



**ASIC**  
Australian Securities &  
Investments Commission

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# ASIC Gazette

## Contents

**Markets Disciplinary Panel:** Infringement Notice

**Recipient:** Interactive Brokers Australia 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: Interactive Brokers Australia Pty Ltd  
ACN 166 929 568  
Level 40, 225 George Street  
SYDNEY NSW 2000

Matter: MDP 0321/23

Date given: 10 August 2023

**TAKE NOTICE:** The Australian Securities and Investments Commission (**ASIC**) gives this infringement notice to Interactive Brokers Australia Pty Ltd ACN 166 929 568 (**Interactive Brokers**) 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, Interactive Brokers must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **\$832,500**. This penalty amount represents 3,750 penalty units (being penalty units at \$222).

### Background

1. At all relevant times, Interactive Brokers was a market participant of the ASX Market. It is also a market participant of, Cboe Australia Limited (previously Chi-X), and a clearing participant of ASX Clear and ASX Clear (Futures).
2. A client of Interactive Brokers (**Client**) was an active trader in the shares of Orthocell Ltd (**OCC**) and known to Interactive Brokers as an experienced trader having been employed in the industry. The Markets Disciplinary Panel (**MDP**) were concerned about orders placed by the Client on 49 days between 10 March and 5 November 2021 in the Closing Single Price Auction (**CSPA**) that resulted in a CSPA trade at a price higher than the last traded price (**Suspicious Orders**). Many of those orders were also at or above the high previously set for OCC that day.
3. Between 10 February and 13 October 2021, the Client's trading in OCC triggered 44 'marking the close' (**MTC**) alerts on Interactive Brokers' post trade surveillance system.
4. On 14 October 2021, ASIC telephoned Interactive Brokers and informed it that ASIC was repeatedly observing MTC alerts for the Client's trading in OCC, through Interactive Brokers. Interactive Brokers informed ASIC that the Client's trading was triggering MTC alerts within its post trade surveillance system but having reviewed those alerts found the issue to be 'benign', and accordingly had closed them out requiring 'no further action'.

5. On the same day and following the call, ASIC emailed Interactive Brokers noting its concerns and requesting it, among other matters, review OCC for all alert activity within Interactive Brokers' post trade surveillance system over the last 3 months.
6. On 18 October 2021, Interactive Brokers emailed the Client seeking an explanation of the strategy and intent as regards 22 transactions between 3 September and 13 October 2021 in the closing auction for OCC, seeking a response within five business days. On 25 October 2021, Interactive Brokers emailed the Client again noting the Client had not replied and requested an immediate response "*in order to avoid any interruptions to your market access*". On 27 October 2021, Interactive Brokers repeated much of the content of the first email in a message to the Client using its ticket system requesting a reply within a further three business days. Attempts to call the Client were then made on 29 October and 1 November 2021 without reply.
7. Between 14 October and 1 November 2021 the Client placed Suspicious Orders in the closing auction for OCC on seven of 11 trading days.
8. On 2 November 2021, ASIC issued Interactive Brokers with a Notice under section 33 of the *ASIC Act 2001* seeking copies of books and records in relation to alerts in OCC (*ASIC's Notice*) and a Direction under section 912C of the Act seeking details of any review of the Client's trading and actions taken by Interactive Brokers (*ASIC's Direction*).
9. On 3 November 2021, Interactive Brokers emailed the Client advising that because of the failure to reply it had placed the Client's account into '*Liquidation Only Status*'. Later that day, the Client contacted Interactive Brokers and sought to explain the trading strategy and conduct. Interactive Brokers then lifted the *Liquidation Only Status* on the account and provided a warning to the Client to '*ensure that you avoid any trading patterns in the future that may be viewed as potentially marking the close*'.
10. On 5 November 2021, Interactive Brokers submitted a suspicious activity report (*SAR*) to ASIC regarding the Client's trading. On this day, the Client placed the last of the Suspicious Orders.
11. The MDP has reasonable grounds to believe that Interactive Brokers contravened Rule 5.7.1(b) and Rule 5.5.2 between 10 March and 5 November 2021 of the *ASIC Market Integrity Rules (Securities Markets) 2017 (Rules)* and therefore contravened subsection 798H(1) of the Act in respect of the following conduct.

#### First Alleged Contravention – Rule 5.7.1(b)

12. Rule 5.7.1 of the Rules provides:

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

...

