

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:

FOREX FINANCIAL SERVICES PTY LTD

ACN 129 217 812

AFSL 323193

Currency House
Suite 201, Level 2
23 Hunter Street
Sydney NSW 2000
(Company)

1. Definitions

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

AFSL means the Australian financial services licence issued to Forex on 1 July 2008, which has licence number 323193;

ASIC means the Australian Securities and Investments Commission;

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

ASIC's Concerns means the matters set out in paragraph 5;

Axxiom means Axxiom Forex Group;

Company means Forex Financial Services Pty Ltd, ACN 129 217 812

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

Corporations Regulations means the *Corporations Regulations 2001* (Cth);

Derivatives has the meaning given by section 761D of the Corporations Act;

Disclosure Document/s has the meaning given by section 1021B of the Corporations Act;

Expert Advisor means software written specifically for use in conjunction with trading platforms. The software advises traders which trades to make or can be programmed to automatically execute trades on a live account;

Financial Product has the meaning given in Division 3 of Part 7.1 of the Corporations Act;

Financial Service has the meaning given in Division 4 of Part 7.1 of the Corporations Act;

Financial Services Business has the meaning given by Chapter 7 of the Corporations Act;

Financial Services Law has the meaning given by section 761A of the Corporations Act;

Foreign Exchange Contracts has the meaning given by section 761A of the Corporations Act;

Forex means Forex Financial Services Pty Ltd, ACN 129 217 812;

Forex Signal System means a set of analyses that a forex trader uses to determine whether to buy or sell a currency pair at any given time;

IMA means Individually Managed Account;

Managed Investment Scheme has the meaning given by section 9 of the Corporations Act;

Master Account means the virtual accounts referred to in sub paragraph 4.1(a) of this undertaking, set up to place trades that are duplicated across the IMAs (Slave Accounts);

MDA means managed discretionary account;

MDA Service means a managed discretionary account service as defined in RG179.11;

MIS means Managed Investment Scheme;

PAMM means Forex's Percent Allocation Management Module;

PDS means Product Disclosure Statement;

Pip means the smallest price change that a given exchange rate can make, which priced to four decimal points is the equivalent of 1/100 of one percent (\$0.0001), or one basis point;

Presentations means presentations conducted by Forex on 28 June 2010 and 30 August 2010, for 25 to 30 attendees, in relation to IMAs

Retail Client has the meaning given by sections 761G and 761GA of the Corporations Act;

RG179 means ASIC Regulatory Guide 179 – Managed Discretionary Account Services;

ROI means Return on Investment;

Signal Provider means a person that provides a Forex Signal System;

Slave Account means a Forex client's IMA which receives trades duplicated from the Master Account;

T&C's means terms and conditions;

Virtual Trading Period means June 2009 to September 2010 being the period over which the Master Account of the Moderate Strategy had been virtually traded.

Website means <http://www.forexfs.com/>; and

Wholesale Client has the meaning given by section 761G of the Corporations Act.

1.2. Except so far as the contrary intention appears in this Enforceable Undertaking the interpretation provisions in Part 1.2 of the Corporations Act and Part 2 Division 4 of the ASIC Act apply for the purposes of this Enforceable Undertaking as if the provisions of those acts were provisions of this Enforceable Undertaking.

2. 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.

3. Background

3.1. Forex Financial Services Pty Ltd, ACN 129 217 812 (**Forex**), operates a financial services business within the meaning of Chapter 7 of the Corporations Act. Forex holds an Australian financial services licence number 323193 issued 1 July 2008 (**AFSL**).

3.2. Forex's core business is the provision of a service that provides 'straight through processing', which refers to a process whereby the entire trade process between clients and banks trading in foreign exchange contracts, derivatives, and precious metal derivatives occurs electronically without the need for manual intervention, facilitating faster settlement. Forex also allows clients to use Expert Advisors and Signal Providers, through their platform.

3.3. Under the AFSL, subject to condition 21, Forex is authorised to provide financial product advice for derivatives and foreign exchange contracts, deal in derivatives and foreign exchange contracts and make a market for derivatives and foreign exchange contracts for retail and wholesale clients.

3.4. Condition 21 of the AFSL precludes Forex from providing a Managed Discretionary Account (**MDA**) service to Retail Clients unless the MDA service is operated and provided pursuant to a Managed Investment Scheme (**MIS**) that is registered under section 601EB of the Corporations Act.

