to determine the remedial action to be taken in the public interest.

After appropriate notice, a hearing was held before the undersigned hearing examiner, at which the Division of Trading and Markets ("Division") and the registrant were given full opportunity to be heard and to file proposed findings of fact and conclusions of law and supporting briefs.

After the hearing, the Division filed proposed findings of fact and conclusions of law and a brief and the respondent filed a brief.

The uncontradicted facts are as follows:

The registrant, a sole proprietor, became effectively registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Act on July 28, 1958, and is a member of the NASD.

On November 27, 1963 the Commission's New York Regional Administrator ("administrator") addressed a letter to the registrant reminding him to file his annual report for 1963 pursuant to Rule 17a-5 adopted under the Act, and pointed out that such reports "must be filed within

45 days of the date of which they speak and must speak as of a date not later than December 31, 1963." The administrator also informed the registrant that if he failed to file his annual report within the time specified in the rule, the administrator would "have no alternative but to deem such failure a wilfull violation of the law and to recommend to the Commission that it institute proceedings to revoke your registration or take other appropriate action."

On March 23, 1964 the administrator addressed another letter, by certified mail, to the registrant pointing out that the Commission's records indicated that the registrant had not filed a financial report covering the year 1963 as required by Rule 17a-5 and repeating his statement of November 27, 1963 that registrant's failure to comply with the rule would impel him to recommend to the Commission that it institute revocation proceedings against the registrant.

The registrant, nevertheless, failed and neglected to file a financial report for 1963.

On August 26, 1964, the Commission instituted this proceeding.

The registrant did not file an answer to the Commission's order. However, in September, 1964 he went to the offices of the administrator and proffered a financial report covering the calendar year 1963. Supervisory personnel in the New York Regional Office informed him that such report should have been filed not later than February 14, 1964, that such financial report would not be accepted for filing principally because it was not timely filed under Rule 17a-5 and because it was

otherwise deficient and they thereupon returned such report to the registrant.^{1/}

The registrant conceded during his testimony that he had been negligent but claimed "to have had various problems" which he had been unable to solve and stated that his "present trouble with the SEC is caused by these problems." He acknowledged the serious character of the offense, stated he would be careful to comply with the rule in the future, and expressed regret concerning the trouble and expense to which the Commission had been put by reason of his negligence. The registrant contended, however, that an order revoking registration would be unduly severe and urged that his offense was of such character that suspension for a month or less would constitute a severe penalty for his negligence.

It was clear that the registrant had been fully informed by the administrator of the requirements of Section 17(a) and Rule 17a-5 adopted thereunder and of the serious impact which failure to file financial reports might have upon him. Nevertheless he failed to file a financial report for the calendar year 1963 and had made no attempt to obtain an extension of time to file such report.^{2/}

^{1/} Rule 17a-5(a)(B) provides in pertinent part that ". . . such reports shall be filed not more than 45 days after the date of the report of financial condition."

^{2/} While the Commission's order did not charge any violations of Section 17(a) other than the failure to file for the year 1963, the Division presented evidence showing that registrant had not made such filings for 1959 and 1961. The purpose of adducing such evidence was to support the Division's contention that registrant's failure to file was "wilfull" within the meaning of the Act.

On the facts and circumstances of this case, registrant's failure to file must be considered "wilfull."

The registrant also testified that he had not bought or sold a security in 1963 or 1964, and explained that he had not "done any business as a broker or dealer" during this period. His testimony was uncontradicted and is credited.

Although the registrant had not engaged in business as a broker or dealer for two years, he expressed the hope of engaging in such business at some indefinite and unknown future time. There was no solid evidence as to when, if ever, he would do so. The continuance in registration of persons as brokers or dealers who have ceased conducting such businesses and who have only an intention to resume conducting such businesses at some unknown future time is inconsistent with the purposes of Section 15(b) of the Act and places an unwarranted burden on the Commission's administrative processes.

Section 15(b) provides, among other things, that "If the Commission finds that any registered broker or dealer has ceased to do business as a broker or dealer, the Commission shall by order cancel the registration of such broker or dealer."

This provision does not restrict the Commission's authority to take disciplinary action against a broker or dealer who has violated the Act. It does, however, provide an effective means of excluding from registration brokers or dealers not actually engaged in the securities business.^{3/}

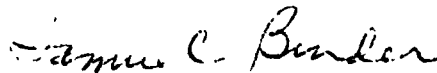
^{3/} E.g., Sherley Colbert, 36 S.E.C. 368 (1955).

Since the registrant is not actively engaged in the securities business censure or suspension of registration for 30 days would have little or no impact in this case.

Two courses are available to protect the public interest. One would be to revoke the registration because of misconduct and the other would be to cancel the registration because the registrant is not actually engaged in the securities business as a broker or dealer.

In the particular circumstances of this case an order revoking registration would appear to be a harsher remedial action than necessary to protect the public interest, while an order cancelling registration would be consistent with the purposes of Section 15(b)(6) of the Act, would relieve the Commission of an unwarranted administrative burden, and would fully protect the public interest.

Accordingly, IT IS ORDERED, pursuant to Section 15(b) of the Securities Exchange Act of 1934, that the registration of Harold E. Winterhalter, doing business as Harold E. Winterhalter Co., as a broker or dealer, be and it hereby is, cancelled.



Samuel Binder
Hearing Examiner

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