

ENFORCEABLE UNDERTAKING

Australian Securities and Investments Commission Act 2001

Section 93AA

The commitments in this undertaking are offered to the Australian Securities and Investments Commission (ASIC) by:

Commonwealth Bank of Australia (CBA)
ACN 123 123 124
Ground Floor Tower 1, 201 Sussex Street, Sydney NSW 2000

1. Definitions

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

Acceptance Date means the date this undertaking is accepted by ASIC.

AFSL means Australian financial services licence as that term is defined in section 761A of the Corporations Act.

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth).

CBA means Commonwealth Bank of Australia ACN 123 123 124.

Corporations Act means the *Corporations Act 2001* (Cth).

FX means foreign exchange.

Independent Expert means the person, firm or company appointed under paragraph 3.2.

Relevant Period means 1 January 2008 to 30 June 2013.

Spot FX refers to foreign exchange contracts involving the exchange of two currencies at a price (exchange rate) agreed on a date (the trade date), and which are usually settled two business days from the trade date.

WM/R London 4pm fix rate refers to a benchmark rate for Spot FX published by Thomson Reuters which, during the Relevant Period, was determined over a one-minute window from 30 seconds before 4:00 pm in London to 30 seconds after 4:00 pm (that is, from 3:59:30pm to 4:00:30pm).

2. Background

ASIC's role

- 2.1 Under section 1 of the ASIC Act, ASIC is charged with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.

Details of Conduct

- 2.2 CBA operates a financial services business within the meaning of Chapter 7 of the Corporations Act.
- 2.3 During the Relevant Period, CBA held an AFSL (no. 234945) which authorised CBA, among other things, to:
 - 2.3.1 provide financial product advice in respect of foreign exchange contracts;
 - 2.3.2 deal in foreign exchange contracts; and
 - 2.3.3 make a market in foreign exchange contracts.
- 2.4 Foreign exchange contracts involving the exchange of two currencies at a price (exchange rate) agreed on a date (the trade date), and which are usually settled two business days from the trade date, are commonly referred to as 'spot foreign exchange' (Spot FX).

CBA's Spot FX business

- 2.5 CBA's Institutional Banking and Markets (IB&M) division represents the wholesale business unit of the bank, within which sits its Global Foreign Exchange business division (Global FX).
- 2.6 Since the beginning of the Relevant Period:
 - 2.6.1 Global FX has been split into two core businesses, FX Sales and FX Trading;
 - 2.6.2 FX Trading has in turn comprised the FX Spot and FX Options desks; and
 - 2.6.3 CBA's Global FX business has comprised nine sales locations (Sydney, Melbourne, Adelaide, Brisbane, Perth, Hong Kong, Singapore, London and New York) and three trading locations (Sydney, London and New York), and has been headquartered in Sydney.
- 2.7 The FX Spot desk is responsible for pricing, managing and owning all market risk and open positions relating to Spot FX, with some minor exceptions. The role of FX Sales is to execute client orders based on prices obtained from the FX Trading desks.

- 2.8 CBA's Global FX business predominantly entered into transactions with institutional counterparties such as other banks (including central banks), sovereign wealth funds, fund managers and large corporate entities (**Clients**).

ASIC's investigation and analysis

- 2.9 In December 2014, ASIC commenced an investigation pursuant to section 13(1) of the ASIC Act into suspected contraventions of section 912A of the Corporations Act in relation to trading by CBA in Spot FX during the Relevant Period (**FX Investigation**).
- 2.10 ASIC's investigation identified the following conduct:
- 2.10.1 On two occasions in 2011 and 2013, two former CBA traders in New York acquired proprietary positions in a currency, after coming into possession of knowledge of large CBA fix orders in that currency.
- 2.10.2 On at least two occasions during the Relevant Period, when the market approached the trigger price of a stop loss order, the CBA trader in Sydney responsible for managing the order (a different trader on each occasion) traded in a manner that may have been intended to cause the trigger price to trade when it might not have traded at that time.
- 2.10.3 On a number of occasions during the Relevant Period, three CBA employees in London disclosed confidential details of pending client orders to external third parties including identification of a Client through use of a code name.