4. Details of Conduct

4.1. Individually Managed Accounts (IMAs)

(a) Between about March 2010 to October 2011 Forex offered clients an Individually Managed Account (IMA) that operated in the following manner:

- i. Each client opened an IMA;
- ii. Clients contributed money to their IMA;
- iii. Each IMA was 'linked' to one of three virtual Master Accounts; each of which used differing investment strategies, which were referred to as: Conservative, Moderate and Aggressive; and
- iv. The IMAs and the Master Accounts were operated by Forex using a management system called the Forex Percent Allocation Management Module (PAMM), which operated in the following manner:
 - a. The PAMM was a system that was used to allocate trades placed through the Master Account in proportion to the amount invested from the IMA. The IMA was also referred to as a Slave Account. This process allowed professional traders to duplicate trades on an unlimited number of IMAs (Slave Accounts);
 - b. These Slave Accounts were operated by Forex on a discretionary basis;
 - c. The PAMM distributed the Master Account trade signal, adjusting the size of trades in proportion to the balance of each IMA;
 - d. The Master Accounts managed by PAMM were virtual accounts, the balance of which equalled the sum of the balance of all the Slave Accounts; and
 - e. The trading activity conducted through the PAMM, including profit and loss, was proportionally allocated across all the IMAs.

- i. Forex used the client contributions with the intention of generating a financial benefit for the IMA clients. Forex had sole discretion as to the trades that were undertaken on the IMAs through the PAMM;
 - ii. Forex traded foreign exchange contracts, which were leveraged at a rate of 1:100; and
 - iii. Forex received remuneration of up to three (3) pips per trade on the IMAs, half of which was paid to a third party introducing broker.
- (b) IMAs were offered to clients with a minimum investment of \$50,000, although Forex accepted smaller investments including investments from as little as \$10,000.
- (c) Forex classified all investors who opened an IMA as Wholesale Clients. This classification was based on advice about which ASIC has concerns.
- (d) The advice of concern to ASIC, was to the effect that Forex could rely on a regulation in the Corporations Regulations which did not apply for the service being provided by Forex:
- i. The term "Retail Client" has the meaning given in sections 761G and 761GA of the Corporations Act. The term "Wholesale Client" has the meaning given by section 761G of the Corporations Act.
 - ii. Forex was advised that it could rely upon sub section 761G(7)(a) of the Corporations Act which provides that any financial product or service provided to a person that does not relate to a general insurance product or superannuation, is provided to the person as a Retail Client unless:

"The price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purpose of this paragraph as being applicable in the circumstances (but see also subsection (10))"

- iii. Section 761G(10) of the Corporations Act further provides for the Corporations Regulations to deal with how the price or value referred to in paragraph (7)(a) is to be calculated and to modify the way in which that paragraph applies in particular circumstances.
 - iv. Forex was advised that to determine whether a client was a Retail Client or a Wholesale Client it could rely upon Regulation 7.1.22, which makes arrangements about the value of derivatives. Pursuant to that regulation the value of a derivative is the face value, or the notional amount in respect of the financial product (in dollar terms) as at the date on which the relevant arrangement is entered into by the parties, and a client will be a Wholesale Client if that face value is greater than \$500,000.
 - v. Based on this advice, Forex relied on the leverage for the foreign exchange contracts of 1:100 to conclude that, for example, where a client invested \$10,000 in an IMA, the contracts to be purchased with that \$10,000 would have a face value of up to \$1 million and applying Regulation 7.1.22 concluded that the investor was a Wholesale Client.
- (e) IMAs were opened by 34 clients, with investments totalling more than \$2.6 million.
- (f) With the exception of one client, all the clients who opened an IMA invested less than \$500,000.
- (g) The IMAs were not operated as part of a registered MIS.
- (h) Forex provided all IMA clients with a PDS for commodity derivatives and margin foreign exchange. However, Forex did not provide IMA clients with a PDS in relation to the IMAs.

4.2. Representations in relation to IMAs

Forex Website

- (a) Between about May 2010 and November 2012, Forex stated on its Website that Forex IMAs had a 'target' Return on Investment (ROI) of 30-50% per annum. This representation was accompanied by the following disclaimer:

"Disclaimer: Past Performance is no guarantee or reliable indication of future results. Forex FS undertakes no responsibility for failure to meet the performances shown"

