



**ASIC**

Australian Securities &  
Investments Commission

Commonwealth of Australia Gazette

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# ASIC Gazette

## Contents

**Markets Disciplinary Panel:** Infringement Notice

**Recipient:** Share Investing 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*.

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

**To:** Share Investing Limited ACN 078 174 973  
Level 23  
242 Pitt Street  
SYDNEY NSW 2000

Matter: MDP 6024/15  
Date given: 19 January 2017

**TAKE NOTICE:** The Australian Securities and Investments Commission (“ASIC”) gives this infringement notice to Share Investing Limited (“SIL”) under regulation 7.2A.04 of the Corporations Regulations 2001 (“Regulations”).

To comply with this notice, SIL must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **\$130,000**.

Unless a contrary intention appears, capitalised terms used in this notice have the same meaning as those defined in Rule 1.4.3 of the ASIC Market Integrity Rules (ASX Market) 2010 (“the Rules”) as in force at the time of the conduct.

### Details of the alleged contravention

1. SIL<sup>1</sup> was a participant in the Market operated by ASX at all relevant times and was required by subsection 798H(1) of the *Corporations Act 2001* (“the Act”) to comply with the Rules.
2. Rule 5.7.1(b)(iii) of the Rules relevantly provided:

A Market Participant must not make a Bid or Offer for, or deal in, any Products:

  - (a) ...
  - (b) on account of any other person where: ...
    - (iii) taking into account the circumstances of the Order, a Market Participant ought reasonably suspect that the person has placed the Order with the intention of creating,

a false or misleading appearance of active trading in any Product or with respect to the market for, or the price of, any Product.
3. Rule 5.7.2 of the Rules sets out certain matters that a Market Participant must have regard to in considering the circumstances of the Order. The circumstances

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<sup>1</sup> The name of the entity at the relevant time was ETRADE Australia Securities Limited.

include the recent trading in the Product, material variations in the price of the Product, the time of entry of the Order and whether the person on whose behalf the order is placed may have an interest in creating a false or misleading appearance with respect to the market for, or the price of, the Product.

4. At all relevant times, SIL operated an Automated Order Processing (“AOP”) system that allowed clients to enter orders into the Market.
5. The Markets Disciplinary Panel (“MDP”) has reasonable grounds to believe that SIL contravened Rule 5.7.1(b)(iii) and thereby contravened subsection 798H(1) of the Act in respect of the following conduct. The MDP was satisfied that:
  - (a) between 5 April and 19 April 2013, SIL’s post-trade surveillance software alerts system (“SMARTS”) generated seven alerts relating to a number of Bids, which resulted in trades, by a client of SIL, using SIL’s AOP system, which warned SIL of the trades establishing the high or closing price of the shares of New Guinea Energy (“NGE”), a small energy company listed on ASX and that the trading may represent a pattern of trading activity warranting further enquiries;
  - (b) on 24 April 2013, the Operations Division of SIL made a decision (the “management decision”) to continue to closely monitor trading by the client in NGE shares, and to lodge a Suspicious Activity Report (“SAR”) with ASIC in relation to the trading by the client of NGE shares. The SAR was lodged with ASIC on 26 April 2013;
  - (c) following the management decision, the Designated Trading Representative (“DTR”) Manager verbally communicated to the DTRs the concerns with the client’s trading in NGE shares, and placed NGE on a watch list on a whiteboard to inform the DTRs of the management decision;
  - (d) between 22 April and 2 May 2013, the client placed six Bids, using SIL’s AOP system, in relation to NGE shares. The Bids, which resulted in trades:
    - (i) were for very small values which were significantly lower than the average value of the client’s purchase of NGE shares before 4 April 2013;
    - (ii) materially altered the price of NGE shares as follows:
      - (A) Bid 1 (22 April 2013): increased the price by 10% and traded at the highest price for the share on that day;
      - (B) Bid 2 (23 April 2013): increased the price by 5.5% and set the closing price for the share on that day;
      - (C) Bid 3 (29 April 2013): increased the price by 9.1% and traded at the highest price for the share on that day;

