



ASIC

Australian Securities &
Investments Commission

Commonwealth of Australia Gazette
No. MDP02/14, Friday 31 January 2014

Published by ASIC

ASIC Gazette

Contents

Markets Disciplinary Panel Infringement Notice

Recipient: Pershing Securities Australia Pty 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.

RIGHTS OF REVIEW

Recipients affected by the decision of the Markets Disciplinary Panel to give them an infringement notice under subsection 798H(1) of the *Corporations Act 2001* and Part 7.2A of the *Corporations Regulations 2001* administered by ASIC may have a right of review or may be entitled to have the infringement notice withdrawn. ASIC has published RG 216 to assist recipients to determine whether they have such rights – see RG 216.71 and RG 216.77 to 216.79. Copies of this document can be obtained from the ASIC website at www.asic.gov.au

ISSN 1445-6060 (Online version)
ISSN 1445-6079 (CD-ROM version)

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PART 7.2A OF THE CORPORATIONS REGULATIONS 2001 INFRINGEMENT NOTICE

To: Pershing Securities Australia Pty Ltd
Level 7
No.1 Chifley Square
SYDNEY NSW 2000

TAKE NOTICE: The Australian Securities and Investments Commission ("ASIC") gives this infringement notice to Pershing Securities Australia Pty Ltd ACN 136 184 962 ("Pershing") under regulation 7.2A.04 of the Corporations Regulations 2001 ("Regulations"). To comply with this notice Pershing must:

Pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of
\$15,000.

This infringement notice is given on 5 December 2013.

The unique code for this notice as required by paragraph 7.2A.06(b) of the Regulations is MDP16985/13.

The terms defined in Rule 1.4.3 of the ASIC Market Integrity Rules (ASX Market) 2010 have the same meaning when used in this notice, including those set out in the Appendix to this notice.

Alleged contravention and penalty

Pershing was a Market Participant in the Market operated by ASX at the relevant time and was therefore an entity required by subsection 798H(1) of the *Corporations Act 2001* ("Act") to comply with the market integrity rules at that time.

Pershing is alleged to have contravened subsection 798H(1) of the Act by reason of contravening Rule 3.4.1(1) of the ASIC Market Integrity Rules (ASX Market) 2010 ("MIR 3.4.1(1)"), which provides:

"Subject to Rule 3.4.3, a Market Participant must give a confirmation to a person (the "Client") in respect of each Market Transaction entered into on the Client's instructions or on the Client's Managed Discretionary Account."

Rule 3.4.3 of the ASIC Market Integrity Rules (ASX Market) 2010 ("MIR 3.4.3"), relevantly provides:

"A Market Participant is not required to comply with Rule 3.4.1 in respect of a client that is not a Retail Client..."

On the evidence before it, the Markets Disciplinary Panel ("MDP") was satisfied that:

- 1) Between 1 August 2010 and 26 June 2012 inclusive ("Relevant Period"), Pershing provided third party execution and clearing services to certain of its clients ("Intermediaries") including Australian Financial Services Licensees who were not ASX Trading Participants and therefore unable to execute ASX Market Transactions on behalf of their own clients.
- 2) Clients of the Intermediaries held trading accounts with Pershing and were therefore "Clients" of Pershing for the purposes of MIR 3.4.1(1) ("Pershing Clients"). Twenty-nine of the Pershing Clients were Retail Clients for the purposes of MIR 3.4.1 ("Relevant Pershing Clients").
- 3) Intermediaries had access to and used Pershing's client application and amendment manager application ("CAAMA") to set-up trading accounts with Pershing on behalf of the Relevant Pershing Clients. The set-up of the trading accounts for the Relevant Pershing Clients was performed either by Pershing or by the Intermediaries who had access to CAAMA.
- 4) During the Relevant Period, Pershing executed, cleared and settled ASX Market Transactions for the Relevant Pershing Clients. To this end, the Relevant Pershing Clients provided instructions to the Intermediaries, and the Intermediaries placed Orders either:
 - directly with Pershing for execution by Pershing itself; or
 - into the ASX Trading Platform through Pershing's direct market access service.
- 5) On 19 March 2012, one of Pershing's Intermediaries ("Pershing Intermediary") notified Pershing that as a result of the incorrect set-up of trading accounts, 12 Relevant Pershing Clients had not received confirmations from Pershing in respect of ASX Market Transactions executed on their instructions.
- 6) Between 20 March 2012 and 27 April 2012, Pershing carried out a review of approximately 36,000 trading accounts that had been set-up over the period between 2010 and 2012. As a result of the review, Pershing among other things, identified:
 - a total of 37 trading accounts that were set-up incorrectly for which confirmations were not issued to the Relevant Pershing Clients between 10 May 2010 and 26 June 2012 ("Relevant Accounts"). Of the Relevant Accounts, Intermediaries set up 17 of the trading accounts incorrectly and Pershing set up 20 of the trading accounts incorrectly;
 - a total of 701 Market Transactions that were executed on behalf of the Relevant Accounts ("Relevant Transactions"); and
 - the incorrect set-up of the trading accounts was attributable to either:

- the Relevant Pershing Clients' postal addresses not being provided, because it was mistakenly thought that email addresses, to which the confirmations could be sent, were preferred. However those email addresses were not provided; or
 - the addresses provided by the Relevant Pershing Clients being third party addresses, to which the confirmations could be sent, rather than the Relevant Pershing Clients' own addresses as required by MIR 3.4.1.
- 7) On 20 April 2012, Pershing lodged a self-report with ASIC. The self-report advised, among other things, that:
- Pershing undertook a review of its trading accounts upon being notified by the Pershing Intermediary of the incorrect set-up of trading accounts;
 - confirmations were not received by the Relevant Pershing Clients for the Relevant Transactions; and
 - Pershing was implementing compliance initiatives to ensure the breach did not reoccur.