- (b) Forex used as the basis for this representation, which was not disclosed, the virtual trading results from the Master Account of the Moderate Strategy, which had been virtually trading between June 2009 and September 2010 (the **Virtual Trading Period**). During the Virtual Trading Period trading results were significantly greater than 30% to 50% per annum.
- (c) Following the opening of IMAs by clients Forex reassessed the ROI from time to time, relying on both the returns in the Virtual Trading Period and the actual returns experienced by clients. Although, in many cases, clients suffered losses on their investments in IMAs, the positive results recorded during the Virtual Trading Period were sufficient to offset those losses and the cumulative results still recorded returns greater than 30% to 50% per annum.
- (d) Between about October 2012 to March 2013 Forex also stated on its Website that one of its Signal Providers, (referred to on the Website as the Axxiom Forex Group (**Axxiom**)), had a 'target performance objective' of 40-60% per annum for a managed account operated through Forex by Axxiom. This representation was accompanied by the following disclaimer:

"Disclaimer: Please note that past performance is no guarantee or reliable indication of future results"

- (e) Forex provided links on its Website to the Axxiom website, but did not provide any information as to the basis for the statement. The Axxiom website did not refer to a 'target performance objective'.

Presentations by Forex

- (f) On 28 June 2010 and 30 August 2010 Forex conducted presentations, for 25 to 30 attendees, in relation to IMAs (**the Presentations**). During the Presentations Forex made written and oral representations to the following effect:
- i. That a capital protection policy and strategy used for the Conservative trading strategy would ensure that Forex would only trade using a small percentage of capital at any one time and there would be minimal exposure to capital loss on the Conservative trading strategy;
 - ii. Forex was a "Riskless STP Broker", that cleared all client trades through a third party liquidity provider, and did not trade against clients; and
 - iii. Despite the capital protection policy and strategy, large moves in the foreign exchange market could result in significant losses, including losses greater than the initial capital investment.

5. ASIC's concerns

5.1. ASIC is concerned that:

Obligations of Financial Services Licensees

- i. Forex was providing an IMA which was an MDA Service.
- ii. In determining whether clients were Retail Clients or Wholesale Clients, Forex was advised that subsections 761G(7)(a) and (10) applied, but ASIC considers that

Forex should have been advised to apply Regulation 7.1.18 of the Corporations Regulations and not Regulation 7.1.22:

- a. Pursuant to sections 763A and 763B of the Corporations Act, the MDA and MDA service are financial products in their own right, and should be distinguished from the financial products which are purchased through the MDA or MDA service. In ASIC's view, the fact that derivatives were purchased through the IMAs was not the determining factor as to the correct regulation to apply for the purposes of subsections 761G(7)(a) and (10) of the Corporations Act.
 - b. Regulation 7.1.18 (Retail clients and wholesale clients: price of investment-based financial products) applies to the IMAs for the purposes of determining whether clients are Retail Clients or Wholesale Clients.
 - c. Regulation 7.1.18 requires a client to invest a minimum of \$500,000 in the financial product before they are classified as a Wholesale Client.
- iii. As a result of relying upon regulation 7.1.22, ASIC is concerned that Forex incorrectly classified IMA clients as Wholesale Clients when they were Retail Clients;
 - iv. As a result, ASIC is concerned that Forex failed to comply with condition 21 of its AFSL which prohibits the operation and provision of an MDA service to a Retail Client, except through a registered MIS;
 - v. By offering an MDA service to Retail Clients other than through a registered MIS, ASIC is concerned that Forex may have contravened section 911A of the Corporations Act by carrying on a financial services business in Australia without an AFSL covering the provision of the financial services;
 - vi. By failing to comply with the conditions of its AFSL and contravening section 911A of the Corporations Act, ASIC is concerned that Forex may have contravened section 912A of the Corporations Act;

Obligation to give Product Disclosure Statement (PDS)

- vii. By offering and issuing the IMAs, which were financial products, to Retail Clients, Forex was required to give to those persons a PDS for the product;
- viii. Forex did not give a PDS to any of the clients who opened an IMA;
- ix. By failing to give a PDS for the IMAs, ASIC is concerned that Forex may have contravened s 1012B of the Corporations Act;

Representations as to the Return on Investment

- x. Pursuant to sections 769C of the Corporations Act and 12BB of the ASIC Act, representations about future matters are taken to be misleading if made without reasonable grounds;
- xi. The representation as to a 'target' ROI for the IMAs was a representation as to a future matter;
- xii. ASIC considers that it may not have been reasonable to represent the 'target' ROI of the IMAs as 30% to 50% per annum:
 - a. initially, based on only 12 months of virtual trading. ASIC considers that this was not a sufficient period of trading for Forex to be able to rely on the results as a reasonable ground for representing a target ROI;
 - b. subsequently, by relying on the significant virtual returns in the Virtual Trading Period to offset actual losses that occurred on the IMAs after the Virtual Trading Period; and
 - c. at all times this representation was made the total period of virtual and live trading was less than 2 years. ASIC considers that this was not a sufficient

period of trading for Forex to be able to rely on the results as a reasonable ground for representing a target ROI.

