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Contents

Markets Disciplinary Panel: Infringement Notice

Recipient: BGC Partners (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



PART 7.2A OF THE CORPORATIONS REGULATIONS 2001 INFRINGEMENT NOTICE

To: BGC Partners (Australia) Pty Ltd ACN 092 873 099
Level 24, 357-363 George Street
Sydney NSW 2000

Matter: MDP 1021/21

Date given: 16 December 2021

TAKE NOTICE: The Australian Securities and Investments Commission (*ASIC*) gives this infringement notice to BGC Partners (Australia) Pty Ltd ACN 092 873 099 (*BGC*) 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 BGC must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **\$110,250**. This penalty amount represents 525 penalty units, where the amount of a penalty unit is \$210.

Unless a contrary intention appears, capitalised terms used in this notice have the same meaning as in Rules 3.3.1 and 3.3.1A of the *ASIC Market Integrity Rules (Futures Markets) 2017* (the *Rules*) as in force at the time of the conduct.

Background

1. BGC was a Market Participant in the ASX 24 Market operated by ASX at the relevant time and was required by subsection 798H(1) of the Act to comply with the Rules.
2. Part 3.3 of the Rules deals with pre-negotiated business orders. In particular, rules 3.3.1 and 3.3.1A(1) provide as follows:

3.3.1 Pre-negotiated business

(1) Where a Market Participant receives an instruction from a Client which can be executed as pre-negotiated business on a Market, the Market Participant may:

- (a) withhold transmission of the instructions in order to solicit Orders from Clients and other Market Participants of that Market

- (b) disclose details of Clients' instructions; and
- (c) aggregate Orders received from Clients in satisfaction or partsatisfaction of the originating Client Order.

(2) For the purposes of subrule (1), *pre-negotiated business* on a Market refers to Orders involving Contracts which have been:

- (a) permitted to be pre-negotiated in the operating rules of the relevant Market; and
- (b) are in numbers of Contracts greater than or equal to the number designated by the Operator of the relevant Market.

...

3.3.1 A Entry of orders

(1) If counterparties have been solicited by a Market Participant pursuant to paragraph 3.3.1(1)(a), the Market Participant must:

- (a) make an enquiry through the message facility of the Trading Platform of the relevant Market, for a market in that contract month or strategy;
- (b) wait until the period of time prescribed in the operating rules or in the procedures of the relevant Market, has elapsed since the entry of the enquiry or, if no such time is prescribed, 30 seconds; and
- (c) then immediately enter the Order on the Trading Platform of the relevant Market for execution.

3. The Markets Disciplinary Panel (*MDP*) has reasonable grounds to believe that BGC contravened Rule 3.3.1A(1) and therefore contravened subsection 798H(1) of the Act on two occasions in respect of the following conduct.

Alleged contravention 1

4. On the evidence before it, the MPD is satisfied as to the matters set out in paragraphs 5 to 10.
5. On 22 March 2019, BGC received orders from two Clients which resulted in pre-negotiated business between those Clients in relation to the following futures contracts:
 - (a) Put Options on ASX Three Year Treasury Futures Contract exercising at 98.50 and expiring May 2019 (YTK90098500P);
 - (b) Call Options on ASX Three Year Treasury Futures Contract exercising at 98.70 and expiring May 2019 (YTK9009860C);

- (c) Call Options on ASX Three Year Treasury Futures Contract exercising at 98.60 and expiring May 2019 (YTK9009870C); and
- (d) A User-Defined Combination comprising of the above Options at the following ratio: YTK90098500P:S:1; YTK9009860C:B:1; YTK9009870C:S:1 (together, the *User Defined Combination* or *UDC*).
6. The User Defined Combination was created as a strategy in the Bloomberg ASXD page approximately 8 minutes before any orders were released and executed.
7. Before submitting the orders, BGC did not make an enquiry (*RFQ*) through the message facility of the Trading Platform as required by Rule 3.3.1A(1)(a).
8. It appears that the failure to make an RFQ was the result of an unintentional operator error. The BGC employee responsible for executing the trade pressed the RFQ button in the trading platform twice at 19:12:00 before entering the first order in the UDC at 19:12:34. However, the RFQ did not go to market because the employee did not select "BGC" from the dropdown next to the RFQ button (which was a pre-requisite to the RFQ going to the market).
9. At 19:12:34, a second BGC employee (*employee 2*) entered the first User Defined Combination order (*Order 1*) on his machine (being to purchase the strategy at 0.005), equating to:
- Sell 3,000 YTK90098500P
 - Buy 3,000 YTK90098600C
 - Sell 3,000 YTK90098700C
10. At 19:12:40, employee 2 cancelled the order.
11. By reason of BGC's failure on 22 March 2019 to make an enquiry through the message facility of the Trading Platform and wait 30 seconds before entering Order 1 at 19:12:34, the MDP has reasonable grounds to believe that BGC contravened Rule 3.3.1A(1) of the Rules and therefore contravened subsection 798H(1) of the Act (*first alleged contravention*).