(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 financial product or with respect to the market for, or the price of, any financial product.*

13. The MDP considered that when the Client placed a solitary buy order on 10 March 2021 to acquire 145 shares in OCC (***First Suspicious Order***), Interactive Brokers ought reasonably to have suspected that the Client was placing that order with the intention of increasing the closing price of OCC on that day and therefore creating a false or misleading appearance with respect to the price of OCC.
14. Interactive Brokers ought reasonably to have suspected on 10 March 2021 the Client's intention was to increase the closing price because the First Suspicious Order:
  - a. was entered very late in the closing auction for OCC at 16:10:10;
  - b. was undertaken two price steps above the previous trade in OCC;
  - c. returned the price for OCC to the high of the day;
  - d. was the only buy order the Client undertook that day in OCC other than to sell shares in OCC;
  - e. was uncommercial and illogical having regard to the very small number of shares acquired at a total value of \$73.95 when having regard to:
    - i. brokerage charged for the trade, which added a meaningful percentage to the total cost per share, equal to 8 prices steps above the high of the day; and
    - ii. the total number of shares held by the Client in OCC;
  - f. was uneconomical noting the Client had sold significantly more shares at or below the price of the First Suspicious Order; and
  - g. noting the above factors, was undertaken in the Client's single largest portfolio holding in its Interactive Brokers' portfolio, as visible to Interactive Brokers.
15. Following 10 March 2021, the Client placed Suspicious Orders during the CSPA on a further 48 days up to and including 5 November 2021 where Interactive Brokers ought reasonably to have suspected the Client's intention was to increase the closing price of OCC. The circumstances of those Suspicious Orders reflected many of the characteristics of the First Suspicious Order (but not uniformly so). Collectively the Suspicious Orders were (but not on each occasion):
  - a. for a very small volume and value;
  - b. entered or amended late in the CSPA;
  - c. returned or held the price for OCC to or at the high of the day;
  - d. often entered or amended above the last traded price for OCC and on occasion by two and three price steps;
  - e. entered after earlier Suspicious Orders had triggered a MTC alert in Interactive Brokers' post trade surveillance system;
  - f. entered despite the Client having a significant number of bids resting at numerous lower price levels for a materially larger sum of shares (whilst rarely if ever having any resting orders on the sell side of the market let alone at different price levels);
  - g. inconsistent with the Client's previous trading in OCC during the relevant day including:
    - i. with regards to the quantity of shares bid as opposed to the number traded; and

- ii. being uneconomical transactions (trading at a price above which the Client had sold that day); and
  - h. undertaken in the Client's largest portfolio holding as visible to Interactive Brokers.
16. For these reasons, the MDP considered that Interactive Brokers breached Rule 5.7.1(b) for allowing each of the Suspicious Orders to be placed on the market between 10 March 2021 and 5 November 2021.
17. The MDP considered that this conduct should be treated as a single course of conduct.

### **Second Alleged Contravention – Rule 5.5.2**

18. Rule 5.5.2 provides:

*A Trading Participant must have and maintain the necessary organisational and technical resources to ensure that:*

- a. *Trading Messages submitted by the Trading Participant do not interfere with:*
    - (i) *the efficiency and integrity of a Market; or*
    - (ii) *the proper functioning of a Trading Platform; and*
  - b. *the Trading Participant complies at all times with these Rules and the operating rules of all Markets of which it is a Trading Participant.*
19. The Client's trading in OCC triggered up to 44 MTC alerts on Interactive Brokers' surveillance system between 10 February and 13 October 2021. The MDP considered this was indicative of Interactive Brokers having in place adequate automated systems to identify suspicious orders.
20. However, the MDP considered Interactive Brokers' response and follow up to the suspicious activity was inadequate. This was because:
- a. the MTC alerts were closed noting '*no further action*' required when Interactive Brokers ought reasonably to have suspected that the Client was placing the orders with the intention of creating a false or misleading appearance with respect to the price of OCC;
  - b. many of the explanations in the alerts appeared to be copied and pasted from other alerts stating matters that had little if any connection with the relevant trade being reviewed, such that the MDP was not confident that the alert reviews had taken appropriate account of the relevant order, client and market circumstances. Notable examples included MTC alerts on 18 March 2021 (MTC alert 17743) and 12 April 2021 (MTC alert 19478) in which the Client's only trading was buying OCC in the CSPA on each day whereas the commentary for the alert closure stated '*The client traded not only near the market close but also traded in both the morning and the rest of the afternoon sessions.*';