Management of fix orders

- 2.11 As part of its Spot FX business, CBA entered into FX agreements that were referenced to the WM/R London 4pm fix rate, known as 'fix orders', with its Clients.
- 2.12 It was the practice of CBA that a particular trader in London and/or New York would be responsible for managing particular fix orders in a particular currency on a particular day.
- 2.13 On two occasions, in 2011 and 2013, two CBA traders in New York (who are no longer employed by CBA) who were not responsible for managing CBA's fix position on those days acquired proprietary positions in a currency, after coming into possession of knowledge of large CBA fix orders in that currency.

Management of stop loss orders

- 2.14 As part of its Spot FX business, CBA entered into FX agreements known as 'stop loss orders' with its Clients.

- 2.15 It was the normal and accepted practice of CBA to enter into stop loss orders which indicated the direction, volume, price, currency and instructions for the fill of the order. The order would nominate a price at which, if the market traded at that price (**the trigger price**), CBA would then be required to fill the order at that or some other specified price level.
- 2.16 It was the practice of CBA that one CBA trader would be responsible for managing a particular stop loss order.
- 2.17 On at least two occasions, when the market approached the trigger price of the stop loss order, the CBA trader responsible for managing the order traded in a manner that may have been intended to cause the trigger price to trade when it might not have traded at that time. For example, on one of those occasions, the CBA trader made the following statements in a chat communication to an external party in relation to the stop loss order:

'got a tricky stop at 60'
'not big'
'but tricky'
'yep i got it done'
'was 60 one touch'
'but boy wa sity hard'
'was 59 offered quite a few'
'went long from 44'
'and kept buying smalls as is going up'
'average in long at 52'
's/l 60 one touch'
'happy days'
'had to buy 10 extra at 60 to get it done and sold thsoe at 61'
'coz had to clear all teh 59s'
'so went 60 bid 25'
'when 59 offerd'

Disclosure of confidential information

- 2.18 As part of its Spot FX business, CBA entered into different types of Spot FX agreements (**orders**) with its Clients. The orders generally included details such as the identity of the client, the relevant currency pair, and instructions for the fill of the order such as the direction, volume and price (**level**) to be traded.
- 2.19 During the Relevant Period, it was normal and accepted practice for FX traders to provide 'market colour', which could involve a disclosure of positions and interests at a general level, for purposes which included purposes of:
- 2.19.1 ascertaining whether other parties had any interest in a trade to offset the first trader's position; or

2.19.2 exchanging general information and views regarding the general state of the market.

- 2.20 On a number of occasions, a CBA salesperson located in London (who is no longer employed by CBA) disclosed details of pending orders to external third parties other than in the ordinary course of market-making activities or in the provision of 'market colour'. These disclosures included identification of the client, for example by use of a code name. On a limited number of occasions, the former CBA salesperson also disclosed to external third parties the direction, volume or level, or all three of these aspects of client orders.
- 2.21 For example, on one occasion, the former CBA salesperson disclosed '[Code name] 55 STOP FOR 40 AUD' indicating a stop loss order for that Client to buy AUD/USD at the rate of 1.0255.
- 2.22 On another occasion, in relation to a large CBA client fix order, the former CBA salesperson confirmed to an external third party the currency, direction and client identity for the particular fix order and also disclosed the general magnitude of the fix order (in contravention of CBA's policies).

CBA's systems, training, monitoring and supervision

- 2.23 During the Relevant Period, CBA's policies and training provided a general overview of the legal obligations applying to market participants in global financial transaction based markets. At least some CBA traders considered that the conduct training provided by CBA in relation to market practices was not tailored to the Spot FX trading context.
- 2.24 During the Relevant Period, CBA did not have in place an adequate monitoring and supervisory process which would have enabled it to identify conduct that might be of concern. As a result, on the occasions referred to above, inappropriate behaviour by CBA's traders went undetected by CBA's front office or compliance functions.

ASIC's views concerning the conduct

- 2.25 As a result of matters referred to in paragraphs 2.10 to 2.24, ASIC is concerned that during the Relevant Period, CBA failed to comply with its obligations under section 912A(1)(a) of the Corporations Act to do all things necessary to ensure that financial services in connection with its FX business were provided efficiently, honestly and fairly, in that CBA failed to ensure that its systems, controls, training, guidance and supervision of employees in its FX business were effective in relation to:

2.25.1 management of fix orders;

2.25.2 management of stop loss orders; and

2.25.3 external communications containing specific confidential information.

2.26 ASIC is also concerned that, by reason of the above, during the Relevant Period, CBA did not comply with Condition 2 of its AFSL, by which it was required to establish and maintain compliance measures that ensure, as far as is reasonably practicable, that it complies with its obligation to ensure that its financial services were supplied efficiently, honestly and fairly.