Alleged contravention 2

12. On the evidence before it, the MPD is satisfied as to the matters set out in paragraphs 13 to 19.
13. BGC's customary process was to release the RFQ and check the Bloomberg ASXD page to confirm that the message had been sent. A third BGC employee confused the User Defined Combination strategy in the Bloomberg ASXD page (see paragraph 6) for the RFQ.

14. As a result of this error, BGC submitted the orders a second time without making an RFQ the message facility of the Trading Platform as required by Rule 3.3.1A(1)(a). Further details are set out in paragraphs 15 to 19.
15. At 19:12:46, employee 2 re-entered the UDC order (**Order 2**):
 - Sell 3,000 YTK90098500P
 - Buy 3,000 YTK90098600C
 - Sell 3,000 YTK90098700C
16. At 19:12:50, employee 2 entered a UDC order (**Order 3**) (being to sell the strategy at 0.01):
 - Buy 3,000 YTK90098500P
 - Sell 3,000 YTK90098600C
 - Buy 3,000 YTK90098700C
17. At 19:13:00, employee 2 entered a UDC order (**Order 4**) (to sell the following strategy at 0.005) which was executed on the market:
 - Buy 1,500 YTK90098500P at 0.03
 - Sell 1,500 YTK90098600C at 0.075
 - Buy 1,500 YTK90098700C at 0.04
18. At 19:13:07, employee 2 entered a UDC order (**Order 5**) (to buy the following strategy at 0.01) which was executed on the market:
 - Sell 1,500 YTK90098500P at 0.03
 - Buy 1,500 YTK90098600C at 0.075
 - Sell 1,500 YTK90098700C at 0.035
19. At 19:13:11 the balance of 1,500 was cancelled.
20. By reason of BGC's failure on 22 March 2019 to make an enquiry through the message facility of the Trading Platform and wait 30 seconds before entering Orders 2 to 5, the MDP has reasonable grounds to believe that BGC contravened Rule 3.3.1A(1) of the Rules and therefore contravened subsection 798H(1) of the Act (**second alleged contravention**).

Identification of failure to make enquiry

21. BGC identified the failure to make an enquiry on 22 March 2019 due to BGC's SMARTS Broker surveillance system raising alerts in relation to the failure to make the relevant enquiries on Market prior to submitting the Orders. A compliance review of these alerts by BGC confirmed this failure. On 5 April 2019, BGC submitted a breach report to ASIC under section 912D of the Act.

Previous compliance issues

22. On 4 December 2012, BGC received an infringement notice MDP12/16893 (**2012 Infringement Notice**) which concerned an alleged contravention of Rules 3.1.8 and 3.1.11 of the *ASIC Market Integrity Rules (ASX 24 Market) 2010 (ASX 24 Rules)* in relation to intentionally withholding the entry of Buy and Sell orders into the ASX 24 Market to enable the Buy and Sell to transact with one another, which potentially precluded other participants from participating as counterparty to the orders. The penalty was \$45,000.
23. On 25 January 2017, BGC received an infringement notice MDP 798/16 (**2017 Infringement Notice**) which concerned an alleged contravention of Rule 3.3.1A(1) of the ASX 24 Rules (the previous equivalent of Rule 3.3.1A(1) of the Rules) in relation to a failure to make an enquiry through the message facility of the Trading Platform; and Rule 3.3.2 of the ASX 24 Rules (which requires written authorisation from a Market Participant's client before entering into pre-negotiated business on their behalf). The penalty was \$90,000.
24. On 8 June 2018, BGC submitted to ASIC a breach report (**June 2018 breach report**) under section 912D of the Act, identifying that BGC considered it had breached Rule 3.3.1A(1) as a result of sending an RFQ message to the market that incorrectly identified the relevant futures contract. ASIC issued a No Further Action Letter on that occasion.
25. On 26 July 2018, BGC submitted to ASIC a breach report (**July 2018 breach report**) under section 912D of the Act, identifying that BGC considered it had breached Rule 3.3.1A(1) as a result of releasing orders to the market after 29 seconds, rather than the minimum 30 seconds. ASIC also issued a No Further Action Letter on that occasion.