- xiii. The representation as to a 'target performance objective' for Axxiom was a representation as to a future matter;
- xiv. By representing that the 'target performance objective' of Axxiom was 40% to 60% per annum, based on the historical results of Axxiom's trading where Axxiom itself had not disclosed on its website any such 'target performance objective', ASIC is concerned that Forex may not have had reasonable grounds for making the representation;
- xv. By making representations as to future matters without sufficient reasonable grounds for making the representations, ASIC is concerned that Forex may have made representations that were misleading and may have contravened section 1041E of the Corporations Act and sections 12DA, 12DB and 12DF of the ASIC Act;

Representations as to risk and protection

- xvi. By reason of Forex making representations at the Presentations as to a capital protection policy and strategy in relation to the IMAs and asserting that Forex was a 'Riskless STP Broker', ASIC is concerned that attendees of the Presentations could have been misled as to the risks associated with investing in the IMAs, including that the IMAs were a low risk investment. ASIC is concerned that by engaging in this conduct Forex may have contravened section 1041E of the Corporations Act and sections 12DA, 12DB and 12DF of the ASIC Act; and
- xvii. Although Forex advised attendees at the Presentations that, despite the capital protection policy and strategy, large moves in the foreign exchange market could result in significant losses, including losses greater than the initial capital investment. Forex did not inform attendees about the compounding effect of trading with small amounts of capital when those amounts were leveraged at a rate of 1:100. ASIC is concerned that by reason of these representations attendees of

the Presentations could have been misled as to the level of risk associated with the IMAs Conservative Strategy and that Forex may have contravened section 1041E of the Corporations Act and sections 12DA, 12DB and 12DF of the ASIC Act.

6. Acknowledgement of concerns

6.1. Forex acknowledges ASIC's concerns and that they are reasonably held.

7. Undertakings

7.1. Under s93AA of the ASIC Act, Forex has offered, and ASIC has agreed to accept the following undertakings as an alternative to commencing civil proceedings or pursuing an administrative action in relation to the matters referred to in paragraph 5 of this undertaking.

7.2. The Company undertakes that it will pay the costs of its compliance with this enforceable undertaking.

7.3. The Company undertakes not to provide financial services contrary to the requirements of the Corporations Act, the ASIC Act or their AFSL.

7.4. The Company undertakes that it will not offer IMAs, MDAs or MDA Services to retail clients for a period of 10 years from the date of acceptance of this undertaking by ASIC.

Continuing Professional Education

7.5. The Company undertakes that all Directors of the Company will engage in the following continuing professional education within 12 months of the date of acceptance of this undertaking by ASIC:

(a) Individual assessment in accordance with paragraphs 146.121 to 146.123 of ASIC Regulatory Guide 146, Licensing: Training of financial product advisers; and

(b) A course in compliance, from Financial Education Professionals Pty Ltd (ABN 51 096 944 062).

7.6. The Company undertakes to provide ASIC a statutory declaration, within 28 days of completing the continuing professional education referred to in paragraph 7.5, confirming that the continuing professional education referred to in paragraph 7.5 has been completed by the Directors of the Company, setting out the details of the completed continuing professional education undertaken, and annexing copies of any document(s) which confirm completion of the continuing professional education..

Compliance Review

7.7. Within 45 days of the date of this undertaking the Company must appoint a person who has particular expertise in the area of compliance who is independent of the Company, the Company's officers and the Company's current compliance consultants, to be the Company's independent expert for the purposes of this undertaking (**Independent Expert**).

7.8. The Independent Expert and the Independent Expert's terms of engagement must be approved by ASIC before the Independent Expert is engaged. The Company must advise ASIC of the expertise and prior association of the proposed Independent Expert with the Company and its related bodies corporate and officers at the time approval is sought from ASIC. The terms of engagement may only be varied with the agreement of ASIC.

7.9. The terms of engagement must ensure the Independent Expert:

(a) conducts an assessment of:

- i. the financial products and financial services offered by Forex, including whether each of those financial products and financial services comply with Forex's AFSL, the Corporations Act, the ASIC Act, and any other applicable legislation, regulations and rules;

- ii. Forex's arrangements for ensuring any new financial products and financial services that may be introduced comply with Forex's AFSL and all applicable legislation, regulations and rules; and
- iii. any new financial product or financial service offered or proposed to be offered by Forex in the 12 months following the date of this undertaking including whether those financial products and financial services comply with Forex's AFSL, the Corporations Act, the ASIC Act, and any other applicable legislation, regulations and rules.

