



**ASIC**

Australian Securities &  
Investments Commission

Commonwealth of Australia Gazette

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# ASIC Gazette

## Contents

### Markets Disciplinary Panel Infringement Notice

**Recipient:** Etrade Australia Securities Limited

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Regulations 2001* administered by ASIC may have a right of review or may be entitled to have the infringement notice withdrawn.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](http://www.asic.gov.au)

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

**To:** Etrade Australia Securities Limited  
Level 21, 242 Pitt Street  
SYDNEY NSW 2000

**TAKE NOTICE:** The Australian Securities and Investments Commission ("ASIC") gives this infringement notice to Etrade Australia Securities Limited ACN 078 174 973 ("Etrade") under regulation 7.2A.04 of the Corporations Regulations 2001 ("Regulations"). To comply with this notice, Etrade must:

Pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **\$55,000**.

This infringement notice is given on 25 August 2014

The unique code for this notice as required by paragraph 7.2A.06(b) of the Regulations is MDP3294/14.

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

### **Alleged contravention and penalty**

Etrade was a Trading Participant in the Market operated by the 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.

Etrade is alleged to have contravened subsection 798H(1) of the Act by reason of contravening Rule 5.9.1 of the ASIC Market Integrity Rules (ASX Market) 2010 ("MIR 5.9.1") which provides:

*"A Market Participant must not do anything which results in a market for a Product not being both fair and orderly, or fail to do anything where that failure has that effect."*

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

- 1) On 24 June 2013, prior to the commencement of trading on the ASX Market of the Exchange Traded Fund or ETF units in the SPDR MSCI Australia Select High Dividend Yield Fund having ASX code 'SYI':
  - a) The ASX purged from the Order Book all existing Orders in SYI following an announcement made at 9:42:25 entitled "Final Distribution Announcement". The distribution was finalised as \$0.17374; and
  - b) The last traded price on commencement of trading was the closing price on the previous Trading Day in SYI at \$27.15.
- 2) At 10:17:13, Etrade received from a client by Direct Market Access or DMA, an Order to sell 225 SYI at \$19.92 ("Initial Order");
- 3) Immediately prior to the Initial Order, the market for SYI was \$20.00/no ask/\$27.15 (Bid/ask/last traded price);
- 4) On receipt, the Initial Order triggered Etrade's automated 'orderly market' filter on its Automated Order Processing or AOP system (as it was more than 5% away from the last traded price of \$27.15) and was diverted to an Etrade Designated Trading Representative or DTR ("Etrade DTR 1") for assessment with the following alert or warning message '*instruction received will move the market if executed*' ("Pre-trade Alert");
- 5) After assessing the Initial Order (by giving consideration to certain factors including the Pre-trade Alert and the market for SYI), at 10:18:13, Etrade DTR 1 submitted the Initial Order into the ASX Trading Platform being an Order to sell 225 SYI at \$19.92 ("Relevant Order");
- 6) The Relevant Order traded immediately in full resulting in a Market Transaction for 225 SYI at \$20.00, for a total consideration of \$4,500 ("Relevant Transaction");
- 7) The entry into the ASX Trading Platform of the Relevant Order, resulting in the Relevant Transaction, caused the price of SYI to decrease from \$27.15 to \$20.00, representing a \$7.15 or 26% decrease in the price of SYI;
- 8) At 10:18:14, Etrade received the following post-trade alert ("Post-trade Alert") notifying it of the Relevant Transaction '*executed an on-market trade which moved the SYI price from \$27.15 to \$20.00 which represents a movement of 26% (compared to the threshold of 6.40%)*'. At 10:59:21, another DTR from Etrade ("Etrade DTR 2) considered the Post-trade Alert and decided to take no action;
- 9) At 11:09:00, prompted by a telephone call from the ASX, a third DTR from Etrade ("Etrade DTR 3") then requested by email to the ASX that the Relevant Transaction be cancelled; and

- 10) At 11:14:29, the ASX by its direction cancelled the resulting Market Transaction under procedure 3210 of the ASX Operating Rules Procedures at the relevant time, as it occurred within the Extreme Trade Range or ETR.

By reason of Etrade's entry of the Relevant Order into the ASX Trading Platform on 24 June 2013, the MDP has reasonable grounds to believe that Etrade has contravened MIR 5.9.1 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 Etrade to pay for contravening subsection 798H(1) of the Act by reason of contravening MIR 5.9.1, is \$1,000,000.

The maximum pecuniary penalty that may be payable by Etrade under an infringement notice given pursuant to subsection 798K(2) of the Act, by reason of allegedly contravening MIR 5.9.1, is \$600,000.