2.27 ASIC is concerned that:

2.27.1 the conduct of two CBA traders referred to in paragraph 2.13 in relation to fix orders was engaged in other than in the ordinary course of undertaking hedging or market-making activities on behalf of CBA;

2.27.2 the conduct of the CBA traders referred to in paragraph 2.17 in relation to stop loss orders was not consistent with the accepted and appropriate risk management strategy to execute hedging transactions close to a trigger price (conduct which may impact the reference price and result in a stop loss order being triggered); and

2.27.3 in addition to the conduct of the CBA salesperson referred to in paragraphs 2.20 to 2.22, there were some other instances of two former CBA traders disclosing confidential details of pending Client orders to external third parties including identification of a Client through use of a code name.

2.28 ASIC is concerned that the conduct referred to in paragraphs 2.13, 2.17 and 2.20, taken separately or together, had the potential to undermine confidence in the proper functioning of the market.

Acknowledgements

2.29 CBA acknowledges that the concerns expressed by ASIC in relation to the alleged facts are reasonably held and has offered an enforceable undertaking in the terms of paragraphs 3.1 to 3.18 below.

2.30 ASIC acknowledges that:

2.30.1 CBA reported its concerns about the disclosure of confidential information by the CBA salesperson to ASIC, and terminated the employment of that individual; and

2.30.2 CBA has cooperated with ASIC in the course of ASIC's investigation including by voluntarily providing details of its own enquiries and working constructively with ASIC on tasks which have involved significant resources.

3. Undertakings

- 3.1 Under section 93AA of the ASIC Act, CBA has offered, and ASIC has agreed to accept as an alternative to ASIC commencing civil proceedings or pursuing administrative action against CBA in respect of the FX Investigation, the following undertakings.

Remediation assessed by an Independent Expert

Engagement of Independent Expert

- 3.2 CBA agrees to the appointment by ASIC of an Independent Expert who, in ASIC's opinion:
- 3.2.1 has the necessary expertise, experience and operational capacity to perform the role contemplated by this enforceable undertaking;
and
 - 3.2.2 is independent of CBA, its related bodies corporate and its officers at the time of the appointment, and who will at all material times be capable of exercising objective and impartial judgement.
- 3.3 CBA agrees that the terms of engagement of the Independent Expert appointed by ASIC will include at least the following:
- 3.3.1 a statement to the effect that the work of the Independent Expert is being carried out for CBA and ASIC, and acknowledging that ASIC is relying on the work of the Independent Expert;
 - 3.3.2 a statement that upon request ASIC is to be copied into all or some communications between CBA and the Independent Expert;
 - 3.3.3 require the Independent Expert to notify ASIC where a conflict of interest arises during the engagement or when the Independent Expert becomes aware of information that adversely affects its ability to exercise objective and impartial judgement;
 - 3.3.4 require the Independent Expert to perform the work, and provide the written reports to ASIC and CBA, as set out at paragraphs 3.7, 3.9 and 3.12;
 - 3.3.5 acknowledgement that in relation to the written reports to be provided to ASIC and CBA as described in paragraphs 3.7, 3.9 and 3.12, ASIC may from time to time publicly refer to the content of the report(s), and may make a summary of the content of the report(s) or a statement that refers to the content of the report(s) public (subject to paragraph 4.4); and
 - 3.3.6 require the reports of the Independent Expert to:
 - (i) set out separately each of the factual findings or assumptions on which the Independent Expert's opinion is based;

- (ii) set out separately from the factual findings or assumptions each of the Independent Expert's opinions;
- (iii) set out the reasons for each of the Independent Expert's opinions; and
- (iv) where the Independent Expert believes that its report may be incomplete or inaccurate without some qualification, that qualification.

3.4 CBA undertakes to:

- 3.4.1 permit the Independent Expert, to the extent that it is reasonable having regard to the requirements of this enforceable undertaking, to have access to its books and to interview current employees;
- 3.4.2 give the Independent Expert any information or explanation reasonably requested by the Independent Expert of any matter in any way connected with the reports required to be prepared by the Independent Expert under this enforceable undertaking; and
- 3.4.3 otherwise reasonably assist the Independent Expert in carrying out the terms of its engagement and producing the reports required to be prepared by the Independent Expert under this enforceable undertaking.