(b) provides:

- i. a written report to the Company and ASIC in relation to (a)(i) and (ii) above within 6 months after the date of the undertaking (**First Expert Report**), or such later time as may be agreed with ASIC; and
- ii. a written report to the Company and ASIC in relation to (a)(iii) above within 13 months after the date of the undertaking (**Second Expert Report**), or such later time as may be agreed with ASIC.

7.10. If the Independent Expert identifies non-compliance and/or deficiencies in the assessment referred to in paragraph 7.9, the terms of engagement must ensure the Independent Expert sets out in the First Expert Report and/or the Second Expert Report details of the non-compliance and/or deficiencies and recommendations on how to rectify the non-compliance and/or deficiencies and a reasonable time for a rectification program to be commenced and implemented.

7.11. The Company must consider the recommendations made by the Independent Expert to rectify the non-compliance and/or deficiencies and then provide to ASIC a plan (**Remedial Action Plan**) setting out the action it proposes to take to rectify the non-compliance and/or deficiencies and specifying the reasonable time in which this action will be taken. The Company must provide this plan to ASIC within one month of the date that the First Expert Report and/or Second Expert Report was received by ASIC. If ASIC requires any reasonable modifications to the Remedial Action Plan, the Company must implement the Remedial Action Plan as modified.

7.12. The Company must implement the Remedial Action Plan within the time specified. The Company will provide to ASIC a written report detailing the implementation of the Remedial Action Plan within 14 days of the final step in the Remedial Action Plan being completed.

7.13. The Company must:

- (a) permit the Independent Expert, to the extent that is reasonable having regard to the requirements of this undertaking, to have access to its books, to interview any present employee and to consult with ASIC and disclose to ASIC any information obtained by the Independent Expert in the course of carrying out their reviews:
- (b) give the Independent Expert any information or explanation reasonably requested by the Independent Expert of any matter in any way connected with the report required to be prepared by the Independent Expert under this undertaking; and
- (c) otherwise reasonably assist the Independent Experts in conducting the reviews and producing the First Expert Report and the Second Expert Report.

7.14. The Company will ensure that the terms of engagement of the relevant Independent Expert will include a requirement that the First Expert Report and the Second Expert Report will:

- (a) set out the steps that the Independent Expert has taken to fulfil his or her task, including but not limited to:
 - i. the people that have assisted the Independent Expert and in what way;
 - ii. the personnel that have been interviewed; and
 - iii. the documents that have been assessed:
- (b) set out any limitations or qualifications to the First Expert Report and the Second Expert Report:

- (c) list those documents or extracts of documents most relevant (in the view of the Independent Expert) in producing the First Expert Report and the Second Expert Report; and
- (d) otherwise comply (to the extent applicable) with those paragraphs of the Federal Court of Australia Practice Direction 'Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia', that fall under the sub-heading 'The form of the expert evidence' (see Annexure A1).

7.15. The Company must provide reasonable access and assistance and take all reasonable steps to allow the Independent Expert to be able to fulfil the terms of their appointment.

7.16. The address for providing ASIC with any document, including but not limited to any plan or report, which this undertaking requires to be provided to ASIC is:

Senior Manager, Investment Banks
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

Requests for documentation

7.17. The Company will provide all documents and information requested by ASIC from time to time for the purpose of assessing the Company's compliance with the terms of this enforceable undertaking; subject to a valid claim of legal professional privilege.

8. Acknowledgements

8.1. The Company acknowledges that ASIC:

- (a) 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;
- (b) may from time to time publicly refer to this undertaking; and
- (c) will make this undertaking available for public inspection.

8.2. Further the Company acknowledges that:

- (a) 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 ASIC's concerns in this enforceable undertaking or arising from future conduct;
- (b) 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.

8.3. The Company acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered an enforceable undertaking in the terms of paragraphs 7.1 to 7.17 above.

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

8.5. Nothing contained in this undertaking constitutes an admission by the Company.

THE COMMON SEAL of THE)
COMPANY was affixed in accordance with)
the Corporations Act 2001 in the presence of:



RH

..... Director

DF

..... Director/Company Secretary

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

David McGuinness

.....
David McGuinness

Delegate of Australian Securities and Investments Commission

Date: *19 February 2014*