



**ASIC**

Australian Securities &  
Investments Commission

Commonwealth of Australia Gazette

No. MDP07/16, Wednesday 7 September 2016

Published by ASIC

# ASIC Gazette

## Contents

### Markets Disciplinary Panel Infringement Notice

**Recipient:** Morgan Stanley 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Regulations 2001* administered by ASIC may have a right of review or may be entitled to have the infringement notice withdrawn.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)

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

Available from [www.asic.gov.au](http://www.asic.gov.au)  
Email [gazette.publisher@asic.gov.au](mailto:gazette.publisher@asic.gov.au)

© Commonwealth of Australia, 2016

This work is copyright. Apart from any use permitted under the *Copyright Act 1968*, all rights are reserved. Requests for authorisation to reproduce, publish or communicate this work should be made to: Gazette Publisher, Australian Securities and Investment Commission, GPO Box 9827, Melbourne Vic 3001



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

**To: Morgan Stanley Australia Securities Limited**  
Chifley Tower  
2 Chifley Square  
SYDNEY NSW 2000

**TAKE NOTICE:** The Australian Securities and Investments Commission ("ASIC") gives this infringement notice to Morgan Stanley Australia Securities Limited ACN 078 652 276 ("Morgan Stanley") under regulation 7.2A.04 of the *Corporations Regulations 2001* ("the Regulations"). To comply with this notice Morgan Stanley must:

Pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of  
**\$123,750.**

This infringement notice is given on 9 August 2016.

The unique code for this notice as required by paragraph 7.2A.06(b) of the Regulations is MDP11285/15.

The terms defined in Rule 1.4.3 of the ASIC Market Integrity Rules (ASX 24 Market) 2011 ("MIR 1.4.3") have the same meaning when used in this notice, including those set out in this Appendix to this notice. Certain additional defined terms used in this notice are also set out in the Appendix to this notice.

### **Alleged contraventions and penalty**

Morgan Stanley was a Market Participant in the ASX 24 Market at the relevant time and was therefore an entity required by subsection 798H(1) of the *Corporations Act 2001* ("the Act") to comply with the market integrity rules at that time.

Morgan Stanley is alleged to have contravened subsection 798H(1) of the Act by reason of contravening Rules 2.3.3(1), (2), (3)(f), (3)(g) and (4), Rule 2.3.5 and Rule 2.3.2(2) of the ASIC Market Integrity Rules (ASX 24 Market) 2011 ("MIR 2.3.3(1)", "MIR 2.3.3(2)", "MIR 2.3.3(3)(f)", "MIR 2.3.3(3)(g)", "MIR 2.3.3(4)", "MIR 2.3.5" and "MIR 2.3.2(2)"). The text of these rules is set out in Appendix 2 to this notice.

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

- 1) On 20 September 2013 Morgan Stanley was admitted as a Participant of ASX Clear (Futures) Pty Limited ("ASX Clear (Futures)").