- c. the MTC alerts took too long to be closed. Whilst 13 alerts took longer than 50 days to be closed most of the alerts took over 20 days to be closed and on average were not closed for 31 days;
  - d. even after ASIC contacted Interactive Brokers on 14 October 2021 and advised that it was repeatedly observing MTC alerts triggered by the Client's trading in OCC, Interactive Brokers allowed the Client to continue trading. While Interactive Brokers made attempts to contact the Client, it did not suspend the Client's account for three weeks and only after being served with ASIC's Notice and ASIC's Direction, allowing the Client to place Suspicious Orders on a further eight days; and
  - e. it was not until 5 November 2021 that Interactive Brokers submitted a SAR to ASIC regarding the Client's trading. Even on this day, the Client placed the last of the Suspicious Orders that day.
21. The MDP considered that these circumstances demonstrated that Interactive Brokers did not have sufficient staff with the necessary skills, knowledge or experience to properly assess the alerts or those staff were not adequately supervised to ensure they were doing their job.
22. In addition to the Client's trading in OCC, there were additional circumstances to indicate the deficiencies in Interactive Brokers' post trade surveillance.
23. ASIC's Notice to Interactive Brokers required it to provide records in relation to its alert history and review of trading in seven additional listed companies, which evidenced that the delays in closing reviews was not limited to just those in OCC. Records provided showed that Interactive Brokers left open eight price support alerts in one stock for between 47 and 115 days. Records also showed delays in closing an alert in three other stocks of 78, 107 and 123 days respectively.
24. In isolation each matter above is of concern but does not alone lead to the conclusion that Interactive Brokers was in breach of Rule 5.5.2. However, the combination of:
- a. an absence of any meaningful notes recorded by Interactive Brokers in its review of the alerts for OCC of evident circumstances of concern in relation to the Suspicious Orders;
  - b. the cut and paste process of commentary between alerts where the reality of the circumstances of the Suspicious Orders was materially different from that stated in the commentary to the closure of the alert; and
  - c. the lack of action to address the trading conduct of the Client, indeed, to make enquiries of the Client prior to the contact of ASIC on 14 October 2021 evidences that the issue in regard to the alerts was not one of a failure to close alerts in good time but rather a failure to review with due care and attention the alerts in good time;

leads the MDP to conclude that the deficiencies identified above in Interactive Brokers' response to alerts generated by its automated systems were systemic.



25. Interactive Brokers' internal post trade monitoring system performed soundly, flagging the vast majority of the Suspicious Orders. The finding of failure in relation to 5.5.2 is limited to Interactive Broker's analysis of the relevant alerts, assurance that the process was being undertaken in good time with due care and attention, lack of appropriate documentation of the processes being undertaken and that concerns were appropriately and promptly escalated. This decision is in keeping with the principle articulated by Colvin J in *Australian Securities and Investments Commission v State One Stockbroking Ltd* in relation to the scope of "necessary organisational and technical resources":

*"Therefore, policies and procedures, no matter how well-crafted they may be, will not be sufficient. In almost every instance they will be required. However, of greater importance, will be training staff in what is required, systems to ensure that questionable conduct is identified and escalated to those with the necessary knowledge and experience to make decisions as to what to do in particular circumstances and a culture that encourages observance and implementation of the policies and procedures. Further, there must be sufficient time available for matters of compliance to be considered and addressed promptly. The policies and procedures must be integrated into day-to-day practice and reinforced by the way employees are supervised."*

26. The Panel notes that for a review of post trade alerts to be of value, review of higher risk alerts must begin on the relevant trading date or very shortly thereafter. Multiple intra-day alerts may even require review within hours of the relevant trades, whilst lower risk alerts should be undertaken within 3 business days of the relevant trading date. Any time taken longer than this will lead to an unmanageable process of alerts queuing each day awaiting review behind a backlog or earlier unreviewed alerts. This timeframe does not include historical alerts previously closed which may be subsequently revisited should additional information come to light. The analysis of all alerts should be concluded within a fortnight, if not earlier, of the relevant trading date so as to either be closed out or be escalated as appropriate, for potential reporting in accordance with Rule 5.11.1 of the Rules, among other reporting obligations. A timeframe greater than this runs the risk of a Market Participant failing to identify potential misconduct in good time.
27. For the above reasons, the MDP considered that it had reasonable grounds to believe Interactive Brokers breached Rule 5.5.2 as it did not maintain the necessary organisational and technical resources to ensure that (a) trading messages submitted by it did not interfere with the efficiency and integrity of the market and (b) it complied with Rule 5.7.1.

