ASIC Gazette

Contents

Markets Disciplinary Panel: Infringement Notice

Recipient: OpenMarkets Australia Ltd

The recipient has complied with the infringement notice. Compliance is not an admission of guilt or liability; and the recipient is not taken to have contravened subsection 798H(1) of the *Corporations Act 2001*.

**PART 7.2A OF THE CORPORATIONS REGULATIONS 2001
INFRINGEMENT NOTICE**

To: OpenMarkets Australia Ltd
Level 2, 451 Bourke Street
MELBOURNE VIC 3000

Matter: MDP 679601/17
Date given: 1 August 2017

TAKE NOTICE: The Australian Securities and Investments Commission ("ASIC") gives this infringement notice to OpenMarkets Australia Ltd (ACN 090 472 012) ("OpenMarkets") under regulation 7.2A.04 of the Corporations Regulations 2001 ("Regulations").

To comply with this notice OpenMarkets must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **$200,000**.

Unless a contrary intention appears, capitalised terms used in this notice have the same meaning as those defined in Rule 1.4.3 of the following market integrity rules as in force at the time of the conduct:

- ASIC Market Integrity Rules (ASX Market) 2010; and
- ASIC Market Integrity Rules (Chi-X Australia Market) 2011.

These market integrity rules are respectively referred to as the ASX Rules and the Chi-X Rules.

Background Information

1. On 13 December 2016, and prior to referral of this matter to the Markets Disciplinary Panel ("MDP"), OpenMarkets consented to the imposition of conditions on its Australian financial services licence ("AFS licence") under section 914A of the *Corporations Act 2001* ("the Act"), (referred to collectively as "Licence Conditions").

2. The Licence Conditions required OpenMarkets to appoint an independent expert to review specified arrangements (including arrangements to comply with ASX Rule 5.5.2, ASX Rule 5.6.1 and Chi-X Rule 5.6.1), identify any deficiencies, and recommend enhancements appropriate to the business.

Details of the alleged contraventions

3.　　OpenMarkets was a Market Participant in the markets operated by ASX Limited and Chi-X Australia Pty Ltd ("ASX Market" and "Chi-X Market" respectively) at all relevant times and was required by subsection 798H(1) of the Act to comply with the ASX Rules and the Chi-X Rules.

4.　　ASX Rule 5.6.1 provided:

(1) A Trading Participant which uses its system for Automated Order Processing must at all times:

(a) have appropriate automated filters, in relation to Automated Order Processing; and

(b) ensure that such use does not interfere with:

(i) the efficiency and integrity of the market …

5.　　ASX Rule 5.5.2 provided:

A Trading Participant must have and maintain the necessary organisational and technical resources to ensure that:

(a) Trading Messages submitted by the Trading Participant do not interfere with:

(i)　the efficiency and integrity of the [ASX] Market; or

(ii)　the proper functioning of a Trading Platform; and

(b) the Trading Participant complies at all times with these Rules and the Market Operating Rules.

6.　　Chi-X Rule 5.6.1 provided:

(1) A Market Participant which uses its system for Automated Order Processing must at all times:

(a) have appropriate automated filters, in relation to Automated Order Processing; and

(b) ensure that such use does not interfere with:

(i) the efficiency and integrity of the Chi-X Market…

Appropriate Automated Order Processing (AOP) filters (ASX Market)

7.　　The MDP has reasonable grounds to believe that OpenMarkets contravened ASX Rule 5.6.1 and thereby contravened subsection 798H(1) of the Act in respect of the following conduct.

(a) Between 12 June 2015 and 11 December 2015, by use of the IRESS IOS AOP, OpenMarkets executed 1,858 trades for clients which involved no change of beneficial ownership ("Relevant NCBO Trades"). The 'anti-wash trade' filter in IRESS IOS AOP was not activated and OpenMarkets had not started using the ASX UCP tool. This resulted in the automated filters in OpenMarkets' AOP system failing to reject, or pass to a DTR for review, the orders that resulted in the Relevant NCBO Trades.

(b) The Relevant NCBO Trades created a misleading appearance of active trading and misrepresented the supply, demand and price for trading in the relevant financial products on the ASX market. This meant the Relevant NCBO Trades interfered with or had the potential to interfere with the efficiency and integrity of the market.