For the avoidance of doubt, CBA is not required to provide the Independent Expert with any document or information that is reasonably the subject of a claim by CBA of legal professional privilege.

Proposed FX Program

- 3.5 CBA has undertaken a review of its Global FX business (including by way of a review of policies and conducting training) to seek to identify and rectify weaknesses in its management of fix orders, management of stop loss orders and handling of confidential information, with a focus on:
 - 3.5.1 strengthening CBA's mandatory training requirements for all FX employees, in particular concerning appropriate communications and trading behaviour;
 - 3.5.2 implementing new procedures around the use of chat rooms; and
 - 3.5.3 strengthening supervision and surveillance of FX trading desks, including the ongoing introduction of specific trade surveillance systems and enhancements to electronic communication monitoring.

CBA has from time to time reported on the progress of its review to ASIC.

- 3.6 CBA undertakes to, within 60 days (or such later date as agreed between ASIC and CBA) of the appointment of the Independent Expert, provide to ASIC and the Independent Expert a program (**FX Program**):

3.6.1 of changes which CBA has implemented, and which it proposes to implement, to its systems, controls, training, guidance and framework for monitoring and supervision of employees in its FX business in relation to:

- (i) management of fix orders;
- (ii) management of stop loss orders; and
- (iii) external communications containing specific confidential information,

to ensure compliance with CBA's obligation to ensure that relevant financial services are provided efficiently, honestly and fairly; and

3.6.2 which specifies the date by which each proposed action will be taken.

Assessment by Independent Expert

3.7 The Independent Expert is to, within three months of receiving CBA's FX Program under paragraph 3.6 (or such other date as may be agreed by CBA and ASIC):

3.7.1 conduct an assessment of the effectiveness of CBA's FX Program to prevent, detect and respond to conduct of the type identified in paragraph 2.10; and

3.7.2 provide a report (**Expert Report**) to CBA and ASIC on the assessment referred to in paragraph 3.7.1, including:

- (i) identification of any deficiencies in the FX Program; and
- (ii) recommendations for actions that, in the opinion of the Independent Expert, would be necessary for CBA to implement to rectify deficiencies identified in the Expert Report.

Provision of Final FX Program

3.8 CBA undertakes to, within 30 days (or such later date as agreed between ASIC and CBA) of receipt of the Expert Report, provide to ASIC and the Independent Expert a revised FX Program (**Final FX Program**) which:

3.8.1 incorporates the actions CBA proposes to take to implement recommendations identified in the Expert Report;

3.8.2 in respect of any recommendation identified in the Expert Report which CBA, acting reasonably, is not willing to implement, provides reasons and an alternative action (if any) that CBA proposes to take to rectify the deficiency identified in the Expert Report to which the recommendation was directed;

3.8.3 specifies the date by which each action will be taken; and

- 3.8.4 provides for all proposed changes to be implemented in a reasonable timeframe having regard to the operational requirements for implementation.
- 3.9 Within 10 days of receiving the Final FX Program, the Independent Expert is to provide a report (**Further Expert Report**), with reasons, to ASIC and CBA, reporting on whether, in the opinion of the Independent Expert and having regard to any reasons and proposed alternative actions provided by CBA under paragraph 3.8.2, the Final FX Program rectifies deficiencies in the FX Program that were identified in the Expert Report.
- 3.10 CBA and ASIC shall seek to agree the terms of the Final FX Program, each acting reasonably. If CBA and ASIC are unable to reach agreement on any of the terms of the Final FX Program, then the provisions of paragraph 3.11.3 apply to the implementation of such terms as are agreed.

Implementation of Final FX Program

- 3.11 CBA undertakes to:
- 3.11.1 ensure that sufficiently qualified and skilled staff are employed to implement the Final FX Program;
- 3.11.2 implement the Final FX Program in full, and within the timeframes specified in the Final FX Program, or such varied timeframes as are agreed by ASIC;
- 3.11.3 alternatively to paragraph 3.11.2, in the event that not all terms of the Final FX Program are agreed by CBA and ASIC, implement those terms of the Final FX Program which are agreed, within the timeframes specified in the Final FX Program, or such varied timeframes as are agreed by ASIC; and
- 3.11.4 notify ASIC and the Independent Expert:
- (i) within 10 days of implementation of the Final FX Program that the Final FX Program has been fully implemented; or
 - (ii) alternatively (if all terms of the Final FX Program have not been agreed) within 10 days of implementation of those terms of the Final FX Program that have been agreed, that those terms have been fully implemented.

