

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 11, 2008

In the Matter of :
: ORDER ADDRESSING DIVISION
NEXT FINANCIAL GROUP, INC. : OF ENFORCEMENT'S HEARING
: EXHIBITS
:

This Order addresses three remaining issues arising from the Division of Enforcement's (Division) hearing exhibits. The parties' request for a protective order is addressed separately.

Division Exhibit 56

The Division's Amended Admitted Exhibit List, dated January 11, 2008, states that pages 1 through 14 of Division Exhibit 56 were admitted into evidence during the hearing. I agree with the Division that pages 1 through 6 were admitted (Tr. 343-44, 431-32). Pages 7 through 14 were withdrawn by the Division (Tr. 344). They are not part of the record.

Division Exhibit 60

I discussed Division Exhibit 60 in my Order of January 28, 2008, and that discussion is incorporated by reference. On February 1, 2008, the Division moved to admit Division Exhibit 60 into evidence, in its entirety and for all purposes. On February 8, 2008, as amended on February 11, 2008, NEXT Financial Group, Inc. (NEXT), opposed the Division's motion.

I agree with NEXT that the Division acted improperly and evaded the Securities and Exchange Commission's (Commission) Rules of Practice when its agents invoked Section 17 of the Securities Exchange Act of 1934 (Exchange Act) and Rules 17a-3 and 17a-4 to gather some of the materials in Division Exhibit 60. I reject the Division's claim that it did not act improperly. The Division asserts that "it was made clear" to non-party brokerage firms that they "were not under scrutiny" (Division's Motion at 4). That is true only in the most technical sense—the brokerage firms were told this information after-the-fact and/or only if they specifically asked (Tr. 852; DX 60 at 17). If the Division's theory of the case is correct, some or most of the brokerage firms that "voluntarily" provided copies of their privacy policies to the Division on short notice during October 2007 may find that the Division's posthearing pleadings label them as primary violators of Regulation S-P because of deficiencies in those privacy policies.

The Division also makes the curious claim that "the letters sent to broker-dealers were not sent at the direction of the Division and were not reviewed by the Division prior to the time they were sent" (Division's Motion at 14). The Division cannot draw a bright line distinction

between the attorneys who prosecute the case and the staff who gather materials at the direction of the attorneys. Assuming that the Division's claim is true (Tr. 842-43, 846-48), it is hardly exculpatory. The Division would not be likely to respond sympathetically if, in some future administrative proceeding, a respondent (a branch office manager of a brokerage firm) raised such a "defense" to the allegation that he had failed reasonably to supervise the registered representatives in his branch office.

Even though some of the evidence in Division Exhibit 60 was gathered improperly, that is not a basis for excluding it from the record. See Richard O. Bertoli, 47 S.E.C. 148, 153 n.23 (1979) (dictum) (citing United States v. Janis, 428 U.S. 433, 447 (1976)). In Bertoli, the respondent moved to suppress evidence allegedly acquired as the result of an illegal search and seizure engaged in by the Commission's staff. In dictum, the Commission noted that "the Supreme Court declined to exclude illegally seized evidence in a civil tax case and stated that it had never applied the exclusionary rule in a civil proceeding." Recent Supreme Court opinions have followed Janis. See Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (holding that no exclusionary rule applies in parole revocation proceedings); INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that no exclusionary rule applies in civil deportation proceedings). The Division relies heavily on this precedent. For its part, NEXT does not argue that the exclusionary rule applies here (NEXT Opposition at 2 n.2).

Rather, NEXT emphasizes that the Division's conduct should not be condoned, and it argues that the fairness and impartiality of the administrative process would be undermined by admitting Division Exhibit 60. I do not believe the conduct at issue is sanctionable under Rule 180 of the Commission's Rules of Practice. To the extent that NEXT seeks relief from its prehearing stipulation to the authenticity and admissibility of Division Exhibit 60, I do not believe that NEXT has satisfied the stringent standard set forth in James F. Glaza, 83 SEC Docket 3101, 3107-08 & n.7 (Sept. 30, 2004) (holding that the Commission will not set aside stipulations of fact without compelling reasons; and ruling that an Administrative Law Judge is under no obligation to second-guess tactical decisions made by counsel for a party in reaching such stipulations).

The Division's motion is granted. Division Exhibit 60 is admitted in its entirety and for all purposes.

NEXT's Motion to Exclude the Privacy
Policies in Division Exhibits 43-45, 47, and 51-58

On January 7, 2008, NEXT moved to exclude the portions of Division Exhibits 43-45, 47, and 51-58 containing privacy policies. On January 11, 2008, the Division opposed NEXT's motion to exclude.

NEXT wrongly assumes that the Division offered into evidence the privacy policies in each of these exhibits (Motion to Exclude at 2). In fact, the Division never moved to admit the privacy notices contained in Division Exhibits 44, 45, 47, 51, 52, 55, 56, 57, and 58.¹ The

¹ If the parties' review of the record shows otherwise, they should cite the appropriate transcript page in their posthearing briefs. I note that the Division's Amended Admitted Exhibit List correctly omits pages 21-22 of Division Exhibit 44; pages 24-25 of Division Exhibit 45; pages 8-

privacy policies in these exhibits are not part of the record.² As a result, NEXT's motion to exclude is moot as to the privacy policies in these nine exhibits.

The Division did offer into evidence the privacy policies in Division Exhibits 43, 53, and 54. I granted the Division's motion to admit pages 52-53 of Division Exhibit 43 and pages 22-23 of Division Exhibit 53 (Tr. 434-35, 505). Insofar as NEXT's motion to exclude can be construed as a request to reconsider these bench rulings, I deny the request to reconsider. The Division also moved to admit the privacy policy on pages 408-09 of Division Exhibit 54, but I deferred a ruling at NEXT's request (Tr. 674-75, 693). I now grant the Division's motion to admit these pages into the record, and I deny NEXT's motion to exclude.

Briefing Schedule

As provided in my Order of January 28, 2008, the Division's posthearing pleadings must be filed and served by February 15, 2008.

NEXT's posthearing pleadings must be filed and served by March 17, 2008. The Division's optional reply brief must be filed and served by April 4, 2008.

SO ORDERED.



James T. Kelly
Administrative Law Judge

9 of Division Exhibit 47; pages 20-21 of Division Exhibit 51; pages 21-22 of Division Exhibit 52; page 50 of Division Exhibit 55; page 15 of Division Exhibit 56; pages 44-45 of Division Exhibit 57; and pages 73-74 of Division Exhibit 58.

² It may well be that the equivalent pages can be found elsewhere in the record, but the privacy policies in these exhibits are not part of the record.