### **The determination of penalty**

28. In determining the appropriate penalty for each alleged contravention, 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*

29. The MDP characterised Interactive Brokers' first alleged contravention as negligent up until the time Interactive Brokers was contacted by ASIC on 14 October 2023. That is, while it did not believe or suspect the Client's Suspicious Orders were placed with the intent to increase the closing price of OCC, given the circumstances of the trading by the Client during the CSPA, it should have.
30. On 14 October 2021, Interactive Brokers was contacted by ASIC and alerted to ASIC's concerns regarding the Client's trading in OCC. The MDP considered Interactive Brokers' response to these concerns was inadequate. Interactive Brokers took two business days to email the Client and while it was unsuccessful in getting a response from the Client for three weeks after further attempts to contact it, it allowed the Client to continue to trade and place further Suspicious Orders. The MDP considered this conduct was reckless and was an aggravating factor.
31. The MDP characterised Interactive Brokers' second alleged contravention as negligent as it should have realised that it did not maintain the necessary organisational and technical resources to ensure that:
  - a. trading messages submitted by it did not interfere with the efficiency and integrity of a market; and
  - b. it complied with Rule 5.7.1.
32. In particular, Interactive Brokers should have been alert to its deficiencies given the lengthy delay in alerts being closed, that any reasonably diligently supervisor review would have identified a meaningful gap between the commentary used to support the closure of an alert and the genuine circumstances of the relevant order and noting that ASIC had identified the suspicious trading in a small capitalised listed company independently of Interactive Brokers. While Interactive Brokers was aware of the Client's trading when contacted by ASIC, it was only after this contact that it took steps to query the Client's trading conduct. Interactive Brokers should have been alerted to deficiencies in its organisational and technical resources at those times.
33. The MDP noted that the identified failure in organisational and technical resources was limited to Interactive Brokers' 'post trade surveillance and responses'. Notably, its automated post trade monitoring system accurately identified the suspicious conduct but it was the analysis thereafter that was lacking in its adequacy and timeliness. In summary, Interactive Brokers either lacked a sufficient number of skilled surveillance staff to adequately and diligently assess the relevant alerts or it lacked suitable monitoring and supervision to ensure those individuals undertook that task in a timely manner to allow an appropriate escalation of concerns.



*Consequences of the conduct*

34. The consequences of Interactive Brokers allowing transmission of the Suspicious Orders to the market was that they impacted the closing price of OCC on many days over a period of more than six months. However, the impact on the closing price was very small, being only one to three price steps and there does not appear to have been a lasting impact on the price for shares in OCC. Nevertheless the MDP recognised that the conduct risked damaging market integrity and noted Interactive Brokers' important gatekeeper function to avoid this risk.
35. The consequences of Interactive Brokers' failure to maintain the necessary organisational and technical resources was, in this instance, the breach of Rule 5.7.1(b) by Interactive Brokers. Had Interactive Brokers had the necessary organisational and technical resources to assess the MTC alerts generated by the Client's trading, it would have prevented the Client from continuing to place the Suspicious Orders, increasing the closing price of OCC and risking damage to market integrity.

*Compliance culture*

36. The MDP considered that the circumstances surrounding the alleged contraventions indicated a poor compliance culture at the relevant time in respect of monitoring surveillance alerts. The inappropriate copying of responses to alerts showed a lack of analysis and care when considering each alert. The delay in analysing and closing the alerts showed a lack of diligence for an essential process in protecting market integrity.
37. The lack of urgency is particularly demonstrated by the Interactive Brokers' faltering response after being contacted by ASIC. While Interactive Brokers was aware of the alerts regarding the Client, in the current circumstances, the MDP would have expected Interactive Brokers to have pressed for a response from the Client to its questions within 24 hours and, failing to receive that response, should have called the Client pressing for a response within no more than a further 24 hours before placing the account into "*Liquidation Only Status*" pending a comprehensive and satisfactory response.

