



ASIC
Australian Securities &
Investments Commission

Commonwealth of Australia Gazette
MDP01/20, Friday, 3rd July 2020

Published by ASIC

ASIC Gazette

Contents

Markets Disciplinary Panel: Infringement Notice

Recipient: Credit Suisse Equities (Australia) 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*.

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

Available from www.asic.gov.au
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ASIC
Australian Securities &
Investments Commission



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

To: Credit Suisse Equities (Australia) Limited
ACN 068 232 708

Matter: MDP 205/20

Date given: 25 May 2020

TAKE NOTICE: The Australian Securities and Investments Commission (“ASIC”) gives this infringement notice to Credit Suisse Equities (Australia) Limited (“Credit Suisse”) 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 Credit Suisse must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of \$75,000.

Unless a contrary intention appears, the capitalised terms used in this notice have the same meaning as in Rule 1.4.3 of the ASIC Market Integrity Rules (Securities Markets) 2017 (“the Securities Rules”), Rule 1.4.3 of the ASIC Market Integrity (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. Credit Suisse was engaged as a broker to conduct an on-market buy-back of fully paid ordinary shares on behalf of three ASX listed companies, namely Client A, Client B and Client C (collectively, the “Buy Back Clients”).
2. The terms of Credit Suisse’s engagement were set out in the mandate letters sent to each of the Buy Back Clients. Under the terms of engagement, Credit Suisse was to acquire shares on-market on behalf of the Buy Back Client. The terms also stated that all buy-back transactions must be executed in the ordinary course of trading on the ASX and Chi-X Market.
3. The on-market buy-backs were conducted by Credit Suisse from 6 March 2017 to 27 February 2019. During this period, Credit Suisse entered 101,855 trades on the ASX Market in relation to the buy-backs.
4. Credit Suisse entered 121 trades between 6 March 2017 and 8 November 2018 (“the Relevant Period”) where Credit Suisse:
 - (a) matched instructions from the Buy Back Clients to purchase securities in the buy-back with instructions from the respective selling clients to sell securities; and

- (b) the transactions were entered other than by the matching of Orders on an Order Book; and
 - (c) the transactions were reported to the ASX as Trades with Price Improvement (“NXXT”).
5. Credit Suisse had disabled its Crossing System during the Relevant Period to prevent the execution of off-market crossings. However, this did not prevent the NXXT trades from being executed, and Credit Suisse’s trade surveillance system did not have alerts during the on-market buy-back to identify NXXT trades.
 6. Credit Suisse purchased a total of 54,160,067 securities across the buy-backs and, of these securities, 12,244,313 were purchased using NXXT trades.
 7. The volume of securities purchased by Credit Suisse using NXXT trades represented:
 - (a) 4% of total securities purchased in the buy-back for Client A;
 - (b) 37% of total securities purchased in the buy-back for Client B; and
 - (c) 29% of total securities purchased in the buy-back for Client C.
 8. The number of transactions entered by Credit Suisse using NXXT trades accounted for less than 0.40% of all buy-back transactions for each Buy-Back Client.
 9. The Buy Back Clients did not instruct Credit Suisse to conduct the buy-back using NXXT trades. Credit Suisse did not contest that it failed to act in accordance with client instructions by executing some transactions in the buy-back as NXXT trades.

Acting in accordance with client instructions

10. Rule 3.3.1(b) of the ASX Rules stated that:

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...

11. Rule 3.3.1(b) of the ASX Rules applied to Market Transactions entered by Credit Suisse from 22 March 2017 to 6 May 2018.
12. On 7 May 2018, the ASX Rules were replaced with the Securities Rules. Rule 3.3.1(b) of the Securities Rules applies to Market Participants in substantively the same manner as Rule 3.3.1(b) of the ASX Rules, despite minor differences in the expression of this Rule.

On-market buy-backs

13. An “on-market buy-back” is defined in section 9 of the Act to mean a buy-back by a listed corporation on a prescribed financial market in the ordinary course of trading on that market. ASX Limited is a prescribed financial market for the purposes of this

definition: see regulation 1.0.02A of the Regulations. This definition applies to both the ASX Rules and Securities Rules: see Rule 1.4.2 of the ASX Rules and the Securities Rules.