By reason of Pershing's failure to give confirmations to the Relevant Pershing Clients in respect of the Relevant Transactions entered into on the Relevant Pershing Clients' instructions between 1 August 2010 and 26 June 2012, the MDP has reasonable grounds to believe that Pershing has contravened MIR 3.4.1(1) and thereby contravened subsection 798H(1) of the Act.

Maximum pecuniary penalty that a Court could order

The maximum pecuniary penalty that a Court could order Pershing to pay for contravening section 798H(1) of the Act by reason of contravening MIR 3.4.1(1), is \$100,000.

The maximum pecuniary penalty that may be payable by Pershing under an infringement notice given pursuant to subsection 798K(2) of the Act, is \$60,000.

Penalty under the Infringement Notice

The penalty payable under this infringement notice for the alleged contravention of subsection 798H(1) of the Act and therefore the total penalty that Pershing must pay to the Commonwealth, is **\$15,000**.

The penalty is payable to ASIC on behalf of the Commonwealth. Payment is to be made by bank cheque to the order of the "Australian Securities and Investments Commission".

In determining this matter and the appropriate pecuniary penalty to be applied, the MDP took into account all relevant guidance, including ASIC Regulatory Guide 216—*Markets Disciplinary Panel*, and noted in particular the following:

- MIR 3.4.1 is aimed at ensuring the timely sending of confirmations to all Retail Clients to uphold financial security and the integrity of the market. This is fundamental to client protection as confirmations safeguard against possible unauthorised trading activity;

- The breach was careless on the part of Pershing as it neglected to act on internal checks and balances to detect the incorrect set-up of trading accounts, especially in the circumstances where it had provided third party access to its client on-boarding system;
- The MDP emphasised the importance of Market Participants ensuring adherence to correct client on-boarding procedures, particularly in circumstances where Market Participants have granted third party access to their client on-boarding system;
- The breach transpired over an unacceptable length of time between 1 August 2010 and June 2012, being approximately two years;
- The breach was not identified by Pershing, but was brought to Pershing's attention by a third party, despite Pershing having in place policies and procedures to ensure compliance with the market integrity rules and to detect any breaches of them;
- Pershing did not derive any actual or potential benefit, nor cause any actual or potential detriment, as a result of the breach;
- Pershing self-reported the breach to ASIC;
- Pershing rectified the breach by resending confirmations to the Relevant Pershing Clients for the Relevant Transactions;
- Pershing undertook remedial steps in response to the breach including implementing education and training on the setting-up of trading accounts, performing regular audits to check that Clients are receiving confirmations, and building exception reports to minimise or eliminate recurrences of the same breach;
- Pershing had no history of non-compliance with the market integrity rules or ASX Market Rules, including no previous contraventions found against it by the MDP;
- Pershing co-operated with ASIC throughout its investigation and did not dispute any material facts; and
- Pershing agreed not to contest the matter, thereby saving time and costs that would otherwise have been expended.

Compliance with the Infringement Notice

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

To comply with this infringement notice, Pershing must pay the penalty within the compliance period. The compliance period:

- (a) starts on the day on which the infringement notice is given to Pershing; and
- (b) ends 27 days after the day on which the infringement notice is given to Pershing;

unless an application is made for its extension.

Pershing may apply to ASIC for an extension of time to comply with this notice under regulation 7.2A.09 of the Regulations. If Pershing does so, and the application is granted, the compliance period ends at the end of the further period allowed.

If Pershing applies for a further period of time in which to comply with this notice, and the application is refused, the compliance period ends on the later of:

- (a) 28 days after the day on which the infringement notice was given to Pershing; and
- (b) 7 days after the notice of refusal is given to Pershing.

Pershing may apply to ASIC for withdrawal of this notice under regulation 7.2A.11 of the Regulations. If Pershing does so, and the application is refused, the compliance period ends 28 days after the notice of refusal is given to Pershing.

Effect of issue and compliance with the Infringement Notice

The effects of compliance with this infringement notice are:

- (a) any liability of Pershing 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 Pershing for the conduct specified in the infringement notice as being the conduct that made up the alleged contravention 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 Pershing for the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of subsection 798H(1) of the Act; and
- (d) Pershing is not taken to have admitted guilt or liability in relation to the alleged contravention; and
- (e) Pershing is not taken to have contravened subsection 798H(1) of the Act.

Publication

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



Susan Humphreys

Counsel to the Markets Disciplinary Panel

with the authority of a Division of the Australian Securities & Investments Commission

Dated: 5 December 2013

Note: Members of ASIC's 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.

Appendix – Defined Terms

"ASX" means ASX Limited (ACN 008 624 691).

"Market" means the market operated by the Market Operator under Australian Market Licence (Australian Stock Exchange Limited) 2002.

"Market Operating Rules" means the Operating Rules of the Market, other than the Market Listing Rules.

"Market Operator" means ASX.

"Market Participant" means a participant in the Market admitted under the Market Operating Rules.

"Market Transaction" means a transaction for one or more Products, entered into on a Trading Platform or reported to the Market Operator under the Market Operating Rules.

"Order" relevantly means:

- (a) in relation to Cash Market Products, an instruction to purchase or sell Cash Market Products, or an instruction to amend or cancel a prior instruction to purchase or sell Cash Market Products; and

.....

"Product" means a Cash Market Product or a Derivatives Market Contract, as applicable.

"Retail Client" has the meaning given by section 761G of the Corporations Act.

"Trading Platform" means a facility made available by the Market Operator to Trading Participants for the entry of Trading Messages, the matching of Orders, the advertisement of invitations to trade and the reporting of transactions.