### 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 Etrade must pay to the Commonwealth is **\$55,000**.

The penalty is payable to ASIC on behalf of the Commonwealth. Payment is 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 5.9.1 is aimed at promoting confidence in the integrity of the market. Imposing a strict obligation on Market Participants not to do anything which results in a market for a Product not being both fair and orderly, is critical in maintaining the integrity of the market;
- The misconduct had the potential to damage the reputation and integrity of the market, as the submission of the Relevant Order into the ASX Trading Platform caused the price of SYI to decrease from the last traded price of \$27.15 to \$20.00, representing a \$7.15 or 26% decrease;
- The misconduct was negligent on the part of Etrade as the functions of Etrade DTR 1 were not exercised to the requisite high standard when Etrade DTR 1 did not take care in assessing the Initial Order, before submitting the Relevant Order into the ASX Trading Platform;
- The MDP noted in this matter that Etrade DTR 1 received and considered the Pre-trade Alert prior to the Relevant Order being submitted into the ASX Trading Platform, however this did not prevent the misconduct the subject of this matter. An important aspect of the role of the DTR, as an internal control, is to take proper care and pay proper attention and diligence in the consideration of pre-trade alerts or warnings especially in circumstances where the alert triggered is in relation to an Order received through an AOP system via DMA. Taking care and paying attention and diligence to

prevent the entry of Orders into the Trading Platform that could result in a market that is not both fair and orderly, is a critical measure in maintaining the integrity of a market;

- Although not impacting cancellation of the Relevant Transaction, the MDP also noted in this matter that Etrade DTR 2 received and considered the Post-trade Alert after the Relevant Transaction but failed to take any action. Another important aspect of the role of the DTR, as an internal control, is to take proper care in addition to paying proper attention and diligence (including taking proper care and paying proper attention and diligence in the consideration of post-trade alerts or warnings) to promptly attend to cancellation of Market Transactions as required. This is also a critical measure in maintaining the integrity of a market;
- Only after a telephone call from the ASX, did Etrade through Etrade DTR 3 then request cancellation of the Relevant Transaction via email to the ASX. This email was sent approximately 50 minutes after the Relevant Transaction. Notwithstanding this, the ASX thereafter cancelled the Relevant Transaction under its direction;
- There was one breach of MIR 5.9.1;
- The misconduct was an isolated incident;
- Etrade did not derive any actual or potential benefit as a result of the misconduct;
- Etrade took steps to prevent recurrence of the breach, including:
  - Counselling Etrade DTR 1 in relation to the Relevant Order and managing ETF Orders in general;
  - Retraining all its DTRs on the management of ETF Orders; and
  - Reviewing and revising its DTR procedures.
- Etrade had no previous contraventions found against it by the MDP regarding non-compliance with the market integrity rules, but had previously been sanctioned by the ASX Disciplinary Tribunal on eight separate occasions since 2004 – one regarding the predecessor rule to MIR 5.9.1 that involved a DTR (ASX Circular 365/09 dated 30 October 2009);
- Etrade co-operated with ASIC throughout its investigation and did not dispute any material facts; and
- Etrade agreed not to contest the matter, thereby saving time and costs that would otherwise have been expended.

### Compliance with the Infringement Notice

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

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

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

unless an application is made for its extension.

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

If Etrade 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 Etrade; and
- (b) 7 days after the notice of refusal is given to Etrade.

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

### **Effect of issue and compliance with the Infringement Notice**

The effects of compliance with this infringement notice are:

- (a) any liability of Etrade to the Commonwealth for the alleged contravention of subsection 798H(1) of the Act is discharged;
- (b) no civil or criminal proceedings may be brought or continued by the Commonwealth against Etrade 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;
- (c) no administrative action may be taken by ASIC under section 914A, 915B, 915C or 920A of the Act against Etrade 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;
- (d) Etrade is not taken to have admitted guilt or liability in relation to the alleged contravention; and
- (e) Etrade 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

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.

### Appendix – Defined Terms

The terms defined in MIR 1.4.3 have the same meaning when used in this notice, including:

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

"AOP" means the process by which orders are registered in a Trading Participant's system and, if accepted for submission into a Trading Platform by the Trading Participant, submitted as corresponding Trading Messages without being keyed or rekeyed by a DTR.

"DTR" means a Representative of the Trading Participant who has been authorised to submit Trading Messages to the Trading Platform on behalf of the Trading Participant.

"ETF" means a Managed Fund:

- (a) which is listed on the Market or admitted to Trading Status as an AQUA Product or to the AQUA Quote Display Board;

...

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

"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;

...

"Order Book" means an electronic list of Orders, maintained by or on behalf of an Equity Market Operator, on which those Orders are matched with other Orders in the same list.

"Trading Day" means a day on which Market Transactions may be entered into by Trading Participants on a Trading Platform.

"Trading Messages" means those messages submitted into a Trading Platform relating to reading functions, such as Orders, amendment or cancellation of Orders and the reporting or cancellation of Market Transactions on the Trading Platform.

"Trading Participant" means a Market Participant which has Trading Permission in respect of one or more Products.

"Trading Permission" means the right to submit Trading Messages in a Trading Platform.

"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.

This notice adopts the following additional definitions of terms:

"DMA" means an Order submitted by a client of a Trading Participant into the Trading Participant's system and subject to Automated Order Processing.

"ETR" means the range set out in procedure 3200 of the ASX Operating Rules Procedures as defined in rule [7100] of Section 7 of the ASX Operating Rules as at 24 June 2013.