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Contents

Markets Disciplinary Panel: Infringement Notice

Recipient: Wilsons Advisory and Stockbroking 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*.

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ASIC
Australian Securities &
Investments Commission



Markets Disciplinary Panel

PART 7.2A OF THE CORPORATIONS REGULATIONS 2001

INFRINGEMENT NOTICE

To: Wilsons Advisory and Stockbroking Pty Ltd ACN 010 529 665
 Waterfront Place
 Level 30, 1 Eagle Street
 Brisbane QLD 4000

Matter: MDP 1024/22

Date given: 16 December 2022

TAKE NOTICE: The Australian Securities and Investments Commission (**ASIC**) gives this infringement notice to Wilsons Advisory and Stockbroking Pty Ltd ACN 010 529 665 (**Wilsons**) under regulation 7.2A.04 of the *Corporations Regulations 2001* (the **Regulations**), which is made for the purposes of section 798K of the *Corporations Act 2001* (the **Act**).

To comply with this notice, Wilsons must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **\$548,328**. This penalty amount represents 2,500 penalty units (being 556 penalty units at \$210 and 1,944 penalty units at \$222).

Unless a contrary intention appears, capitalised terms used in this notice have the same meaning as in Rules 1.4.3, 6.1.1AA and 6.1.1 of the *ASIC Market Integrity Rules (Securities Markets) 2017* (the **Rules**) as in force at the time of the conduct.

Background

1. At all relevant times, Wilsons was a Market Participant of both the ASX Market and Cboe Market (the financial market previously operated by Chi-X Australia Pty Ltd and operated by Cboe Australia Limited (**Cboe**) since 1 February 2022) and was required by subsection 798H(1) of the Act to comply with the Rules. As a Market Participant of those markets, Wilsons was also a Relevant Participant as defined in Rule 6.1.1AA. At the relevant times, Wilsons' principal place of business was Level 30, 1 Eagle Street, Brisbane QLD 4000.
2. Part 6.1 of the Rules deals with the requirement of pre-trade transparency. In particular, subrules 6.1.1(1) and (2) provide as follows:

6.1.1 Relevant Participants to enter into transactions on Pre-Trade Transparent Order Book, subject to exceptions

(1) Subject to subrule (2), a Relevant Participant must not enter into a transaction unless the transaction is entered into by matching of a Pre-Trade Transparent Order on an Order Book.

(2) A Relevant Participant is not required to comply with subrule (1) in relation to:

- (a) Block Trades;
- (b) Large Portfolio Trades;
- (c) a Trade with Price Improvement;
- (d) a Permitted Trade during the Post-Trading Hours Period;
- (e) a Permitted Trade during the Pre-Trading Hours Period; and
- (f) Out of Hours Trades.

3. Rule 6.2.3 prescribes the circumstances in which a transaction is a Trade with Price Improvement (*TWPI*) for the purposes of the exception in paragraph 6.1.1(2)(c).

6.2.3 Exception—Trades with Price Improvement

(1) In these Rules, a transaction is a *Trade with Price Improvement* where:

- (a) the transaction is executed at a price per Relevant Product which is:
 - (i) higher than the Best Available Bid and lower than the Best Available Offer for the Relevant Product by one or more Price Steps; or
 - (ii) at the Best Mid-Point;
- (b) if the transaction is entered into other than by matching of Orders on an Order Book, the Relevant Participant acts:
 - (i) on behalf of both buying and selling clients to that transaction; or
 - (ii) on behalf of a buying or selling client on one side of that transaction and as Principal on the other side; and
- (c) the consideration for the transaction is greater than \$0.

(2) For the purposes of this Rule, the Best Mid-Point is not limited to standard Price Steps for the Relevant Product.

4. The Markets Disciplinary Panel (*MDP*) has reasonable grounds to believe that Wilsons contravened Rule 6.1.1 on 2,306 occasions during the period between 1 January 2020 and 31 March 2022 (*the Relevant Period*) and therefore contravened subsection 798H(1) of the Act in respect of the following conduct.

Alleged contraventions

5. The MDP was satisfied as to the matters in paragraphs 6 to 10.
6. On 16 March 2022, following a thematic review of TWPI, ASIC contacted Wilsons

and advised that a review of TWPI reported by market participants had been conducted and that a significant number of TWPI reported by Wilsons *'appear to have been executed at either the national best bid price or the national best offer price at the time of the trade, rather than with price improvement'*.

