



**ASIC**  
Australian Securities &  
Investments Commission

Commonwealth of Australia Gazette

MDP02/18, Tuesday, 20<sup>th</sup> November 2018

Published by ASIC

# ASIC Gazette

## Contents

**Markets Disciplinary Panel: Infringement Notice**

**Recipient:** UBS Securities Australia 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*.

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

Available from [www.asic.gov.au](http://www.asic.gov.au)  
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**PART 7.2A OF THE CORPORATIONS REGULATIONS 2001  
INFRINGEMENT NOTICE**

**To:** UBS Securities Australia Ltd ACN 008 586 481  
Level 16, 2 Chifley Square  
Sydney NSW 2000

**Matter:** MDP 806/18

**Date given:** 22 October 2018

**TAKE NOTICE:** The Australian Securities and Investments Commission (“ASIC”) gives this infringement notice to UBS Securities Australia Ltd (“UBS”) 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 UBS must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of \$120,000.

Unless a contrary intention appears, capitalised terms used in this notice have the same meaning as in Rule 1.4.3 of the ASIC Market Integrity Rules (ASX Market) 2010 (“the ASX Rules”) and Rule 1.4.3 of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011 (“the Competition Rules”), as in force at the time of the conduct.

**Background**

1. UBS was engaged by an ASX-listed company to act as the broker to conduct, on behalf of the company, an on-market buy-back on ASX. UBS AG, the ultimate parent company of UBS, was also engaged by five other ASX-listed companies to act as the broker to conduct, on behalf of those respective companies, an on-market buy-back on ASX. The companies are collectively referred to in this notice as the buy-back clients, and severally referred to as Client A, B, C, D, E and F respectively.
2. The terms of engagement were set out in mandate letters, each of which relevantly stated that all buy-backs were to occur in the ordinary course of trading on ASX. According to the mandate letters, “ordinary course of trading” was to be understood as meaning that UBS must be indifferent to the identity of the counterparty and execute trading instructions in strict order of price and time priority, without prior agreements.

3. The mandate letters also stated that the terms of engagement could be conducted by other members within the UBS group. The on-market buy-backs were conducted by Designated Trading Representatives (“the DTRs”) acting as representatives of UBS.
4. UBS entered into a total of 190,626 trades on the ASX Market in relation to these six buy-backs. Of those, 328 trades were entered into over a 7-month period in circumstances where UBS:
  - (a) acted on behalf of each respective buy-back client and a selling client; and
  - (b) entered into them other than by the matching of Orders on an Order Book; and
  - (c) reported the transactions to ASX as Trades with Price Improvement (“NXXT”).
5. The 328 NXXT trades resulted in purchases of more than 18 million securities by UBS on behalf of their buy-back clients. The percentage of NXXT buy-back trade volume transacted by UBS as compared to total buy-back volume transacted by UBS ranged from approximately 10%, 6% and less than 1% (in the case of three of the buy-backs) and from approximately 22%, 25% and 55% (in the case of the other three buy-backs).
6. The matter was brought to the attention of UBS by ASIC. UBS did not self-report the matter to ASIC. UBS did not contest any of the material facts.

#### On-market buy-backs

7. A “buy-back” by a company means the acquisition by the company of shares in itself: section 9 of the Act. An “on-market buy-back” means a buy-back by a listed corporation on a prescribed financial market in the ordinary course of trading on the market: see section 9 of the Act. ASX Limited is a “prescribed financial market”: see regulation 1.0.02A of the Regulations. These definitions apply for the purposes of the ASX Rules and the Competition Rules: see Rule 1.4.2.
8. None of the Act, the ASX Rules or the Competition Rules define the meaning of “ordinary course of trading”. *ASIC Regulatory Guide 110: Share buy-backs* states at RG 110.61 states:

In Australia, this phrase means that the trading is in strict order of price and time priority, with indifference as to the identity of counterparties, and no pre-arrangements or selection of counterparties: see *Attorney-General (Vic) v Walsh’s Holdings Ltd* [1973] VR 137.

#### Pre-trade transparency

9. Rule 4.1.1 of the Competition Rules prohibits a Participant from entering into a Transaction unless the Transaction is entered into by matching of a Pre-Trade Transparent Order on an Order Book. The prohibition does not apply in relation to a Trade with Price Improvement under Competition Rule 4.2.3.
10. 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 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.