- 2) From 23 September 2013 Morgan Stanley commenced holding Client monies in relation to its ASX Clear (Futures) Participant status.
- 3) Between 31 July 2015 and 2 October 2015 Morgan Stanley notified ASIC that it had become aware of a number of oversights in relation to its compliance with MIR 2.3.3(1), MIR 2.3.3(2), MIR 2.3.3(3)(f), MIR 2.3.3(3)(g), MIR 2.3.3(4), MIR 2.3.5 and MIR 2.3.2(2). Specifically, Morgan Stanley notified ASIC that:
  - (a) it had not completed one Client segregated account monthly reconciliation ("monthly reconciliation") for the month of November 2014 in contravention of MIR 2.3.3(1);
  - (b) between September 2013 and May 2015, it had not provided ASIC with a total of 21 monthly reconciliations as required by MIR 2.3.3(2) (for the months September 2013 to May 2015) and nine of the 21 monthly reconciliations were not completed in accordance with MIR 2.3.3(3) and MIR 2.3.3(4);
  - (c) it had not prepared or provided ASIC with annual declarations for Clients' funds ("annual declarations") for its 2013 and 2014 financial years as required by MIR 2.3.5;
  - (d) it had identified six occasions between October 2013 and December 2014 in which it had incorrectly completed its daily reconciliation of Client funds in contravention of MIR 2.3.2(2); and
  - (e) despite the misconduct detailed above, there was no impact on Client monies as Client monies held by Morgan Stanley reconciled and were appropriately segregated at all relevant times.
- 4) In addition to the above issues identified by Morgan Stanley, ASIC identified that Morgan Stanley's monthly reconciliation for September 2014 did not include a Director's signature as required by MIR 2.3.3(4).
- 5) By reason of Morgan Stanley's:
  - (a) failure to perform its monthly reconciliation for November 2014, the MDP has reasonable grounds to believe that Morgan Stanley has contravened MIR 2.3.3(1) and thereby contravened subsection 798H(1) of the Act ("Contravention 1");
  - (b) failure to provide ASIC with a total of 21 monthly reconciliations for the months September 2013 to May 2015, the MDP has reasonable grounds to believe that Morgan Stanley has contravened MIR 2.3.3(2) 21 times, and thereby contravened subsection 798H(1) of the Act 21 times ("Contraventions 2 to 22");
  - (c) failure to provide an explanation of the reason for a Variation in relation to its New Zealand Dollar June 2014 monthly reconciliation, the MDP has reasonable grounds to believe that Morgan Stanley has contravened MIR 2.3.3(3)(f) and thereby contravened subsection 798H(1) of the Act ("Contravention 23");
  - (d) failure to provide an explanation why Total Futures Client Monies was more than 20% for the February and March 2015 monthly reconciliations, the MDP has reasonable grounds to believe that Morgan Stanley has contravened MIR 2.3.3(3)(g)

on two occasions and thereby contravened subsection 798H(1) of the Act twice ("Contraventions 24 and 25");

- (e) failure to provide a statement signed by a director as required by MIR 2.3.3(4) in respect of the September 2013, July 2014, September 2014 and December 2014 monthly reconciliations, the MDP has reasonable grounds to believe that Morgan Stanley has contravened MIR 2.3.3(4) on four occasions and thereby contravened subsection 798H(1) of the Act four times ("Contraventions 26 to 29");
- (f) failure to prepare and give to ASIC annual declarations in relation to its 2013 and 2014 financial years, the MDP has reasonable grounds to believe that Morgan Stanley has contravened MIR 2.3.5 on two occasions and thereby contravened subsection 798H(1) of the Act twice ("Contraventions 30 and 31"); and
- (g) failure to provide accurate prior date balances in its daily reconciliation for 28 March 2014 and failure to provide explanations in its daily reconciliations for 6 May 2014, 17 October 2014 and 8 December 2014 as to why Total Futures Client Monies was greater than 20% from the prior day, the MDP has reasonable grounds to believe that Morgan Stanley has contravened MIR 2.3.2(2) on 4 occasions and thereby contravened subsection 798H(1) of the Act 4 times ("Contraventions 32 to 35").

### Maximum pecuniary penalty that a Court could order

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

- by reason of contravening MIR 2.3.3(1) is \$1,000,000;
- by reason of contravening MIR 2.3.3(2) is \$1,000,000;
- by reason of contravening MIR 2.3.3(3)(f) is \$1,000,000;
- by reason of contravening MIR 2.3.3(3)(g) is \$1,000,000;
- by reason of contravening MIR 2.3.3(4) is \$1,000,000;
- by reason of contravening MIR 2.3.5 is \$1,000,000; and
- by reason of contravening MIR 2.3.2(2) is \$1,000,000;

### Penalty under the Infringement Notice

The maximum pecuniary penalty that may be payable by Morgan Stanley under an infringement notice given pursuant to subsection 798K(2) of the Act:

- for an alleged contravention of MIR 2.3.3(1) is \$600,000;
- for an alleged contravention of MIR 2.3.3(2) is \$600,000;
- for an alleged contravention of MIR 2.3.3(3)(f) is \$600,000;
- for an alleged contravention of MIR 2.3.3(3)(g) is \$600,000;
- for an alleged contravention of MIR 2.3.3(4) is \$600,000;
- for an alleged contravention of MIR 2.3.5 is \$600,000; and
- for an alleged contravention of MIR 2.3.2(2) is \$600,000.