- (D) Bids 4 and 5 (30 April 2013): increased the price by 9.1% and 4.3% respectively, and traded at the highest prices for the share on that day;
      - (E) Bid 6 (2 May 2013): increased the price by 8% and traded at the highest price for the share on that day;
    - (iii) appeared to have been timed to create a price impact at minimal cost; and
    - (iv) were consistent with the client's interest as an existing shareholder in NGE in either maintaining the value of the client's holding in NGE or supporting the price of NGE shares.
- 6. The MDP concluded that a reasonable Market Participant ought to have identified these circumstances and to have suspected that the client placed the Bids with the intention of supporting or maintaining the price of NGE and creating a false and misleading appearance of active trading in NGE or with respect to the market for, or price of, NGE.
- 7. In considering this matter and the appropriate penalty, the MDP commented:
  - (a) Rule 5.7.1(b)(iii) imposes a prohibition on enabling market manipulation. Trading activity which does not reflect genuine supply and demand has a detrimental effect on the integrity of the financial market, and may damage public confidence in the market;
  - (b) SIL demonstrated that it had a corporate culture conducive to compliance with the Rules. SIL had in place post-trade surveillance software alerts and procedures in relation to any Order below \$500 and which displayed aspects possibly attributable to market manipulation by a client. These procedures required a DTR to review the Order and contact the client and, if the client could not be contacted, to escalate the matter to the Operations Division of SIL to suspend the account to prevent further trading. Further, SIL had in place comprehensive and structured training, including in respect of post-trade alert procedures and weekly monitoring by compliance managers;
  - (c) the conduct giving rise to the alleged contravention of Rule 5.7.1(b)(iii) was primarily the result of misjudgements by individual DTRs, both before and after the management decision on 24 April 2013, having failed to properly follow SIL's procedures. The placing of the four Bids after the date of the management decision to closely monitor the trading of the client in relation to shares in NGE was negligent on the part of SIL. Despite these oversights, there was a clear intention to comply with the market integrity rules as demonstrated by the organisational and technical resources that were in place, the submission of the SAR, and the subsequent decision on 2 May 2013 to suspend the client's account;

- (d) SIL gained a nominal direct gross benefit of less than \$120, being the commission earned from the client's account during the period between 22 April and 2 May 2013 in relation to the client's trading in NGE shares;
- (e) SIL co-operated fully with ASIC during its investigation, made an early decision not to contest the alleged contravention of Rule 5.7.1(b)(iii) and has undertaken steps to ensure the misconduct is unlikely to occur again;
- (f) SIL has been sanctioned by the MDP on two previous occasions (October 2015 and August 2014) for unrelated alleged contraventions of Rule 5.9.1 (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) that were characterised as negligent. SIL also has some disciplinary history with the ASX Disciplinary Tribunal, including having been sanctioned on two previous occasions by the Tribunal in relation to a rule not dissimilar to Rule 5.7.1(b)(iii);
- (g) despite the disciplinary history of SIL, having regard to the totality of the circumstances of the matter, the appropriate penalty was an amount in the lower range of penalties for an alleged contravention of Rule 5.7.1(b)(iii) (see Table 4 of ASIC Regulatory Guide 216).

### **Other information**

The maximum pecuniary penalty that a Court could order SIL to pay for contravening subsection 798H(1) of the Act by reason of contravening Rule 5.7.1(b)(iii) is \$1,000,000. The maximum pecuniary penalty that may be payable by SIL under an infringement notice in relation to the alleged contravention of Rule 5.7.1(b)(iii) is \$600,000.

### **Compliance with the infringement notice**

To comply with this infringement notice, SIL must pay the penalty within the compliance period. The compliance period starts on the day on which this notice is given to SIL and ends 27 days after the day on which it is given. Payment is made by bank cheque to the order of "Australian Securities and Investments Commission".

The effects of compliance with this infringement notice are:

- (a) any liability of SIL 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 SIL 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 SIL 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) SIL is not taken to have admitted guilt or liability in relation to the alleged contravention; and
- (e) SIL is not taken to have contravened subsection 798H(1) of the Act.

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

SIL may apply to ASIC for withdrawal of this 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.



**Grant Moodie**

Special Counsel to the Markets Disciplinary Panel  
with the authority of a Division of ASIC

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.