7. On 22 March 2022, ASIC sent Wilsons a spreadsheet with examples of TWPI reported over the period from 1 to 21 March 2022 that did not appear to provide price improvement and requested Wilsons to provide an explanation of the circumstances around these trades. All the examples of trades given by ASIC were executed at either the best bid or of best offer prices across the ASX Market and the Cboe Market at the time of the trade.
8. On 8 April 2022, Wilsons responded to ASIC stating that it did not have a specific post-trade alert in place to identify this particular issue and as a consequence the issue had gone undetected. Wilsons stated that they had acted promptly to address ASIC's concerns by conducting a thorough investigation of the matter and exploring the design and development of pre-trade and post-trade controls with its data providers. Wilsons also briefed its designated trade representatives (**DTRs**) and sales team about the importance of compliance with the pre-trade transparency requirements in Rule 6.1.1 and to only submit trades as TWPI where there is demonstrable price improvement.
9. On 14 April 2022, Wilsons submitted a breach report to ASIC that advised of 2,303 trades reported as TWPI that were either at the best bid price or best offer prices during the period from 30 March 2020 to 17 March 2022. Wilsons indicated that the 2,303 trades reported as TWPI could not be executed under the other pre-trade transparency exceptions.
10. During the Relevant Period, as described in the Statement of Reasons provided by ASIC to Wilsons dated 24 October 2022, Wilsons executed 2,306 trades (**Relevant Trades**) away from an Order Book and reported those trades to Cboe as TWPI trades in circumstances where it was not permitted to do so as the trades did not provide price improvement over the Best Available Bid price and the Best Available Offer price. The Relevant Trades accounted for over 38% of TWPI trades reported to Cboe by Wilsons during the Relevant Period. The MDP was also satisfied that Wilsons could not rely on any of the other exceptions to the requirement for on-market trading in subrule (2) of Rule 6.1.1.

The determination of penalty

11. In determining the appropriate penalty, the MDP considered the four key factors set out in *ASIC Regulatory Guide 216: Markets Disciplinary Panel (RG 216)*, namely:
 - (a) the character of the conduct;
 - (b) the consequences of the conduct;
 - (c) the participant's compliance culture; and
 - (d) remedial steps taken by the participant.

Character of the conduct

12. The MDP characterised Wilsons's conduct as at the high end of careless, rather than as reckless or intentional.
13. The MDP considered the conduct was serious. Wilsons was not aware of the conduct until ASIC brought it to Wilsons' attention. The conduct occurred over an extended period and may have continued for a longer time if ASIC had not brought the conduct to Wilsons' attention. The MDP considered the fact that the conduct went undetected for over two years is an aggravating factor. The MDP considered that Wilsons should have had processes that detected the conduct significantly earlier than it did.

Consequences of the conduct

14. Pre-trade transparency is fundamental to price formation in the framework of the Australian equity market, enabling investors to identify trading opportunities and listed companies to value their assets. The TWPI exception balances the benefit to clients with the importance of price formation by requiring that these trades offer meaningful price improvement to the open market and do not merely trade at the Best Available Bid price or Best Available Offer Price. The Relevant Trades were executed in circumstances that did not provide price improvement to clients and did not contribute to pre-trade price formation.
15. As to the consequences for particular persons, the evidence before the MDP indicated that any trading fee saving obtained by Wilsons was not material. Further, there was insufficient evidence before the MDP to establish that clients or other persons suffered losses as a result of the conduct.
16. In light of those matters, the consequences of the conduct were aggravating, but not materially.

Compliance culture

17. The MDP considered that Wilsons was overly reliant on the knowledge of its DTRs as a control and should have had more robust risk management systems in place either to prevent or detect the conduct in breach of Rule 6.1.1. Despite Wilsons having ongoing education for DTRs, it did not sufficiently cover the relevant parts of the Rule, such that several of their DTRs misunderstood the requirements. Further, the absence of post-trade monitoring meant that the conduct continued for a significant time without being detected, and may have continued for even longer if ASIC had not undertaken its market surveillance.
18. Despite this, the MDP considered that Wilsons generally had a sound compliance culture. Wilsons took swift action after being made aware of its conduct to investigate the conduct, identify the root cause of the issue and take steps to ensure compliance with the TWPI exception going forward. Further information about Wilsons' action in this regard is outlined in paragraph 20.
19. Wilsons co-operated with ASIC during its investigation, undertaking a thorough review of its trading history to identify the breaches and submitting a breach report.

As far as Wilson's past disciplinary or compliance history is concerned, Wilsons was given an infringement notice on 1 May 2018 (MDP 209/18) which concerned a contravention of Rule 5A.2.1(1) and 5A.2.1(2) of the *ASIC Market Integrity Rules (Competition in Exchange Markets) 2011* in relation to Wilsons' failure to provide Regulatory Data for Orders and Trade Reports. The MDP did not consider that the issue of this infringement notice indicated that Wilsons had a poor compliance record.

Remedial steps

20. Upon becoming aware of the issue, Wilsons took the remedial steps that included the following to ensure that the alleged contravening conduct does not re-occur:
 - (a) exploring additional internal systems controls with its surveillance service provider;
 - (b) briefing DTRs and the sales team on TWPI requirements and to emphasise the importance of compliance with pre-trade transparency requirements;
 - (c) conducting one-on-one training sessions with DTRs and sales traders about the pre-trade transparency requirement; and
 - (d) requesting each of the DTRs to re-sit the DTR Accreditation training provided by the Stockbrokers and Investment Advisers Association.
21. Although not directly at issue in the current matter, the MDP noted that it is important for Market Participants to have consequence management processes in place to deal with contraventions of the Rules.

