

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12738

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 19, 2007

In the Matter of

NEXT FINANCIAL GROUP, INC.

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ORDER GRANTING IN PART AND
DENYING IN PART A MOTION FOR
A MORE DEFINITE STATEMENT

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on August 24, 2007. The Chief Administrative Law Judge then assigned the matter to my docket and scheduled a hearing for October 2, 2007.¹ NEXT Financial Group, Inc. (NEXT), received the OIP on August 29, 2007, and filed its Answer on September 13, 2007.

NEXT seeks a more definite statement of certain charges in Paragraphs II.B.6, 9, 12, 14, 15, 18, and 19 of the OIP. See Rule 220(d) of the Commission's Rules of Practice. The Division of Enforcement (Division) opposes NEXT's motion.

There is no merit to the Division's claim that NEXT's motion is "simply a ruse to force the Division into early disclosure of its evidence" (emphasis added). The hearing is scheduled to begin in less than two weeks.² For purposes of ruling on this motion, I assume that the Division will be prepared to go forward with its case-in-chief on October 2, 2007. If the Division were unable or unwilling to go forward within the statutorily mandated thirty-to-sixty-day timeframe, it would have to ask the Commission to dismiss that aspect of the OIP that seeks a cease-and-desist order. See Trautman Wasserman & Co., 2007 SEC LEXIS 1228 (June 1, 2007). Nonetheless, I agree with the Division that the OIP provides enough specificity as to the matters of fact and law asserted in Paragraphs II.B.6, 18, and 19. To that extent, I deny NEXT's motion.

I grant NEXT's motion in part, as to Paragraphs II.B.9, 12, 14, and 15 of the OIP. The relevant parts of the OIP allege that:

¹ An early hearing date is statutorily mandated, because the OIP seeks a cease-and-desist order. Under Section 21C(b) of the Securities Exchange Act of 1934 (Exchange Act), the hearing must commence thirty to sixty days after service of the OIP.

² At present, there are no witness lists, exhibit lists, or prehearing briefs. In view of the early hearing date, the relief sought by NEXT would be available under Rules 222(a)(1)-(2) of the Commission's Rules of Practice if it were not available under Rule 220(d).

- **[I]n some instances**, the NEXT transition team used recruits' user ID and password, provided by recruits, to access recruits' current broker-dealer computer system (§§ II.B.9);
- The NEXT transition team also used recruits' user IDs and Passwords to access **various** mutual fund and annuity company websites to extract nonpublic personal information (§§ II.B.9);
- **On limited occasions**, NEXT used recruits' customer data to pre-populate NEXT's own internal back office client database system (§§ II.B.12);
- **On a limited number of occasions**, NEXT also forwarded nonpublic information to its clearing firm (§§ II.B.14);
- NEXT has received nonpublic personal customer information from **a recruit**, only to have **the recruit** decide not to join NEXT (§§ II.B.15).

The Division must provide a more definite statement that eliminates the ambiguity of each of the phrases identified in boldface type above. It is unrealistic to expect NEXT to comb through the Division's investigative file before October 2 and find every instance of purported misconduct identified above. On the other hand, alleging that misconduct occurred "in some instances," "on limited occasions," "on a limited number of occasions" virtually guarantees endless litigation about whether the alleged misconduct was isolated or recurrent.³ The Division must identify the specific number of occasions of each type of misconduct that will be at issue in these paragraphs of the OIP.⁴ It must also identify the range of dates at issue for each category of alleged misconduct (e.g., "on six occasions between March 2004 and May 2006"). With respect to Paragraph II.B.9 of the OIP, the Division must identify the specific number of mutual fund and annuity company websites that will be at issue. With respect to Paragraph II.B.15 of the OIP, the Division must state if the allegation is limited to a single recruit. If so, the Division must identify the date the recruit decided not to join NEXT. If the OIP is alleging that there was more than one such recruit, it must provide the number of recruits and the range of dates involved.

³ Assuming that the Division succeeds in proving that the alleged violations occurred, it must then demonstrate that sanctions are in the public interest. One of the factors to be considered in determining whether a cease-and-desist order is in the public interest is whether the proven violations were isolated or recurrent. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).


⁴ A more definite statement that attempts to preserve "wiggle room" will not be deemed to comply with the spirit of this Order. Cf. Anthony C. Snell, 90 SEC Docket 1707, 1732 (May 3, 2007) (Initial Decision) (noting that the Division interpreted the OIP's phrase "at least four transactions" to mean that eleven transactions should be at issue during the hearing), final, 2007 SEC LEXIS 1230 (June 1, 2007).

ORDER

By September 24, 2007, the Division must provide a more definite statement of the charges in Paragraphs II.B.9, 12, 14, and 15 of the OIP, as discussed above. By September 27, 2007, NEXT may amend its Answer to the OIP to respond to the more definite statement. NEXT's motion for a more definite statement is otherwise denied.

As a separate matter, the parties shall confer with each other and with this Office to schedule a telephonic prehearing conference. See Rule 221 of the Commission's Rules of Practice. If possible, the conference will be held during the week of September 24-28, 2007, at any time after the Division has filed and served its more definite statement.

SO ORDERED.



James T. Kelly
Administrative Law Judge