

DISCIPLINARY MATTER – Pershing Securities Australia Pty Ltd

Pershing Securities Australia Pty Ltd (“Pershing”) has paid a penalty of **\$15,000** to comply with an infringement notice given to it by the Markets Disciplinary Panel (“MDP”). The penalty was for failing to give confirmations to Retail Clients for Market Transactions entered into on the Retail Clients’ instructions.

Background and circumstances

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 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 AFSL holders 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 had reasonable grounds to believe that Pershing had contravened MIR 3.4.1(1) 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 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 the 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**.

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:

- 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.

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 sub-paragraph 7.2A.15(4)(b)(i) and (ii) of the Regulations, Pershing has complied with the infringement notice, such compliance is not an admission of guilt or liability, and Pershing is not taken to have contravened subsection 798H(1) of the Act.

Further information on market integrity infringement notices, the market integrity rules or 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 Disciplinary Panel”.