



## 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:

**Gabriel Nakhl**

**Address known to ASIC**

### 1. Definitions

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

**Administrative services** means filing, photocopying, coordinating the payment of invoices and the receipt of fees and commissions, coordinating client service activities, such as birthday cards, newsletters and the timing of client meetings. Administrative services does not include any contact with persons to whom financial services (within the meaning of s761A Corporations Act) are provided by the employer AFSL-holder otherwise than in writing.

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

**ASX** means Australian Securities Exchange Limited.

**AFS** means Australian Financial Services Limited (in liquidation) ACN 116 900 362. AFS held AFSL 297239 from 18 April 2006 to 2 May 2013.

**AFSL** means Australian Financial Services licence.

**Clients** means people who received financial product advice from Mr Nakhl.

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

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

**ETOs** means exchange traded options.

**SMSF** means self-managed superannuation fund.

**SydFA** means SydFA Pty Ltd, ACN 146 005 591. SydFA has held AFSL 285022 since 2 March 2011.

**Sydney Sports Car Hire** means the sports car and motorcycle hire business carried on by Mr Nakhl in his personal capacity.

**The Salisbury Group** means The Salisbury Group Pty Ltd (in liquidation) ACN 089 332 918. The Salisbury Group has held AFSL 225379 since 17 February 2003.

### 2. Background

#### 2.1 ASIC's role

2.1.1 Under s1 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.

## **2.2 Mr Nakhl's authority to carry on a financial services business**

2.2.1 Between 24 June 2008 and 20 February 2009 Mr Nakhl was an authorised representative of The Salisbury Group and was authorised to give financial product advice and deal in relation to financial products including securities, superannuation and derivatives.

2.2.2 Between 20 February 2009 and 30 April 2011, Mr Nakhl was an authorised representative of AFS. Mr Nakhl was authorised to give financial product advice and deal in relation to financial products including securities and superannuation. During this period Mr Nakhl was not authorised to give advice or deal in relation to derivatives.

2.2.3 On 26 August 2010:

2.2.3.1 SydFA was incorporated;

2.2.3.2 Mr Nakhl became the sole director of SydFA, and has been the sole director since;

2.2.3.3 Mr Nakhl commenced day-to-day control of SydFA, and has had day-to-day control since this date.

2.2.4 On 2 March 2011 SydFA obtained an AFSL. Mr Nakhl was the only person who provided financial advice on behalf of SydFA.

2.2.5 Since 2 March 2011, Mr Nakhl has been authorised to give financial product advice and deal in relation to financial products including securities, superannuation and derivatives.

## **2.3 Details of Mr Nakhl's Conduct**

2.3.1 Mr Nakhl, between about June 2009 and 30 April 2011, while an Authorised Representative of AFS and, between about 2 March 2011 and at least 31 October 2012, while a director of SydFA:

2.3.1.1 advised a number of Clients to set up an SMSF (SMSF Clients);

2.3.1.2 advised a number of Clients to invest in ETOs, including some SMSF Clients and represented that he was good at trading ETOs and that he could manage the risks of trading in ETOs;

2.3.1.3 represented to some Clients that he could arrange capital protection for the funds invested in ETOs;

2.3.1.4 represented to some Clients that he could provide them with access to a deposit account that offered a higher interest rate than similar products available to those Clients;

2.3.1.5 arranged for a number of Clients (including those Clients referred to in clause 2.3.1.4) to advance money to Mr Nakhl and/or SydFA.

2.3.2 Mr Nakhl used the funds referred to in 2.3.1.5 to, among other things:

- 2.3.2.1 buy assets for SydFA and Sydney Sports Car Hire;
- 2.3.2.2 pay running costs of SydFA and Sydney Sports Car Hire;
- 2.3.2.3 fund ETO trading in his own name and in the name of third parties;
- 2.3.2.4 repay capital invested by other Clients;
- 2.3.2.5 pay personal expenditure.

2.3.3 Between about June 2009 and July 2012, Mr Nakhl received approximately \$7.4m in one or more of the circumstances set out in clause

## **2.4 ASIC's investigation**

2.4.1 ASIC is investigating Mr Nakhl's conduct.

## **3. ASIC's concerns**

### **3.1 Section 911A(1) Corporations Act – the need for an AFSL**

3.1.1 ASIC is concerned that during the period 20 February 2009 to 2 March 2011 Mr Nakhl gave financial product advice in relation to and dealt in ETOs when he was not authorised to give financial product advice in relation to or deal in ETOs.

### **3.2 Section 945A(1) Corporations Act – the requirement to have a reasonable basis for advice**

3.2.1 ETOs are high risk investments and are only suitable for investors with high risk tolerances.

3.2.2 ASIC is concerned that Mr Nakhl advised Clients who did not have high risk tolerances to invest in ETOs and that this advice was not reasonable in all of the circumstances.

3.2.3 ASIC notes that s945A(1) was repealed on 1 July 2013.

### **3.3 Section 1041E Corporations Act – false or misleading statements and Section 12DA ASIC Act – misleading or deceptive conduct**

3.3.1 ASIC is concerned that Mr Nakhl made false or misleading representations to Clients and engaged in misleading and deceptive conduct in relation to the provision of financial services; in particular that Mr Nakhl represented to some Clients that:

- 3.3.1.1 trading in ETOs is low risk in circumstances where trading in ETOs is high risk;
- 3.3.1.2 he could make money for them by trading ETOs on their behalf in circumstances where Mr Nakhl did not have a reasonable basis for this representation;
- 3.3.1.3 he could arrange capital protection for the funds invested in ETOs in circumstances where he knew he would be unable to arrange such protection;
- 3.3.1.4 he could provide them with access to a deposit account that offered a higher interest rate than other products available to

the Clients in circumstances where Mr Nakhl did not have access to such a high interest rate deposit account.