14. The phrase “ordinary course of trading” is not defined in the Act, the ASX Rules or the Securities Rules. ASIC Regulatory Guide 110: *Share buy-backs* at paragraph RG110.61 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.

15. ASIC Regulatory Guide 223: *Guidance on ASIC market integrity rules for competition in exchange markets* (“RG 223”) at paragraph RG 223.195 states that a Trade with Price Improvement that is effected other than on an Order Book is not an on-market transaction within the meaning of section 9 of the Act and is not in the ordinary course of trading. Therefore, a Trade with Price Improvement is not a transaction permitted for an on-market buy-back.

Pre-trade transparency

16. 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 Trades with Price Improvement under Rule 4.2.3 of the Competition Rules.
17. 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.
18. The Competition Rules were replaced with the Securities Rules on 7 May 2018. Rule 6.2.3 of the Securities Rules defines a “Trade with Price Improvement” in substantively the same manner as Rule 4.2.3 of the Competition Rules, despite minor differences in the expression of this term.

Details of the alleged contraventions

19. The MDP is satisfied that Credit Suisse was a Market Participant of the ASX Market

- at all relevant times and was required by subsection 798H(1) of the Act to comply with the ASX Rules, Competition Rules and the Securities Rules.
20. The MDP is satisfied that the client instructions given to Credit Suisse in respect of the on-market buy-backs were expressed in the terms of engagement in each mandate letter sent to the Buy Back Clients.
 21. Rule 6.2.3 of the Securities Rules defines a “Trade with Price Improvement” as a transaction where, among other things, the Participant acts on behalf of both a buying and a selling client, and the transaction is entered into other than by the matching of Orders on an Order Book.
 22. A Trade with Price Improvement is not a transaction permitted for an on-market buy-back (refer to paragraph 15 of this notice). The MDP considers the guidance in RG223 to correctly reflect the law and current market practice.
 23. Similar guidance was given in ASIC Regulatory Guide 265: *Guidance on ASIC market integrity rules for participants of securities markets* (“RG 265”) at paragraph RG 265.392. RG 223 was superseded by RG 265 and other ASIC Regulatory Guides on 4 May 2018.
 24. The MDP considers that the purpose of an on-market buy-back is to give all shareholders in a listed company, a reasonable opportunity to participate in the buy-back of securities in the listed company. Participants who enter trades off-market (i.e. trades other than by matching of Orders on an Order Book of a Market) will limit the participation of the buy-back to shareholders who are clients of the Participant. Shareholders of the listed company who are not clients of the Participant are not given the same opportunity to sell their shares.
 25. Participants should be guided by this purpose in the configuration of their trading systems when they are engaged to act on behalf of a listed company to conduct an on-market buy-back of securities.
 26. The MDP has reasonable grounds to believe that during the Relevant Period, Credit Suisse executed 121 NXXT trades in circumstances that contravened Rule 3.3.1(b) of the ASX Rules and Rule 3.3.1(b) of the Securities Rules (“the Client Instruction Rules”) where Credit Suisse did not act in accordance with the instructions of three clients to purchase securities in an on-market buy-back in the ordinary course of trading on the ASX Market.
 27. The table below shows the number of securities purchased by Credit Suisse for each client using NXXT transactions during the Relevant Period.

Buy Back Client	NXXT trades (number of securities purchased)	Dates
Client A	50 (832,170)	04/04/2017 – 06/06/2018
Client B	66 (9,641,625)	22/03/2017 – 08/11/2018
Client C	5 (1,770,518)	16/05/2018 – 30/05/2018