### Acting in accordance with client instructions

#### 11. Rule 3.3.1(b) of the ASX Rules relevantly provided:

A Market Participant must not: ...

- (b) enter into a Market Transaction for a Client, except in accordance with the instructions of the Client, or of a person authorised in writing by a Client to give such instructions ...
12. A “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.

### **Details of the alleged contraventions**

13. The MDP is satisfied that UBS was a Market Participant and Trading Participant on the ASX Market at all relevant times and was required by subsection 798H(1) of the Act to comply with both the ASX Rules and the Competition Rules.
14. The MDP is satisfied that the terms of engagement in each of the mandate letters constituted an express or implied instruction from each respective buy-back client to purchase the securities under the buy-back in the ordinary course of trading.
15. ASIC Regulatory Guide 223: *Guidance on ASIC market integrity rules for competition in exchange markets* (May 2015) at paragraph RG 223.195 states that Trades with Price Improvement are not in the ordinary course of trading, and therefore are not permitted for on-market buy-backs. The MDP considers that guidance to correctly reflect the law and prevailing market practice.
16. The MDP considers that a transaction is *not* entered into in the ordinary course of trading if the Participant is acting on behalf of a buying client and a selling client, and the transaction is entered into other than by the matching of Orders on an Order Book. This is the case even though the transactions were entered into at the Best Mid-Point.
17. The MDP is satisfied that, between 26 April 2017 and 22 November 2017, UBS entered into 328 NXXT trades in relation to buy-backs on the ASX Market where UBS did not act in accordance with each buy-back client’s instructions to buy securities under the on-market buy-back in the ordinary course of trading on the ASX Market.

18. The MDP has reasonable grounds to believe that UBS entered into the 328 NXXT trades in circumstances that contravened Rule 3.3.1(b) of the ASX Rules:

Buy-back client	NXXT trades (number of securities purchased)	Date or Date Ranges
Client A	2 trades (599,649 securities)	28/09/17 and 10/10/17
Client B	2 trades (100,000 securities)	27/04/17 and 13/06/17
Client C	28 trades (2,420,000 securities)	26/04/17 — 31/10/17
Client D	21 trades (989,065 securities)	15/06/17 — 04/09/17
Client E	18 trades (469,294 securities)	21/08/17 — 10/10/17
Client F	257 trades (13,699,725 securities)	30/08/17 — 22/11/17

19. The MDP considers that UBS was careless for the following reasons:
- first, the DTRs did not know that NXXT trades were not in the ordinary course of trading. This indicates that UBS did not have effective internal training or communication procedures in place, despite ASIC guidance that such trades were not permitted for on-market buy-backs;
  - second, the conduct occurred over a 7-month period for multiple buy-backs without UBS's compliance area detecting the issue. This indicates that UBS also did not have effective internal controls in place;
  - third, an on-market buy-back is a kind of corporate action. Participants should be aware that the trading rules in relation to corporate actions are different to the rules that would apply to trading that does not relate to corporate actions and should put in place appropriate supervisory procedures for corporate actions to ensure compliance with the rules;
  - fourth, in executing the trades as NXXT trades, UBS may have caused the buy-back client to contravene the Act because not all the buy-back trades were in the ordinary course of trading.
20. UBS has been previously sanctioned by the MDP as follows:
- in May 2017, the MDP issued an infringement notice (penalty \$140,000) relating to the operation, use and monitoring of a crossing system known as the UBS Price Improvement Network ("UBS PIN"). A deficiency in the hard-coded logic within UBS PIN caused partially filled Orders to lose priority in certain circumstances;
  - in May 2017, the MDP issued an infringement notice (penalty \$140,000) relating to incorrect disclosures in crossing confirmations about execution venue and trading as principal, and the provision of incorrect regulatory data to market operators. The incorrect disclosures were caused by system errors which were not detected for 14 months (incorrect disclosure of execution venue) and 10 months (incorrect disclosure in relation to trading as Principal);
  - in June and September 2013, the MDP issued two infringement notices (respective penalties \$30,000 and \$50,000) relating to accidental data entry errors when submitting orders.