The determination of penalty

26. In determining the appropriate penalty, the MDP considered the four key factors set out in *ASIC Regulatory Guide 216: Markets Disciplinary Panel*, 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.
27. The MDP considered that BGC acted carelessly in relation to its failure to make enquiries through the message facility of the Trading Platform of the ASX 24 Market in accordance with Rule 3.3.1A(1). BGC's employees demonstrated a misunderstanding of how to enter an RFQ to the market and check the RFQ for entry on the market. In part, this failure was due to BGC's systems

- (a) permitting employees to seek to submit an RFQ without selecting “BGC” on the dropdown menu; and
 - (b) not producing a system error message on screen to indicate the failure of not selecting BGC on the dropdown menu.
28. BGC’s carelessness was particularly concerning given that BGC had identified several flaws in its Rule 3.3.1A(1) compliance processes over recent years, namely the 2017 Infringement Letter and the June 2018 and July 2018 breach reports referred to in paragraphs 23 to 25.
29. The MDP considered that ASIC’s No Further Action Letter was an appropriate response to the June 2018 and July 2018 breach reports. However, the issues identified in the breach reports and the issues the subject of the 2017 Infringement Notice should have alerted BGC that its procedures for complying with Rule 3.3.1A(1) had defects.
30. The MDP considered that although enhanced technological safeguards may not be required where a compliance system is functioning properly, BGC should have upgraded its compliance processes to include appropriate technological safeguards given its previous compliance failures.
31. It is likely that the errors resulting in the non-submission of an RFQ for the UDC could have been avoided if BGC had updated its systems to incorporate such technological safeguards. One possible technological solution would have been for an error message to appear on screen in circumstances where an employee attempted to submit an RFQ without selecting “BGC” from the dropdown menu.
32. ASIC Regulatory Guide 216 states at paragraph RG 216.94 that adverse findings in relation to conduct that occurred more than six years before the conduct being considered by the MDP may be given little weight. Given the passage of time, the MDP did not give any weight to the 2012 Infringement Notice in determining the appropriate penalty.
33. BGC has taken subsequent remedial action in relation to the alleged contraventions. BGC’s compliance manual has been updated to fully document its internal controls in relation to submitting RFQs, although this did not occur until January 2020, well after the date of the relevant conduct. BGC also appointed external consultants to deliver face-to-face training on RFQs. In addition, BGC conducted a review into risks associated with operating a night desk staffed by a smaller number of brokers. As a consequence of the review, the night desk in Australia (which undertook the relevant trades) was closed in October 2020 and BGC’s ASX24 trading responsibilities transferred to the BGC London Futures Desk.
34. There is no evidence of any losses suffered by BGC’s Clients. However, the failure to make enquiries through the message facility resulted in reduced transparency in the market.

35. BGC self-reported in a timely manner the conduct that occurred on 22 March 2019 in relation to the failure to submit an RFQ. Further, BGC co-operated with ASIC throughout the investigation and did not dispute any material facts.
36. ASIC Regulatory Guide 216 states at paragraph RG 216.102 that the amount of the penalties specified in infringement notices in relation to conduct occurring before 13 March 2019 will be of limited precedent value in determining the appropriate penalties specified in infringement notices in relation to comparable conduct occurring on or after 13 March 2019. The penalties specified in the 2017 Infringement Notice were based on the previous penalties regime, involved a number of alleged contraventions and are of limited precedent value.
37. The MDP considered that there should be no penalty for the first alleged contravention given that it was cancelled before transacting and accordingly the detriment to the market was negligible.
38. In the case of the second alleged contravention, the circumstances are such that the MDP considered a penalty should be levied despite the character of the conduct being careless (at the lowest end), the immaterial consequences of the conduct (at the lowest end), BGC having self-reported the matter in a timely manner and the meaningful remedial steps taken by BGC post 2020. It is open to the MDP not to issue an infringement notice in such circumstances. However, the failure of BGC to implement changes to its processes (to its training, compliance manual and/or technology systems before the alleged contraventions), particularly after the 2017 Infringement Notice and the June 2018 and July 2018 breach reports, was an aggravating factor in the MDP's deliberations of penalty.
39. The maximum penalty for a single contravention is 15,000 penalty units. The low range would be up to 5,000 penalty units. The appropriate penalty for the second alleged contravention is 525 penalty units, which represents 10.5% of 5,000 penalty units. This reflects a penalty at the lower end of the low range.

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 3.3.1(b) of the Rules, is \$3.15 million.

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 \$210: see subsection 4AA(1) of the *Crimes Act 1914* (Cth).

The maximum pecuniary penalty that a Court could order BGC to pay for contravening subsection 798H(1) of the Act (a civil penalty provision), by reason of contravening Rule 3.3.1(b) of the Rules, is determined by section 1317G of the Act.

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

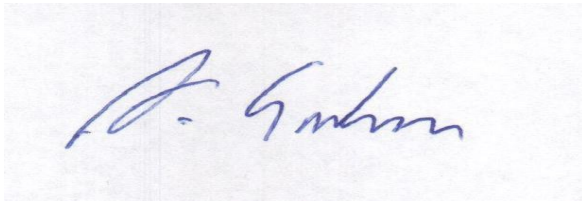
The effects of compliance with this infringement notice are:

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

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

BGC 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.

A handwritten signature in blue ink, appearing to read 'A. Graham', is centered on a light-colored rectangular background.

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.