4 August 2014 **MDP CIRCULAR 2014–08**

DISCIPLINARY MATTER – Credit Suisse AG

Credit Suisse AG ("Credit Suisse") has paid a total penalty of **$88,400** to comply with an infringement notice given to it by the Markets Disciplinary Panel ("MDP"). The penalty was for:

- offering and allocating an Error Trade to a Client in circumstances where that Trade had not been obtained under instructions previously obtained from that Client;
- acting in a manner which had a detrimental effect on that Client's best interests; and
- failing to maintain a separate record of that Error Trade.

Background and circumstances

Credit Suisse is alleged to have contravened subsection 798H(1) of the *Corporations Act 2001* ("Act") by reason of contravening Rules 3.1.17(1), 3.1.13(1)(b) and 2.2.4(3) of the ASIC Market Integrity Rules (ASX 24 Market) 2010 ("MIR 3.1.17(1), MIR 3.1.13(1)(b) and MIR 2.2.4(3)").

MIR 3.1.17(1) provides:

> "*A Market Participant must not offer and/or allocate Trades to a Client unless those Trades have been obtained under instructions previously obtained from that Client.*"

MIR 3.1.13(1)(b) provides:

> "*A Market Participant must not act in a manner which has, or is intended to have, a detrimental effect, on the Client's best interests.*"

MIR 2.2.4(3) provides:

> "*A Market Participant must maintain a separate record of all Error Trades for a period of not less than five (5) years from the date of a Trade, containing the following information:*
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> *(a) a description of the Trade including the deal number supplied by the Market Operator (if any);*
> *(b) the name of the Representative responsible for the Error Trade;*
> *(c) the name of the Representative responsible for the execution of the Trade;*
> *(d) a detailed explanation as to how the Trade occurred, including details of the original Client Order (if any) which precipitated the error;*
> *(e) any subsequent action taken by the Market Participant in relation to that Trade; and*
> *(f) the financial result of the Trade.*"

On the evidence before it, the MDP was satisfied that:

1) On 4 September 2012, at approximately 14:30:07, a Client of Credit Suisse ("Credit Suisse Client") placed an instruction with a Representative of Credit Suisse ("Credit Suisse Representative") to sell 2000 September 2012 ASX 30 Day Interbank Cash Rate Futures Contracts ("IBU2") at 96.510.
2) At 14:30:14, the Credit Suisse Representative instead mistakenly placed an Order to sell 2000 IBU2 at 96.505 which traded immediately in its entirety and resulted in an Error Trade ("Relevant Error").
3) At approximately 14:30:51, the Credit Suisse Representative contacted the Credit Suisse Client to explain that he had made the Relevant Error.
4) At approximately 15:56:56, the Credit Suisse Client contacted the Credit Suisse Representative and stated that it would accept the Relevant Error and that it would like the associated brokerage waived.
5) The Credit Suisse Representative's supervisor waived the brokerage and any further brokerage incurred by the Credit Suisse Client for the rest of the week, which amounted to a total of $3,397.35 including GST.
6) The Relevant Error was then allocated to the Credit Suisse Client's Client Account.
7) The cost to the Credit Suisse Client of accepting the Relevant Error was $24,660.
8) Neither the Credit Suisse Representative nor his supervisor completed an error report detailing the Relevant Error on 4 September 2012.
9) Credit Suisse's Compliance Division identified the Relevant Error, and the misconduct detailed above, on becoming aware of the waiver of brokerage by means of a routine surveillance of telephone calls.
10) Credit Suisse's Compliance Division then conducted a comprehensive investigation of the incident, including interviews with the Credit Suisse Representative and his supervisor.
11) As a result of this investigation, Credit Suisse made a timely and comprehensive report of the incident to ASIC.

By reason of the offer and allocation of the Relevant Error to the Credit Suisse Client on 4 September 2012 in circumstances where that Trade had not been obtained under instructions previously obtained from the Credit Suisse Client, the MDP had reasonable grounds to believe that Credit Suisse contravened MIR 3.1.17(1), MIR 3.1.13(1)(b) and MIR 2.2.4(3) and thereby contravened subsection 798H(1) of the Act which requires compliance with the market integrity rules.

Maximum pecuniary penalty that a Court could order

The maximum pecuniary penalty that a Court could order Credit Suisse to pay for contravening subsection 798H(1) of the Act:

- by reason of contravening MIR 3.1.17(1), is $1,000,000;
- by reason of contravening MIR 3.1.13(1)(b), is $100,000;
- by reason of contravening MIR 2.2.4(3), is $100,000.

Pursuant to subsection 798K(2) of the Act, the maximum pecuniary penalty that may be imposed by the MDP and payable by Credit Suisse under an infringement notice given for contravening subsection 798H(1) of the Act:

- by reason of allegedly contravening MIR 3.1.17(1), is $600,000;
- by reason of allegedly contravening MIR 3.1.13(1)(b), is $60,000;
- by reason of allegedly contravening MIR 2.2.4(3), is $60,000.