28. The MDP regards that the conduct is serious and finds that Credit Suisse was careless because employees with execution responsibilities in connection with the buyback (“execution desk employees”) were not aware that entering NXXT trades during an on-market buy-back is not in the ordinary course of trading and the conduct was permitted to continue over a prolonged period of 20 months from March 2017 to November 2018.
29. The MDP observes that the compliance culture at Credit Suisse was poor for the following reasons:
- (a) execution desk employees were given inadequate training to ensure that they were familiar with their obligations in relation to buy backs and were able to identify transactions that were executed off market during a buy-back, such as NXXT trades. There was no specific compliance training provided in relation to buybacks, instructions to staff on commencement of a buyback were lacking in detail, and there did not appear to be any reminders about these instructions during the course of the buyback; and
 - (b) even though Credit Suisse disengaged its crossing system for the execution of buy-back orders, this did not prevent the NXXT trades from being executed, and its monitoring and surveillance systems were inadequate to identify transactions of this type.
30. The MDP considers that the prolonged period over which the conduct occurred, and a poor compliance culture were aggravating factors in determining the penalty in this matter.
31. Credit Suisse did not appear to derive any gain or benefit from the conduct beyond the brokerage fees and commissions, and that the conduct did not cause financial loss to clients or third parties. The MDP is satisfied that the conduct did not impact public confidence in the market.
32. This is the first matter before the MDP in which Credit Suisse has been alleged to have contravened the Client Instruction Rules. Credit Suisse was previously sanctioned by the MDP in September 2012, July 2013, May 2016 and March 2017 for alleged contraventions of the ASX Rules that do not relate to the present matter.
33. The MDP notes that Credit Suisse lodged a breach report with ASIC after it became aware that the MDP gave an infringement notice to UBS Securities Australia Limited (“UBS”) specifying a \$120,000 penalty in relation to 6 contraventions of the same rule (see MDP 02/18) and took remedial action by:
- (a) contacting each of the Buy Back Clients about trades that were executed as NXXT Trades; and
 - (b) conducting further training for execution desk employees about the meaning of “the ordinary course of trading” and highlighting that NXXT trades and after-hours trading are not acceptable when conducting an on-market buy-back; and
 - (c) implementing further end of day and review processes to identify NXXT trades, special crossings, block trades and trades outside of normal trading hours for

supervisory review; and

- (d) updating the emails sent to execution desk employees to specifically remind them that NXXT trades are off-market transactions and cannot be entered into when conducting an on-market buy-back; and
 - (e) taking other remedial measures to monitor and encourage compliance.
34. In consideration of the mitigating factors in this matter, the MDP finds that this is the first occasion in which Credit Suisse contravened the Client Instruction Rules and that positive action was taken by Credit Suisse to lodge a breach report with ASIC and adopt remedial measures.
35. The MDP considers that it is appropriate to break down the 121 NXXT trades into three groups of alleged contraventions of subsection 798H(1) of the Act by virtue of three alleged contraventions of the Client Instruction Rules because Credit Suisse failed to follow the instructions of three clients to conduct an on-market buy-back of shares in the ordinary course of trading.
36. Credit Suisse does not contest that there have been three contraventions of the Client Instruction Rules in respect of each of the Buy Back Clients.
37. The penalty for each alleged contravention of subsection 798H(1) of the Act in this matter will be the same because the failure of Credit Suisse to follow client instructions arose from the same conduct.
38. The MDP considers a \$25,000 penalty for each contravention in this matter is appropriate having regard to the aggravating and mitigating factors in this matter.
39. The MDP notes that the conduct of Credit Suisse in this matter is similar to the UBS matter (see MDP 02/18). Although Credit Suisse entered a fewer number of NXXT trades, affected a fewer number of clients by their conduct, and self-reported the matter to ASIC, the alleged conduct by Credit Suisse occurred over a 20-month period, which is significantly longer than UBS, whose conduct occurred over a 7-month period.
40. The total penalty payable in this matter is \$75,000.

Other information

The maximum pecuniary penalty that a Court could order Credit Suisse to pay for contravening subsection 798H(1) of the Act, 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, by reason of contravening Rule 3.3.1(b), is \$600,000.

To comply with this infringement notice, Credit Suisse must pay the penalty within the compliance period. The compliance period starts on the day on which this notice is given to Credit Suisse 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 Credit Suisse 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 Credit Suisse 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 Credit Suisse 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) Credit Suisse is not taken to have admitted guilt or liability in relation to the alleged contraventions; and
- (e) Credit Suisse is not taken to have contravened subsection 798H(1) of the Act.

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

Credit Suisse 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.



Fiona Fisher

Lawyer for 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.