The penalties imposed by the MDP for each of the alleged contraventions of subsection 798H(1) of the Act are as follows:

- Contravention 1 – MIR 2.3.3(1) – \$20,000
- Contraventions 2 to 22 - MIR 2.3.3(2) – \$5,000 x 21 = \$105,000
- Contravention 23 - MIR 2.3.3(3)(f) – \$5,000
- Contraventions 24 and 25 - MIR 2.3.3(3)(g) – \$5,000 x 2 = \$10,000
- Contraventions 26 to 29 – MIR 2.3.3(4) – \$5,000 x 4 = \$20,000
- Contraventions 30 and 31- MIR 2.3.5 – \$25,000 x 2 = \$50,000
- Contraventions 32 to 35 – MIR 2.3.2(2) – \$5,000 x 4 = \$20,000

However, the MDP considered it appropriate in this matter, to adjust the total sum of the separate penalties in respect of Contraventions 2 to 29 and 32 to 35 as set out above, to ensure that the final penalty was just, and appropriate and not excessive, having regard to the totality of the conduct, and other relevant factors, including Morgan Stanley's exemplary compliance record to date in addition to its self-reporting to, and significant co-operation with, ASIC. In doing so, the MDP had regard to paragraphs RG 216.125 and RG 216.126 of Part E of ASIC Regulatory Guide 216- *Markets Disciplinary Panel* ("RG 216") and applied the totality principle in arriving at the appropriate pecuniary penalty to apply in this matter.

On this basis, and in accordance with subparagraphs 7.2A.06(g)(i) and (ii) and subregulation 7.2A.07(2) of the Regulations, for the alleged contraventions of subsection 798H(1) of the Act, the MDP imposed a total pecuniary penalty of \$123,750, as follows:

- Contravention 1 – MIR 2.3.3(1) – \$20,000
- Contraventions 2 to 22 - MIR 2.3.3(2) – \$1,250 x 21 = \$26,250
- Contravention 23 - MIR 2.3.3(3)(f) – \$2,500
- Contraventions 24 and 25 - MIR 2.3.3(3)(g) – \$2,500 x 2 = \$5,000
- Contraventions 26 to 29 – MIR 2.3.3(4) – \$2,500 x 4 = \$10,000
- Contraventions 30 and 31- MIR 2.3.5 – \$25,000 x 2 = \$50,000
- Contraventions 32 to 35 – MIR 2.3.2(2) – \$2,500 x 4 = \$10,000

Therefore the total penalty that Morgan Stanley must pay to the Commonwealth is **\$123,750** being the penalty payable under this infringement notice for the thirty five (35) alleged contraventions of subsection 798H(1) of the Act.

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 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:

#### *General statements*

- 6) The remedies applied should:
  - (a) promote market integrity and the confident and informed participation of investors in financial markets; and
  - (b) act as a deterrent to any future misconduct by the subject person; and

- (c) also act as a general deterrent to others from engaging in the same or similar conduct;
- 7) The identification of 35 alleged contraventions occurring over various periods of time relating to Morgan Stanley's accounting procedures indicates that Morgan Stanley's operations team and the compliance controls were not adequate to ensure full compliance with the market integrity rules.
  - 8) the importance of effective internal accounting procedures and continual monitoring of such procedures are crucial to both the business of participants and to maintaining the integrity of the market.
  - 9) Morgan Stanley detected the majority of the contraventions and self-reported the failures to comply with the market integrity rules concerned to ASIC.
  - 10) None of the misconduct giving rise to the alleged contraventions involved dishonesty. Morgan Stanley did not attempt to conceal any of the misconduct.
  - 11) None of the misconduct resulted in any actual benefit accruing to Morgan Stanley or any actual detriment to Morgan Stanley's Clients or other Market Participants. Client monies held by Morgan Stanley were appropriately segregated and reconciled at all times.
  - 12) The misconduct had no impact on public confidence in the market, or on the market itself.
  - 13) Morgan Stanley has had no prior contraventions found against it by the MDP for non-compliance with the market integrity rules.
  - 14) Morgan Stanley co-operated with ASIC throughout its investigation. As a result of Morgan Stanley's detailed section 912D reporting, ASIC did not need to exercise any powers to obtain further information or clarification.
  - 15) Morgan Stanley did not dispute the alleged contraventions, thereby saving time and costs that would otherwise have been expended by ASIC.
  - 16) Morgan Stanley undertook significant steps to prevent recurrence of the contraventions concerned (as detailed below).