Penalty under the Infringement Notice

The penalties imposed by the MDP for each of the alleged contraventions of 798H(1) of the Act were as follows:

- MIR 3.1.17(1) – $100,000;
- MIR 3.1.13(1)(b) – $20,000;
- MIR 2.2.4(3) – $10,000.

However, the MDP considered it appropriate in this matter, to adjust the total sum of the separate penalties as set out above, to ensure that the final penalty payable was just, and appropriate and not excessive, having regard to the totality of the conduct, and other relevant factors. In doing so, the MDP had regard to paragraphs RG 216.125 and RG 216.126 of ASIC Regulatory Guide 216–*Markets Disciplinary Panel* and applied the 'totality principle' in arriving at the appropriate pecuniary penalty to apply in this matter.

On this basis, for the alleged contraventions of subsection 798H(1) of the Act, the MDP imposed a total pecuniary penalty of $88,400, as follows:

- MIR 3.1.17(1) – $68,000;
- MIR 3.1.13(1)(b) – $13,600;
- MIR 2.2.4(3) – $6,800.

Therefore the total penalty payable under the infringement notice for the alleged contraventions of subsection 798H(1) of the Act, which Credit Suisse has paid to the Commonwealth, was **$88,400**.

Relevant factors

In determining this matter and the appropriate pecuniary penalty to be applied, the MDP took into account all relevant guidance and noted in particular the following:

- That the remedies applied should promote market integrity along with confident and informed participation of investors in financial markets;
- MIR 3.1.17(1) imposes a mandatory obligation and is directed at ensuring that Market Participants treat Clients fairly, by not seeking to use Client Accounts to avoid a financial detriment or gain a financial benefit;
- MIR 3.1.13(1)(b) also imposes a mandatory obligation and is similarly directed at ensuring that Market Participants treat Clients fairly, by acting in a manner not detrimental to the Client's best interests;
- These two rules are fundamental to ensuring the fairness of the market and to promoting confidence in the integrity of the Market. The failure to comply with either of these rules risks undermining market integrity because it poses a risk to public confidence in the Market;

- MIR 2.2.4(3) imposes a mandatory obligation and is directed at ensuring that Market Participants maintain audit trails, allowing Error Trades to be tracked and action to be taken with respect to those Trades in the maintenance of market integrity;
- The misconduct had the potential to damage confidence in, and the reputation and integrity of, the Market;
- The misconduct of offering and allocating the Relevant Error to the Credit Suisse Client in circumstances where that Trade had not been obtained under instructions previously obtained from the Credit Suisse Client, was deliberate on the part of the Credit Suisse Representative and his supervisor;
- The breaches formed an isolated incident, arising out of a single course of conduct;
- The misconduct initially allowed Credit Suisse to avoid a loss of $24,660 and caused the Credit Suisse Client to suffer a financial detriment of $24,660. Ultimately, however, Credit Suisse gained no financial benefit from the breach, having later reimbursed the Credit Suisse Client in full;
- Credit Suisse had internal procedures with respect to Error Trades and post-allocation of Trades, but these procedures were not followed. Credit Suisse had also conducted training sessions relating to its mandatory obligations with respect to Error Trades and post-allocation of Trades which were attended by the two Employees involved in the misconduct;
- Credit Suisse had no pattern or history of non-compliance with the market integrity rules, and had a corporate culture conducive to compliance;
- Credit Suisse had in place procedures for detecting breaches of the market integrity rules, and these procedures operated to detect the breaches;
- In the prevention of recurrence of the misconduct, Credit Suisse had taken formal disciplinary action against the two Employees involved in the misconduct, including formal final warnings, zero bonuses for calendar year 2012, and no opportunity for promotion in 2013;
- Credit Suisse informed ASIC of the breaches in a timely and comprehensive manner;
- Credit Suisse conducted a comprehensive internal investigation, the results of which were provided to ASIC, which significantly expedited ASIC’s investigation;
- Credit Suisse cooperated with ASIC throughout its investigation and did not dispute any material facts; and
- Credit Suisse agreed not to contest the matter, thereby saving time and costs that would otherwise have been expended.

The Markets Disciplinary Panel

The MDP is a peer review body that exercises ASIC's power to issue infringement notices and accept enforceable undertakings in relation to alleged breaches of the market integrity rules. The market integrity rules are made by ASIC and apply to market operators, market participants and prescribed entities under the Corporations Regulations 2001 ("Regulations").

Additional regulatory information

Pursuant to subparagraphs 7.2A.15(4)(b)(i) and (ii) of the Regulations, ASIC notes that Credit Suisse has complied with the infringement notice, such compliance is not an admission of guilt or liability, and Credit Suisse is not taken to have contravened subsection 798H(1) of the Act.

Further information on market integrity infringement notices, the market integrity rules and the MDP is available in ASIC Regulatory Guide 216–*Markets Disciplinary Panel* and ASIC Regulatory Guide 225–*Markets Disciplinary Panel practices and procedures* or at http://www.asic.gov.au under "Markets–Supervision", "Markets–Market integrity rules" and "Markets–Markets Disciplinary Panel".