*Remedial steps*

38. Interactive Brokers has stated it has taken and is taking the following remedial steps, it:
  - a. currently completes reviews of approximately 96% of alerts within 1 week and typically 100% within 30 days of the alerts being generated;
  - b. updated its trade surveillance policies and procedures to restrict client trading more promptly where it has formed reasonable suspicions of likely market manipulation, while Interactive Brokers continues its investigations;
  - c. revised policies so that, in cases of suspected market manipulation, if Interactive Brokers has not received a response to its initial enquiry to the client within 24 hours, it will call the client to seek an urgent response and if it does not receive a response within 24 hours of its phone call, Interactive Brokers

- will either restrict the client's account from trading the relevant stock, or place the account in liquidation only mode, pending the outcome of its investigation, or the client's response;
- d. will work with its software developers to improve the presentation of its reports and alerts in future responses to ASIC notices;
  - e. modified the way the surveillance team reviews alerts;
  - f. implemented an enhancement to the quality assurance protocols of its surveillance team;
  - g. updated its procedures to require the surveillance team to submit a follow-up SAR after it has decided to terminate a client account about which it has previously filed a SAR;
  - h. a weekly training session for surveillance staff;
  - i. a daily quality assurance check of each analyst's review (100% for those newly employed and thereafter 50% once more experienced), which replaces the prior practice of conducting spot check reviews of 5% of all alert types; and
  - j. hiring of additional compliance staff, with two additional staff members currently being actively recruited.
39. The MDP considered the above steps taken and being taken by Interactive Brokers were a comprehensive response to the issues observed by the MDP (in particular 38(i)), and would have been a material mitigating factor had they been implemented sooner.

### Penalty

40. The maximum penalty for a single contravention is 15,000 penalty units. The low range is up to 5,000 penalty units. The amount of one penalty unit is \$222 at the time the alleged contraventions.
41. 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 has 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.
42. The MDP considered the alleged contraventions were related as it considered the failure by Interactive Brokers to have the necessary organisational and technical resources caused it to continue to allow the Client to trade and place the Suspicious Orders. It has imposed penalties for each alleged contravention lower than if the alleged contraventions were considered in isolation.
43. Having regard to the circumstances of the first alleged contravention, the MDP

considered the contravention of Rule 5.7.1(b) to be above the middle of the low range but given penalty for the related second alleged contravention decided to impose a penalty of 2,250 penalty units (\$499,500).

44. Having regard to the circumstances of the second alleged contravention, the MDP considered the contravention of Rule 5.5.2 to be in the middle of the low range but given penalty for the related first alleged contravention decided to impose a penalty of 1,500 penalty units (\$333,000).
45. This makes the total penalty for the two alleged contraventions **\$832,500**.

### 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 5.7.1(b) and Rule 5.5.2 of the Rules, is \$3,300,000 per contravention.

Note: The maximum pecuniary penalty is 15,000 penalty units for a body corporate: see subsection 798K(2) of the Act. The amount of a penalty unit as at the time of the conduct to which this infringement notice relates was \$222: see subsection 4AA(1) of the Crimes Act 1914.

The maximum pecuniary penalty that a Court could order Interactive Brokers to pay for contravening subsection 798H(1) of the Act (a civil penalty provision), by reason of contravening Rule 5.7.1(b) and Rule 5.5.2 of the Rules, is determined by section 1317G of the Act.

Note: Under subsections 1317G(2) and (4), the maximum pecuniary penalty per contravention 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, Interactive Brokers must pay the penalty within the compliance period. The compliance period starts on the day on which this notice is given to Interactive Brokers 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:

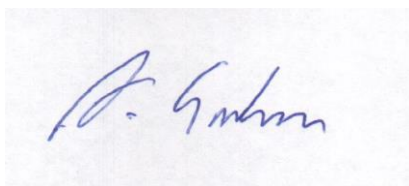
- (a) any liability of Interactive Brokers to the Commonwealth for the alleged contraventions of subsection 798H(1) of the Act is discharged; and
- (b) no civil or criminal proceedings may be brought or continued by the Commonwealth against Interactive Brokers for the conduct specified in the infringement 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 Interactive Brokers 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) Interactive Brokers is not taken to have admitted guilt or liability in relation to the alleged contraventions; and
- (e) Interactive Brokers is not taken to have contravened subsection 798H(1) of the Act.

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

Interactive Brokers 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 0321/23.



**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.