*Contravention 1 – MIR 2.3.3(1) – Performing monthly reconciliation of Client funds*

- 17) MIR 2.3.3(1) is explicit in that it involves a mandatory obligation to perform accurate monthly reconciliations of Client funds, which are an essential part of a Market Participant's proper compliance process for protecting Client money. In an insolvency situation, Client money can be at risk if it is not properly segregated or accounted for as required under the market integrity rules.
- 18) Morgan Stanley's failure to prepare a monthly reconciliation for November 2014 resulted from an oversight by a Morgan Stanley staff member. The misconduct was careless in that Morgan Stanley neglected to ensure that the reconciliation procedures it had in place were being followed as intended.

- 19) Morgan Stanley became aware of its failure to prepare the November 2014 monthly reconciliation following an internal review of its policies and procedures ("Second Review") and reported the misconduct to ASIC. Morgan Stanley had conducted an earlier internal review in approximately November 2014 ("First Review") which focussed on reconciliations for the period March 2014 to May 2014. The First Review therefore did not identify the failure with respect to the November 2014 monthly reconciliation.
- 20) Morgan Stanley undertook significant remediation work to prevent recurrence of the misconduct, including:
- (a) by letter dated 13 August 2015 ("the First Letter"), Morgan Stanley provided to ASIC the monthly reconciliation for November 2014.
  - (b) the ASX 24 reconciliation function has been moved from the Morgan Stanley Listed Derivatives Operations team located offshore ("MSDLO") to the Australian Operations team to ensure this function has direct supervision by Morgan Stanley's Head of Operations based in Australia;
  - (c) Morgan Stanley's Head of Operations is now copied in on all monthly reconciliation submissions to ASIC and samples one monthly reconciliation each quarter to ensure compliance with MIR 2.3.3; and
  - (d) Morgan Stanley's compliance function has provided additional training to relevant managers within operations teams with respect to the Client money reconciliation requirements under the market integrity rules.

*Contraventions 2 to 22- MIR 2.3.3(2) – obligation to provide ASIC with monthly reconciliation of Client funds*

- 21) MIR 2.3.3(2) ensures that ASIC has available to it the information it requires to ensure that it can perform its supervisory role with respect to the efficiency and integrity of financial markets and the protection of Client funds.
- 22) Morgan Stanley's failure to submit to ASIC the 21 monthly reconciliations for the months of September 2013 to May 2015 ("the 21 monthly reconciliations") resulted from an oversight by a Morgan Stanley staff member. By virtue of preparing 20 of the 21 monthly reconciliations, Morgan Stanley had to some extent followed its reconciliation procedures. However, by failing to submit the 21 monthly reconciliations to ASIC, Morgan Stanley neglected to ensure those procedures were followed in their entirety as intended. For these reasons, Morgan Stanley's conduct was inadvertent.
- 23) Morgan Stanley became aware of its failure to submit the 21 monthly reconciliations to ASIC as a result of the Second Review and reported the misconduct to ASIC. The First Review did not include verification whether monthly reconciliations had been provided to ASIC.
- 24) ASIC did not become aware of Morgan Stanley's failure to provide the 21 monthly reconciliations until that failure was reported by Morgan Stanley. For a significant period of 21 months, ASIC failed to detect that it had not received monthly reconciliations from Morgan Stanley in accordance with MIR 2.3.3(2). This is a regrettable oversight by ASIC in a co-regulatory regime where ASIC has an obligation to monitor compliance with the market integrity rules and where the rules require the submission of certain information

to ASIC to enable ASIC to perform its supervisory role in order to uphold market integrity and consumer protection.