(c) Prior to 16 May 2016, OpenMarkets had set a maximum order value limit of $1,000,000 ("Order Limit") for a client. On 16 May 2016, by use of the IRESS IOS AOP, OpenMarkets submitted two Orders onto the ASX Market Trading Platform on behalf of the client.

  a. The client placed an order with OpenMarkets to sell 50,000 shares in Blackmores Limited at $172.24 valued at $8,612,000 (Relevant BKL Order). At the time, the market for shares in Blackmores was Bid/Ask/Last $171.94/$171.97/$171.94. The Relevant BKL Order was more than 8.5 times greater than the Order Limit that OpenMarkets had set for the client and represented over 25% of shares traded on that day.

  b. The client also placed an order with OpenMarkets to sell 100,000 shares in BHP at $18.90 valued at $1,890,000 ("Relevant BHP Order"). At the time, the market for shares in BHP was Bid/Ask/Last $18.45/$18.46/$18.455. The order value of the Relevant BHP Order exceeded the Order Limit that OpenMarkets had set for the client.

(d) The automated filters in OpenMarkets' AOP system failed to reject either the Relevant BKL Order or the Relevant BHP order as a result of not being applied to all 'destinations in the group' and not being configured to provide an alert.

(e) At the time of the Relevant BKL Order and the Relevant BHP Order, the client did not have the right to vest that volume of shares in the buyer. As a result, the Relevant BKL Order and the Relevant BHP Order constituted naked short sales prohibited under subsection 1020B(2) of the Act. OpenMarkets did not have in place automated filters to identify and reject prohibited short sale orders. The client cancelled both the Relevant BKL Order and the Relevant BHP Order before either traded.

<u>Organisational and Technical Resources (ASX Market)</u>

8.   The MDP has reasonable grounds to believe that OpenMarkets contravened ASX Rule 5.5.2 and thereby contravened subsection 798H(1) of the Act in respect of the following conduct.

(a) Between 12 June 2015 and 4 April 2016, OpenMarkets did not have in place an automated post-trade monitoring system to identify trades which interfered with or had the potential to interfere with the efficiency and integrity of the ASX market. Having regard to the nature and structure of OpenMarkets' business, noting its significant transmission of orders to the markets, the only feasible process to conduct real time trade monitoring was through the use of an automated system.

(b) Between 12 June 2015 and 11 December 2015, across 20 clients, OpenMarkets executed 1,858 crossings, being the Relevant NCBO Trades. OpenMarkets did not have the necessary capability to identify the Relevant NCBO Trades in close to real time. OpenMarkets could not take steps without delay to cancel the trades and adjust the relevant automated filters and filter parameters to operate as intended. This could have prevented each subsequent Relevant NCBO Trade from interfering with the efficiency and integrity of the ASX Market.

(c) As such, OpenMarkets failed to have and maintain the necessary organisational and technical resources.

Appropriate AOP filters (Chi-X Market)

9.   The MDP has reasonable grounds to believe that OpenMarkets contravened Chi-X Rule 5.6.1 and thereby contravened subsection 798H(1) of the Act in respect of the following conduct.

(a) Between 20 January 2016 and 3 May 2016, OpenMarkets did not have in place appropriate AOP filters capable of dealing with the submission of orders into competing exchange markets:

   a. Each Relevant Chi-X Order was directed to the Chi-X market by OpenMarkets' client during the Pre-Closing Single Price Auction (CSPA) Phase using OpenMarkets' IRESS IOS AOP;

   b. Each Relevant Chi-X Order was at a price between 9 and 14 price steps away from the last traded price or last matched price in the corresponding product;

   c. OpenMarkets' IRESS IOS AOP did not reference relevant Chi-X Orders against prevailing market conditions on the ASX market before submitting the orders to the Chi-X market;

   d. Each relevant Chi-X Order traded on the Chi-X market and each client was worse off than if the relevant Chi-X Orders had been entered into the CSPA on the ASX.

(b) As such, the Relevant Chi-X Orders interfered with or had the potential to interfere with the efficiency and integrity of the Chi-X market. They were submitted to the Chi-X market during the Pre-CSPA Phase and offered, and ultimately traded at, prices which deviated substantially from the prevailing market conditions for the corresponding product.

10. In considering this matter and the appropriate penalties, the MDP commented:

    (a) ASX and Chi-X Rule 5.6.1 are aimed at promoting confidence in the integrity of the ASX market. Appropriate price filters are fundamental protections to the integrity of the market where an AOP system is used by a Trading Participant. ASX Rule 5.5.2 is aimed at ensuring the integrity of the Market is not compromised by a Trading Participant that fails to maintain necessary organisational and technical resources.