### **3.4 Section 180(1) Corporations Act – general duties of directors**

3.4.1 Between 2 March 2011 and the date of this enforceable undertaking, ASIC is concerned that Mr Nakhl, in his capacity as director of SydFA, did not discharge his duties with the degree of care and diligence that a reasonable person would have exercised if they were a director of a corporation in SydFA's circumstances and were a director of SydFA with the same responsibilities as Mr Nakhl. In particular, Mr Nakhl, did not discharge his duties by:

- 3.4.1.1 failing to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly pursuant to s912A(1)(a) Corporations Act;
- 3.4.1.2 not having adequate arrangements to manage conflicts of interest pursuant to s912A(1)(a) Corporations Act;
- 3.4.1.3 not ensuring that SydFA took reasonable steps to ensure that he complied with the financial services laws pursuant to s912A(1)(ca) Corporations Act;
- 3.4.1.4 not ensuring that SydFA had adequate resources to provide the financial services it was authorised to provide pursuant to s912A(1)(d) Corporations Act;
- 3.4.1.5 not ensuring SydFA ensured that he was adequately trained and was competent to provide financial services pursuant to s912A(1)(f) Corporations Act.

### **3.5 Section 182(1) Corporations Act – use of position**

3.5.1 Between 2 March 2011 and the date of this enforceable undertaking, ASIC is concerned that Mr Nakhl, in his capacity as director of SydFA, improperly used his position to gain an advantage for himself by using some Clients' funds otherwise than in accordance with the purposes for which the Clients understood they were being used.

### **3.6 Acknowledgement of concerns**

- 3.6.1 Mr Nakhl acknowledges:
  - 3.6.1.1 ASIC's concerns; and
  - 3.6.1.2 that those concerns are reasonably held.

## **4. Undertakings**

- 4.1 Under s93AA of the ASIC Act, Mr Nakhl has offered, and ASIC has agreed to accept, as an alternative to ASIC taking administrative action and/or substantive civil proceedings in relation to Mr Nakhl, the following undertakings. Mr Nakhl undertakes:
  - 4.1.1 not to provide any financial services from the time of acceptance of this enforceable undertaking by ASIC;
  - 4.1.2 not to exercise or attempt to exercise any influence in any manner whatsoever in relation to the provision of financial services;

- 4.1.3 not to take any part in the management of corporations for a period of 15 years from the date of acceptance of this enforceable undertaking by ASIC;
- 4.1.4 not to have any involvement in or exercise any influence in any decision-making by any AFSL holder for a period of 15 years from the date of acceptance of this enforceable undertaking by ASIC, including in relation to:
  - 4.1.4.1 recruitment, management, supervision or training of staff and/or representatives;
  - 4.1.4.2 investments and investment strategies;
  - 4.1.4.3 compliance with any obligations arising from holding an AFSL;
  - 4.1.4.4 any operational committees of any AFSL holder, including but not limited to any audit committee, investments committee (including selection of approved product lists) or compliance committee;
  - 4.1.4.5 to pay his costs of compliance with this enforceable undertaking;
  - 4.1.4.6 to provide, within 14 days, all documents and information requested by ASIC from time to time for the purpose of assessing his compliance with the terms of this enforceable undertaking.
- 4.2 Without in any way limiting the undertaking in clause 4.1 above, Mr Nakhil undertakes, from the time of acceptance of this enforceable undertaking by ASIC, not to:
  - 4.2.1 do any act or engage in any conduct as a representative of an AFSL-holder;
  - 4.2.2 hold himself out as a representative of an AFSL-holder;
  - 4.2.3 carry on a business in relation to financial products or financial services, within the meaning of s761A Corporations Act, either directly or indirectly as director, partner, sole trader, employee, manager, servant or agent, other than as an employee providing administrative services to an AFSL holder;
  - 4.2.4 hold out that he is in anyway authorised to provide a particular financial service or services, or that he is in anyway authorised to provide financial services generally;
  - 4.2.5 apply to ASIC under section 913A Corporations Act;
  - 4.2.6 allow an AFSL-holder to give him a written notice authorising him to provide a specified financial service or financial services on its behalf, pursuant to s916A(1) Corporations Act.

## **5. Acknowledgements**

- 5.1 Mr Nakhil acknowledges that ASIC:

- 5.1.1 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;
  - 5.1.2 may from time to time publicly refer to this undertaking; and
  - 5.1.3 will make this undertaking available for public inspection.
- 5.2 Further Mr Nakhl acknowledges that:
- 5.2.1 ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance, pursue a criminal prosecution or lay charges in relation to any contravention that is the subject of ASIC's concerns in this enforceable undertaking;
  - 5.2.2 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;
  - 5.2.3 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; and
  - 5.2.4 this enforceable undertaking has no operative force until accepted by ASIC, and Mr Nakhl and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

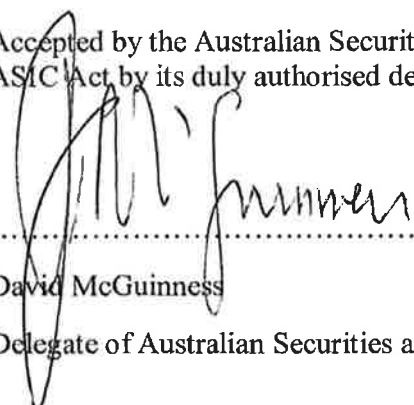


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Gabriel Nakhl

Dated: 7/11/13

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



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David McGuinness

Delegate of Australian Securities and Investments Commission

Dated: 14/1/2013