- 25) Morgan Stanley undertook remedial work in relation to its performance of MIR 2.3.3(2) as noted at paragraph 21(b), (c) and (d) above under the remedial actions for Contravention 1. In addition:
- (a) Morgan Stanley provided to ASIC, under cover of the First Letter, the outstanding 21 monthly reconciliations;
  - (b) the MIR 2.3.3(2) requirement has been added to Morgan Stanley's Regular Reporting Monitor ("RRM") application to ensure monthly reminders for the submission of the monthly reconciliation to ASIC are generated; and
  - (c) all of Morgan Stanley's Listed Derivatives Operations procedures have been reviewed and updated to ensure MIR 2.3.3(2) requirements are incorporated correctly and the appropriate controls are in place.

*Contravention 23 - MIR 2.3.3(3)(f) – explanation for Variation in monthly reconciliation*

- 26) MIR 2.3.3(3)(f) is a mandatory obligation to provide, in a monthly reconciliation required under MIR 2.3.3(1), an explanation for a Variation, if the dollar amount of the Variation is more than, or less than, zero.
- 27) MIR 2.3.3(3)(f), is also an essential part of a Market Participant's proper compliance process for protecting Client money. Once again, in an insolvency situation, Client money can be at risk if it is not properly segregated or accounted for as required under the market integrity rules.
- 28) Morgan Stanley's failure to provide an explanation in accordance with MIR 2.3.3(3)(f) for the June 2014 monthly reconciliation resulted from an oversight by a Morgan Stanley staff member. The misconduct was inadvertent in that Morgan Stanley neglected to ensure that the reconciliation procedures it had in place were being followed as intended.
- 29) Morgan Stanley became aware of its failure in respect of MIR 2.3.3(3)(f) as a result of the Second Review and reported the misconduct to ASIC.
- 30) Morgan Stanley undertook remedial work in relation to its performance of MIR 2.3.3(3)(f) as noted at paragraph 21 (b), (c) and (d) above under the remedial actions for Contravention 1. In addition, Morgan Stanley provided to ASIC, under cover of the First Letter, a remediated version of the June 2014 monthly reconciliation which had not been completed in accordance with the MIR 2.3.3(3)(f) requirements.

*Contraventions 24 and 25 - MIR 2.3.3(3)(g) – explanation for variance of Total Futures Client Monies*

- 31) MIR 2.3.3(3)(g) is a mandatory obligation to provide, in a monthly reconciliation required under MIR 2.3.3(1), an explanation for the reason Total Futures Client Monies varied by more than 20% from the last business day of the prior month.
- 32) MIR 2.3.3(3)(g) is also an essential part of a Market Participant's proper compliance process for protecting Client money. Once again, in an insolvency situation, Client money



can be at risk if it is not properly segregated or accounted for as required under the market integrity rules.

- 33) Morgan Stanley's failure to provide the explanations required under MIR 2.3.3(3)(g) in respect of the February 2015 and March 2015 monthly reconciliations resulted from an oversight by a Morgan Stanley staff member. The misconduct was inadvertent in that Morgan Stanley neglected to ensure that the reconciliation procedures it had in place were being followed as intended.
- 34) Morgan Stanley became aware of its failures in respect of MIR 2.3.3(3)(g) as a result of the Second Review and reported the misconduct to ASIC.
- 35) Morgan Stanley undertook remedial work in relation to its performance of MIR 2.3.3(3)(g) as noted at paragraph 21 (b), (c) and (d) above under the remedial actions for Contravention 1. In addition, Morgan Stanley provided to ASIC, under cover of the First Letter, remediated versions of the February 2015 and March 2015 monthly reconciliations which had not been completed in accordance with the MIR 2.3.3(3)(g) requirements.