21. The MDP considers the conduct in this matter and its cause, namely failing to follow client instructions based on a lack of knowledge of some DTRs as to whether NXXT trades are permitted for on-market buy-backs, to be different in character to the conduct and causes in those previous matters in which the MDP has sanctioned UBS.
22. The MDP also notes that UBS has subsequently adopted remedial measures including:
  - (a) conducting further training for DTRs, highlighting that NXXT trades are not permitted for on-market buy-backs, and updating the Equities Desk Manual to better reflect ASICs guidance in relation to on-market buy-backs; and
  - (b) implementing or developing trade monitoring enhancements, including implementing a post-trade monitoring process to identify NXXT trades for buy-back clients, and commencing negotiations with SMARTS to develop SMARTS pre-trade alerts to automatically identify any NXXT trades for buy-back clients;
23. The MDP accepts that the DTRs had an honest, but mistaken, belief that NXXT trades are in the ordinary course of trading. There was no evidence of an intention to contravene the market integrity rules.
24. The conduct neither caused financial loss to UBS' clients or to third parties nor benefitted UBS beyond the brokerage that would otherwise have been received by UBS in entering into the transactions.
25. The MDP has sanctioned other market participants in the past in relation to alleged contraventions of Rule 3.3.1 of the ASX Rules or similar rules. The MDP issued infringement notices to Patersons Securities Ltd (September 2011, \$25,000), JP Morgan Securities Australia Ltd (October 2012, \$30,000) and Euroz Securities Limited (October 2012, \$20,000) in relation to alleged contraventions of the market integrity rules that expressly prohibit buy-back transactions being carried out by way of special crossings. Each of those matters involved the market participant acting for a single buy-back client.
26. UBS did not carry out the buy-back trades as special crossings but implemented the trades as NXXT trades. While the MDP considers both kinds of trades not to be in the ordinary course of trading, it considers special crossings during on-market buy-backs to be of a more serious nature than NXXT trades executed at the Best Mid-Point. The MDP has applied a discount to each penalty on that basis. But, in contrast to those other matters, this matter involves UBS acting for six buy-back clients over a significant period of time and it is appropriate for a penalty to be applied in relation to each buy-back client.
27. The MDP considers it appropriate to break down the 328 alleged contraventions of Rule 3.3.1(b) of the ASX Rules into 6 groups of alleged contraventions of subsection 798H(1) of the Act to reflect the circumstances that the conduct related to 6 buy-back clients, each of which gave an instruction to UBS to implement an on-market buy-back in the ordinary course of trading.
28. The penalties payable under this infringement notice for those alleged contraventions of subsection 798H(1) of the Act by UBS are as follows:

<b>Contravention</b>	<b>Penalty</b>
Contravention 1	\$ 20,000
Contravention 2	\$ 20,000
Contravention 3	\$ 20,000
Contravention 4	\$ 20,000
Contravention 5	\$ 20,000
Contravention 6	\$ 20,000

29. The percentage of NXXT buy-back trade volume transacted by UBS as compared to total buy-back volume transacted by UBS for each buy-back ranged from relatively low percentages to percentages that are not insignificant. The higher the percentage of NXXT buy-back volume, the greater the potential risk to the fairness and integrity of the market in relation to the on-market buy-back.
30. Nonetheless, the MDP has decided that the penalties for each alleged contravention of subsection 798H(1) of the Act in this matter will be the same. Each buy-back client gave a primary instruction to UBS (i.e. to carry out an on-market buy-back) and the careless conduct essentially arose from the same cause.
31. The total penalty payable is \$120,000.

### **Other information**

The maximum pecuniary penalty that a Court could order UBS to pay for contravening subsection 798H(1) of the Act is, by reason of contravening Rule 3.3.1(b), is \$1,000,000.

The maximum pecuniary penalty payable under an infringement notice in relation to an alleged contravention of subsection 798H(1) of the Act is, by reason of contravening Rule 3.3.1(b), is \$600,000.

To comply with this infringement notice, UBS must pay the penalty within the compliance period. The compliance period starts on the day on which this notice is given to UBS 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 UBS 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 UBS 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 UBS 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) UBS is not taken to have admitted guilt or liability in relation to the alleged contraventions; and

- (e) UBS is not taken to have contravened subsection 798H(1) of the Act.

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

UBS 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.



**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.