    (b) OpenMarkets' primary business is to provide online direct market access to its clients. Appropriate AOP filters are integral to the proper functioning of OpenMarkets' business. In this context, OpenMarkets' failure to have appropriate AOP filters in place posed a significant risk to market integrity.

    (c) OpenMarkets' failure to identify that the 'anti-wash trade' filter in IRESS IOS AOP was not operating as intended and employ the ASX UCP tool were more than mere oversight and regarded as negligent in the context of their business. OpenMarkets was also negligent in failing to ensure the automated price filters and associated alerts in IRESS IOS AOP were appropriately configured.

    (d) OpenMarkets' failures resulted in a number of contraventions over a significant period of time. OpenMarkets allowed 1,858 wash trades to occur over a period of almost 6 months. This significant number of trades heightened the risk OpenMarkets' failings posed to the integrity of the market. The trades resulted in significant brokerage and were executed on behalf of 20 clients.

    (e) OpenMarkets was negligent in failing to have in place appropriate filters which allowed orders to be traded at prices that substantially deviated from prevailing market conditions, resulting in a detriment to clients.

    (f) In relation to all alleged contraventions, the cooperation of OpenMarkets in consenting to Licence Conditions is a mitigating factor and should be given due weight. The Licence Conditions also provide evidence to support submissions that OpenMarkets has taken significant steps to address the shortcomings within its business.

11. The penalties payable under this infringement notice for the three alleged contraventions of subsection 798(H)(1) of the Act are as follows:

    (a) by reason of contravening ASX Rule 5.6.1 – $75,000;
    (b) by reason of contravening ASX Rule 5.5.2 – $75,000; and
    (c) by reason of contravening Chi-X Rule 5.6.1 – $50,000.

12. The total penalty payable is $200,000.

13. The MDP, in specifying the penalties payable for each alleged contravention took into account that OpenMarkets consented to imposition of Licence Conditions prior to referral of this matter. But for the imposition of the Licence Conditions, the MDP would have been minded to specify a total penalty in the sum of $560,000,

comprised of $280,000, $180,000 and $100,000, by reason of contravening ASX Rules 5.6.1, 5.5.2 and Chi-X Rule 5.6.1 respectively.

Other information

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

- by reason of contravening ASX Rule 5.6.1 – $1,000,000;
- by reason of contravening ASX Rule 5.5.2 – $1,000,000; and
- by reason of contravening Chi-X Rule 5.6.1 – $1,000,000.

The maximum pecuniary penalty payable under an infringement notice in relation to an alleged contravention of subsection 798H(1) of the Act is:

- by reason of contravening ASX Rule 5.6.1 – $600,000;
- by reason of contravening ASX Rule 5.5.2 – $600,000; and
- by reason of contravening Chi-X Rule 5.6.1 – $600,000.

To comply with this infringement notice, OpenMarkets must pay the penalty within the compliance period. The compliance period starts on the day on which this notice is given to OpenMarkets and ends 27 days after the day on which it is given. Payment is made by bank cheque to the order of "Australian Securities and Investments Commission".

The effects of compliance with this infringement notice are:

(a) any liability of OpenMarkets to the Commonwealth for the alleged contravention of subsection 798H(1) of the Act is discharged; and

(b) no civil or criminal proceedings may be brought or continued by the Commonwealth against OpenMarkets for the conduct specified in the infringement notice as being the conduct that made up the alleged contraventions of subsection 798H(1) of the Act; and

(c) no administrative action may be taken by ASIC under section 914A, 915B, 915C or 920A of the Act against OpenMarkets for the conduct specified in the infringement notice as being the conduct that made up the alleged contraventions of subsection 798H(1) of the Act; and

(d) OpenMarkets is not taken to have admitted guilt or liability in relation to the alleged contraventions; and

(e) OpenMarkets is not taken to have contravened subsection 798H(1) of the Act.

OpenMarkets may choose not to comply with this infringement notice, but if OpenMarkets does not comply, civil proceedings may be brought against it in relation to the alleged contravention.

Open Markets may apply to ASIC for withdrawal of this infringement notice under regulation 7.2A.11 of the Regulations; and for an extension of time to comply under regulation 7.2A.09 of the Regulations.

ASIC may publish details of this notice under regulation 7.2A.15 of the Regulations.

David Dworjanyn
Senior Specialist, Markets Disciplinary Panel
with the authority of a Division of the Australian Securities and Investments Commission

Note: Members of the Markets Disciplinary Panel constitute a Division of ASIC as delegates of the members
of the Division for the purposes of considering the allegations covered by this notice.