*Contraventions 26 to 29 - MIR 2.3.3(4) – statement signed by a Director*

- 36) MIR 2.3.3(4) is a mandatory obligation to provide a statement signed by a Director, or a person authorised in writing by a Director, stating that the signatory believes, and has no reason not to believe, that the reconciliation required under MIR 2.3.3 is accurate in all respects.
- 37) MIR 2.3.3(4) is also an essential part of a Market Participant's proper compliance process for protecting Client money. Once again, in an insolvency situation, Client money can be at risk if it is not properly segregated or accounted for as required under the market integrity rules. In addition, the requirement for a Director (or other authorised person) to provide a signature attesting to the accuracy of the MIR 2.3.3 reconciliation provides an additional and important layer of oversight.
- 38) Morgan Stanley's failure to provide a statement signed by a Director required under MIR 2.3.3(4) for the September 2013, July 2014, September 2014 and December 2014 monthly reconciliations resulted from an oversight by a Morgan Stanley staff member. The misconduct was inadvertent in that Morgan Stanley neglected to ensure that the reconciliation procedures it had in place were being followed as intended.
- 39) Morgan Stanley became aware of its failures in respect of MIR 2.3.3(4) (with the exception of the failure in respect of the September 2014 monthly reconciliation) as a result of the Second Review and reported the misconduct to ASIC. After receiving the First Letter, ASIC identified the MIR 2.3.3(4) failure in respect of the September 2014 monthly reconciliation.
- 40) Morgan Stanley undertook remedial work in relation to its performance of MIR 2.3.3(4) as noted at paragraph 21 (b), (c) and (d) above under the remedial actions for Contravention 1. In addition, Morgan Stanley provided to ASIC, under cover of the First Letter, remediated versions of the monthly reconciliations which it identified had not been completed in accordance with the MIR 2.3.3(4) requirements.

*Contraventions 30 and 31- MIR 2.3.5 – Annual declarations for Clients' funds*

- 41) MIR 2.3.5 is a mandatory obligation on Market Participants to provide to ASIC, within 3 months of the end of the Market Participant's financial year, a directors' declaration and an auditor's report ("annual declaration") declaring that the Market Participant maintained suitably designed and effective internal controls to comply with the requirements of MIR 2.2.6.
- 42) MIR 2.3.5 supports the function of MIR 2.2.6 in ensuring that Client funds are appropriately segregated and balanced and ensures that ASIC has available to it the information it requires to ensure it can perform its supervisory role with respect to the efficiency and integrity of financial markets and the protection of Client funds. In addition, annual declarations also provide an additional and important layer of oversight.
- 43) Morgan Stanley's failure to provide to ASIC annual declarations for its 2013 and 2014 financial years resulted from an oversight by a Morgan Stanley staff member in addition to Morgan Stanley's misunderstanding with regards to its capital and financial reporting obligations when it was admitted as a Participant of ASX Clear (Futures) in September 2013. The misconduct was careless on the part of Morgan Stanley who failed to have the necessary understanding of the relevant reporting requirements.
- 44) Morgan Stanley became aware of its failure to lodge the 2013 and 2014 directors' declarations required under MIR 2.3.5 on 12 August 2015 and reported the misconduct to ASIC by letter dated 19 August 2015.
- 45) ASIC failed to detect that it had not received Morgan Stanley's 2013 and 2014 annual declarations required by MIR 2.3.5 (due 31 March 2014 and 31 March 2015, respectively), being periods of 17 months and five months, respectively. This is a regrettable oversight by ASIC in a co-regulatory regime where ASIC has an obligation to monitor compliance with the market integrity rules and where the rules require the submission of certain information to ASIC so that ASIC can perform its supervisory role.
- 46) Morgan Stanley undertook the following remedial work in relation to its performance of MIR 2.3.5:
  - (a) on 1 October 2015 Morgan Stanley provided ASIC with the outstanding annual declarations for Client funds for its 2013 and 2014 financial years; and
  - (b) Morgan Stanley has added the MIR 2.3.5 requirement into Morgan Stanley's RRM application, which systematically generates annual reminders for the submission of annual declarations of Client funds to ASIC.