Assessment of FX Program implementation by the Independent Expert

- 3.12 The Independent Expert is to, within three months after the receipt of CBA's notification under paragraph 3.11.4 (or such other date as may be agreed between CBA and ASIC), conduct an assessment of CBA's implementation of the Final FX Program and to provide a report (**Final Expert Report**) on the outcome of such assessment to CBA and ASIC as soon as practicable after that assessment.

Attestation

3.13 CBA undertakes to, upon full implementation of the Final FX Program, and thereafter annually for a period of three years, provide ASIC with an attestation signed by a senior executive of CBA responsible for its Global FX business and who has personal knowledge of the CBA's compliance with paragraph 3.11, that he or she has taken reasonable steps to satisfy himself or herself that CBA's systems and controls in its Spot FX business are appropriate and adequate to effectively manage conduct risks relating to:

3.13.1 management of fix orders;

3.13.2 management of stop loss orders; and

3.13.3 external communications containing specific confidential information.

Community benefit payment

3.14 CBA undertakes to, within 14 days of the Acceptance Date, make a community benefit payment in the amount of \$2.5 million to Financial Literacy Australia to support the further development of financial literacy education relating to changes to delivery of care in the aged care sector.

Other undertakings

3.15 CBA undertakes to pay the costs of its compliance with this enforceable undertaking.

3.16 CBA undertakes to pay the costs of the Independent Expert appointed by ASIC.

3.17 CBA undertakes to provide all documents and information requested by ASIC from time to time for the purpose of assessing CBA's compliance with the terms of this enforceable undertaking (except for material over which there is reasonably a claim by CBA of legal professional privilege).

3.18 CBA undertakes to notify ASIC as soon as reasonably practicable and in any event within five business days of becoming aware of any failure by CBA to comply with a term of this enforceable undertaking.

4. Acknowledgements

4.1 CBA acknowledges that ASIC:



4.1.1 may issue a media release on execution of this undertaking referring to its terms and to the concerns of ASIC which led to its execution;

4.1.2 may from time to time publicly refer to this undertaking;


4.1.3 will, subject to paragraph 4.4, from time to time publicly report about compliance with this undertaking; and

- 4.1.4 will make this undertaking available for public inspection.
- 4.2 In relation to the written reports to be provided to ASIC and CBA under paragraphs 3.7, 3.9 and 3.12, CBA acknowledges that ASIC:
 - 4.2.1 may issue a media release referring to the content of the reports;
 - 4.2.2 may, subject to paragraph 4.4, from time to time publicly refer to the content of the reports; and
 - 4.2.3 will make available for public inspection a summary of the content of the reports, or a statement that refers to the content of those reports.
- 4.3 CBA acknowledges that ASIC may, subject to paragraph 4.4, from time to time publicly refer to the terms of the Final FX Program.
- 4.4 ASIC acknowledges that it will not refer to any information from an expert report or the Final FX Program that:
 - 4.4.1 consists of personal information of an identified natural person whose acts or omissions are not the subject of, or a concern mentioned in, the enforceable undertaking;
 - 4.4.2 ASIC is satisfied would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of CBA or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking;
 - 4.4.3 ASIC is satisfied should not be released because it would be against the public interest to do so; or
 - 4.4.4 CBA has requested not to be released if ASIC is satisfied:
 - (i) it would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of CBA otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking; or
 - (ii) it should not be released because it would be against the public interest to do so.
- 4.5 Further CBA acknowledges that:
 - 4.5.1 ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of the FX Investigation or arising from future conduct; and
 - 4.5.2 this undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.

4.6 CBA acknowledges that this undertaking has no operative force until accepted by ASIC, and CBA and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

<p>Commonwealth Bank of Australia by Andrew John McDonald Hinchliff its attorney under power of attorney dated 24 June 2013 who declares that he is Executive General Manager, Markets, Institutional Banking and Markets of Commonwealth Bank of Australia in the presence of:</p>	<p>(X)  Attorney sign here</p> <p>(X) Andrew HINCHLIFF Attorney print name here</p>
<p>(X)  Witness sign here</p> <p>(X) DAVID SHANNON Witness print name here</p>	

Accepted by the Australian Securities and Investments Commission under s93AA of the ASIC Act by its duly authorised delegate:



Christopher Savundra
 Delegate of Australian Securities and Investments Commission
 Date: 21 DECEMBER 2016