Penalties

22. The maximum penalty for a single contravention is 15,000 penalty units. The low range would be up to 5,000 penalty units. The MDP notes that this is the first matter where the MDP has considered an alleged contravention of Rule 6.1.1.
23. The conduct wholly occurred after 13 March 2019. Therefore, the MDP considered the applicable penalty under the new penalty regime imposed by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*, which significantly increased the maximum penalties that can be specified in an infringement notice for each alleged contravention of a rule in relation to conduct that occurs wholly on or after 13 March 2019.
24. The infringement notice regime does not allow for global penalties to be determined for multiple contraventions because separate penalties must be specified for separate contraventions. Nonetheless, as noted in *ASIC Regulatory Guide 216: Markets Disciplinary Panel* at RG 216.111, the infringement notice regime does not otherwise restrict the approach the MDP can take in relation to multiple contraventions where there is a factual overlap in the circumstances of the matter. For example, it is open to the MDP to specify a single penalty for one of the contraventions and specify no penalty for the other factually related contraventions.

25. The MDP considered that this matter involved multiple instances of Wilsons reporting trades under the TWPI exception when the trades did not meet the price requirements for TWPI in contravention of Rule 6.1.1. These occurred in factually similar circumstances arising from the same causes and should be treated as a single course of conduct. Having regard to the circumstances of the alleged contraventions, including the long period of time over which they occurred and the absence of controls to prevent or detect the breaches, the MDP decided that a total penalty of 2,500 penalty units is appropriate.
26. The amount of one penalty unit is \$210 for alleged contraventions committed between 1 July 2017 and 30 June 2020 and \$222 for alleged contraventions committed on or after 1 July 2020. The value of a penalty unit was therefore \$210 for the first six months of the relevant period and \$222 for the remaining 21 months. In light of this, the MDP decided to allocate the 2,500 penalty units on a pro-rata basis between those two periods as follows:
- (a) for the conduct between 1 January 2020 and 30 June 2020 (*First Period*), which represents the first six months of the Relevant Period:
 - (i) for the first Relevant Trade of the First Period—556 Penalty Units, being **\$116,760**; and
 - (ii) for each other Relevant Trade during the First Period—nil; and
 - (b) for the conduct between 1 July 2020 and 31 March 2022 (*Second Period*), which represents the remaining 21 months of the Relevant Period:
 - (i) for the first Relevant Trade of the Second Period—1,944 Penalty Units, being **\$431,568**; and
 - (ii) for each other Relevant Trade during the Second Period—nil.
27. Accordingly, the total penalty for the alleged contraventions of Rule 6.1.1 during the Relevant Period is **\$548,328**.

Other information

The maximum pecuniary penalty payable under an infringement notice in relation to an alleged contravention of subsection 798H(1) of the Act, by reason of contravening Rule 6.1.1(1) of the Rules, is \$3,300,000.

Note: The maximum pecuniary penalty is 15,000 penalty units for a body corporate: see subsection 798K(2) of the Act. Since 1 July 2020 the value of a penalty unit has been \$222.

The maximum pecuniary penalty that a Court could order Wilsons to pay for contravening subsection 798H(1) of the Act (a civil penalty provision), by reason of contravening Rule 6.6.1 of the Rules, is determined by section 1317G of the Act.

Note: Under subsections 1317G(2) and (4), the maximum pecuniary penalty is the greatest of:

- (a) 50,000 penalty units; and
- (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and
- (c) either:
 - (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
 - (ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

To comply with this infringement notice, Wilsons must pay the penalty within the compliance period. The compliance period starts on the day on which this notice is given to Wilsons and ends 27 days after the day on which it is given. This penalty can be paid using the method detailed in the email by which this notice is given.

The effects of compliance with this infringement notice are:

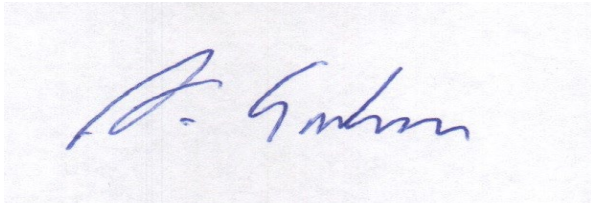
- (a) any liability of Wilsons to the Commonwealth for the alleged contraventions of subsection 798H(1) of the Act is discharged; and
- (b) no civil or criminal proceedings may be brought or continued by the Commonwealth against Wilsons for the conduct specified in the infringement notice as being the 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 sections 914A, 915B, 915C or 920A of the Act against Wilsons 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) Wilsons is not taken to have admitted guilt or liability in relation to the alleged contraventions; and
- (e) Wilsons is not taken to have contravened subsection 798H(1) of the Act.

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

Wilsons 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.

The unique code for this notice is MDP 1024/22.

**Anthony Graham**

Counsel to the 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.