*Contraventions 32 to 35 – MIR 2.3.2(2)*

- 47) MIR 2.3.2(2) is a mandatory obligation to, when performing daily reconciliations of Client funds, provide certain information set out in the rule. This is also an essential part of a Market Participant's proper compliance process for protecting Client money. Again, in an insolvency situation, Client money can be at risk if it is not properly segregated or accounted for.
- 48) Morgan Stanley's failure to satisfy the MIR 2.3.2(2) requirements for the 28 March 2014, 6 May 2014, 17 October 2014 and 8 December 2014 reconciliations resulted from an

oversight by a Morgan Stanley staff member. The misconduct was inadvertent in that Morgan Stanley neglected to ensure that the reconciliation procedures it had in place were being followed as intended.

49) Morgan Stanley became aware of its failure to satisfy the MIR 2.3.2(2) requirements following a review of its internal control structure with respect to MIR 2.2.6 and reported the failure to ASIC on 2 October 2015.

50) Morgan Stanley undertook the following remediation work in relation to its performance of MIR 2.3.2(2):

(a) The missing explanations in respect of the daily reconciliations for the 6 May 2014, 17 October 2014 and 8 December 2014 daily reconciliations and the inaccurate prior date balance identified in the 28 March 2014 daily reconciliation were all remediated and entered into the relevant reconciliations.

(b) As stated above under the remedial actions for Contravention 1:

(i) the ASX 24 reconciliation function has been moved from the MSDLO located offshore to the Australian Operations team to ensure this function has direct supervision by Morgan Stanley's Head of Operations based in Australia; and

(ii) Morgan Stanley's compliance function has provided additional training to managers within the offshore and Sydney operations teams with respect to the Client money reconciliation requirements under the market integrity rules.

### Compliance with the Infringement Notice

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

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

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

unless an application is made for its extension.

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

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

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

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

The effects of compliance with this infringement notice are:

- (a) any liability of Morgan Stanley 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 Morgan Stanley 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 Morgan Stanley 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) Morgan Stanley is not taken to have admitted guilt or liability in relation to the alleged contraventions; and
- (e) Morgan Stanley 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: 9 August 2016

### Appendix 1 – Defined Terms

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

"ASX 24 Market" means the market operated by the Market Operator under the *Australian Market Licence (Australian Securities Exchange Limited) 2002*.

"Client" means in relation to a Market Participant, any person, partnership or Corporation on behalf of whom the Market Participant enters, Acquires or Disposes of a Futures Contract or Option Contract, or on whose behalf the Market Participant proposes to enter, Acquire or Dispose of a Futures Contract or Option Contract or from whom the Market Participant accepts instructions to enter, Acquire or Dispose of Futures Contracts or Option Contracts.

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

The terms defined in MIR 2.3.1 have the same meaning when used in this notice, including:

"Total Futures Client Monies" means the total amount of money received from Clients in respect of transactions in futures contracts, including amounts relating to futures contracts traded on any exchange.

"Variation" means Total Third Party Client Monies less Total Deposits.

**Appendix 2 – Relevant Market Integrity Rules**

MIR 2.3.3 provides:

- 1) *“Subject to Rule 2.3.3(5), a Market Participant must perform an accurate reconciliation of the aggregate balance held by it at the close of business on the last Business Day of each calendar month in clients’ segregated accounts maintained under Rule 2.2.6 and the corresponding balance as recorded in the Market Participant’s accounting records.*
- 2) *The reconciliation referred to in Rule 2.3.3(1) must be given to ASIC by the last Business Day of the calendar month following the calendar month to which the reconciliation relates.*
- 3) *The reconciliation referred to in Rule 2.3.3(1) must set out:*
  - (a) *the date to which the reconciliation relates;*
  - (b) *for both the last Business Day of the month of the reconciliation and the last Business Day of the prior month, the dollar amounts of:*
    - (i) *Total Futures Client Monies;*
    - (ii) *Director/Employee Monies; and*
    - (iii) *Total Third Party Client Monies;*
  - (c) *for both the last Business Day of the month of the reconciliation and the last Business Day of the prior month, the dollar amounts of:*
    - (i) *Clients’ Segregated Account at Bank;*
    - (ii) *Deposits with ASX Clear (Futures) Client Account;*
    - (iii) *Deposits with ASX Clear Client Account;*
    - (iv) *Deposits with ASX Clear (Futures) Clearing Participant;*
    - (v) *Deposits with ASX Clear Participant;*
    - (vi) *Deposits with an ASX 24 Market Participant;*
    - (vii) *Deposits with an ASX Market Participant;*
    - (viii) *Deposits with an Overseas Broker;*
    - (ix) *funds invested in accordance with section 981C(a) of the Corporations Act; and*
    - (x) *Total Deposits;*
  - (d) *the dollar amount of the Variation for both the last Business Day of the reconciliation and the last Business Day of the prior month;*
  - (e) *the percentage amount of the Variation for both the last Business Day of the month of the reconciliation and the last Business Day of the prior month;*
  - (f) *an explanation of the reason for a Variation, if the dollar amount of the Variation is more than, or less than, zero; and*
  - (g) *where the movement in Total Futures Client Monies is greater than 20% from the last Business Day of the prior month, an explanation of the reason.*
- 4) *A reconciliation created for the purposes of this Rule 2.3.3 must contain a statement signed by a Director or a person authorised in writing by a Director, stating that the signatory believes, and has no reason not to believe, that the reconciliation is accurate in all respects.*
- 5) *A Market Participant does not need to comply with Rule 2.3.3(1) until 1 January 2012.”*

MIR 2.3.5 provides:

- 1) *“A Market Participant must prepare and give to ASIC within 3 months of the end of the financial year of the Market Participant:*

- (a) a directors' declaration containing the information set out in Form 1 Part 1 of these Rules, authorised in the manner specified in Rule 2.3.5(2); and
  - (b) an auditor's report containing the information set out in Form 1 Part 2 of these Rules, signed by a partner or director of the audit firm.
- 2) For the purposes of this Rule, a directors' declaration must be authorised by:
- (a) 2 directors of the Market Participant whose names appear in the declaration; or
  - (b) 1 director ('first director') of the Market Participant and 1 representative of the Market Participant, whose names appear in the declarations, where the representative has been authorised by the board or by a director other than the first director.
  - (c) 2 representatives of the Market Participant whose names appear in the declaration and who have been authorised by the board or each authorised by a different director of the Market Participant to give the declaration."

MIR 2.3.2 provides:

- 1) Subject to Rule 2.3.2(3), a Market Participant must perform an accurate reconciliation, by 7.00 pm on the Business Day after the Business Day to which the reconciliation relates, of the aggregate balance held by it at the close of business on each Business Day in clients' segregated accounts maintained under Rule 2.2.6 and the corresponding balance as recorded in the Market Participant's accounting records.
- 2) The reconciliation referred to in Rule 2.3.2(1) must set out:
  - (a) the date to which the reconciliation relates;
  - (b) for both the day of the reconciliation and the prior day, the dollar amounts of:
    - (i) Total Futures Client Monies;
    - (ii) Director/Employee Monies; and
    - (iii) Total Third Party Client Monies;
  - (c) for both the day of the reconciliation and the prior day, the dollar amounts of:
    - (i) Clients' Segregated Account at Bank;
    - (ii) Deposits with ASX Clear (Futures) Client Account;
    - (iii) Deposits with ASX Clear Client Account;
    - (iv) Deposits with ASX Clear (Futures) Clearing Participant;
    - (v) Deposits with ASX Clear Participant;
    - (vi) Deposits with an ASX24 Market Participant;
    - (vii) Deposits with an ASX Market Participant;
    - (viii) Deposits with an Overseas Broker;
    - (ix) funds invested in accordance with section 981C(a) of the Corporations Act; and
    - (x) Total Deposits;
  - (d) the dollar amount of the Variation for both the day of the reconciliation and the prior day;
  - (e) the percentage amount of the Variation for both the day of the reconciliation and the prior day;
  - (f) an explanation of the reason for a Variation, if the dollar amount of the Variation is more than, or less than, zero; and
  - (g) where the movement in Total Futures Client Monies is greater than 20% from the prior day, an explanation of the reason.
- (3) A Market Participant does not need to comply with Rule 2.3.2 until 1 January 2012.