

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

2017 - 2018

Division/Agency: Australian Securities and Investment Commission

Question No: 104

Topic: Forex Investigation

Reference: Written

Senator: Ketter, Chris

Question:

1. Between December 2016 and May 2017, ASIC has entered into enforceable undertakings with CBA, NAB, Westpac, ANZ and Macquarie Bank with regard to inadequacies at their foreign exchange desks.
2. Is ASIC considering further action against persons involved in the inadequacies referred to?
3. Has ASIC quantified the loss or part of the loss to customers from the misconduct described? What is the amount of the loss?
4. For each instance in which stop-loss orders have been triggered, is ASIC aware of the amount of the losses? If yes, what was the amount of the losses?
5. Has remediation been undertaken by each of the five banks involved or is it proposed? Have the customers impacted been contacted by the banks?
6. Has action been taken, either by the banks involved, or by the regulator against any of the individuals involved?
7. Was action against the individuals involved a condition of the any of the undertakings?
8. On Friday, 26 May 2017, ASIC issued its Report 525 - Promoting better behaviour: Spot FX. Paragraph 23 of the ASIC Report on promoting better conduct in FX, released on Friday states that "The spot FX market has been the focus of regulatory scrutiny globally in recent years. Regulatory action against banks for misconduct and control failings in their spot FX businesses has been taken by a number of international regulators (including the UK Financial Conduct Authority, the US Commodity Futures Trading Commission, the US Department of Justice, and the Swiss Financial Market Supervisory Authority)."
 - a. Please identify the instances of regulatory action taken by the UK FCA, the US Commodity Futures Trading Commission, the US Department of Justice and the Swiss Financial Market Supervisory Authority that are referred to.
9. In a report on 22 December 2016 in relation to the CBA and NAB undertaking, the Australian Financial Review stated that "[t]he Australian Financial Review understands that because the trading took place overseas jurisdictional complexities led ASIC to accept an undertaking." Is this statement correct? Could ASIC provide a further explanation.
10. Did any of the conduct described in the media releases take place in Australia?
11. Is ASIC taking action against individuals involved in these breaches?
12. What consequences have occurred relation to the following example, described in ASIC's December 2016 media release:

"a NAB employee on an offshore spot FX desk, acting together with an employee of another Australian bank, shared confidential information and entered offers into the trading platform without any apparent legitimate commercial reason for placing the offers".

13. For each of the three media releases and in relation to CBA, NAB, Westpac, ANZ and Macquarie Bank, please provide the following information:
 - a. At which date and time was each bank provided with a first draft of the media release.
14. Paragraphs 18-20 of ASIC's Report 525: Promoting Better Behaviour – Spot FX, released in May 2017, states that there are a number of provisions of the law that may be relevant to conduct issues in the spot FX market with regard to those provisions.
 - a. Does ASIC consider that any of these provisions were breached by the banks or individuals referred to in the 3 media releases?
 - b. Does ASIC consider any of the conduct described in the media releases to constitute or to be analogous to insider trading?
 - c. Does ASIC consider any of the conduct described in the media releases to constitute or to be analogous to market manipulation?
 - d. Does ASIC consider any of the conduct described in the media releases to constitute or to be analogous to 'spoofing'?

Answer:

1. No response required.
2. ASIC is not presently contemplating further action to be taken against individuals involved in the inadequacies referred to in the enforceable undertakings. As part of the enforceable undertakings, each of the banks acknowledged ASIC's concerns as to systems and controls failings during the period under investigation (1 January 2008 to 30 June 2013) and have undertaken to strengthen, among other things, their monitoring and supervision frameworks to ensure they can adequately detect, prevent and respond to specified conduct risks in the future.
3. ASIC has not been able to quantify any loss to customers from the misconduct described in the enforceable undertakings. ASIC was concerned that the conduct had the potential to undermine confidence in the integrity and/or proper functioning of the foreign exchange market, to the detriment of all end users and the wider economy. ASIC notes that customers of the banks' wholesale foreign exchange businesses were predominantly institutional counterparties such as other banks (including central banks), sovereign wealth funds, fund managers and large corporate entities. ASIC has not identified any evidence to indicate that any retail customers were directly impacted by the conduct of the banks.
4. ASIC has not been able to identify any losses incurred by customers in relation to each instance of stop-loss triggering described in the enforceable undertakings. The identification of any losses would require, among other things, a view as to how the currency may have traded in the absence of the particular bank's trading and details about each customer's level of exposure to the relevant currency on a given day (at least part of which may have been acquired through transactions undertaken with other institutions).
5. The enforceable undertakings require the banks to implement measures to strengthen the systems and controls in their wholesale foreign exchange businesses and thereafter to provide annual attestations to ASIC for a period of three years that those systems and controls remain adequate. As noted above, ASIC has not been able to quantify any losses suffered by customers or identify that any retail customers were directly impacted by the banks' conduct. ASIC is not aware whether the banks have contacted any customers that may have been potentially impacted. ASIC notes that customers of the banks' wholesale foreign exchange businesses were predominantly institutional

counterparties such as other banks (including central banks), sovereign wealth funds, fund managers and large corporate entities.

6. ASIC has not taken action against individuals involved in the occasions of misconduct referred to in the enforceable undertakings. ASIC understands that during the course of ASIC's investigation, a number of the banks' employees were subject to internal investigations by the banks, some of which resulted in suspension and/or termination of the individual's employment contract. ASIC further notes that a number of the occasions of misconduct referred to in the enforceable undertakings involved former employees of the banks.
7. Action by the banks against the individuals involved was not a condition of any of the enforceable undertakings. The focus of the enforceable undertakings was to address ASIC's principal concern in respect of the systems and control failings that may have allowed the misconduct specified in the enforceable undertakings, to occur. Please also refer to response to question 6 above.
8. The instances of regulatory action taken by the international regulators referred to in paragraph 23 of ASIC's Report 525 *Promoting better behaviour: Spot FX*, includes the following:
 - Financial Conduct Authority (UK), press release, *FCA fines five banks £1.1 billion for FX failings and announces industry-wide remediation programme*, 12 November 2014, www.fca.org.uk/news/press-releases/fca-fines-five-banks-%C2%A311-billion-fx-failings-and-announces-industry-wide
 - Commodities Futures Trading Commission (US), press release, PR7056-14: *CFTC orders five banks to pay over \$1.4 billion in penalties for attempted manipulation of foreign exchange benchmark rates*, 12 November 2014, www.cftc.gov/PressRoom/PressReleases/pr7056-14
 - Department of Justice (US), press release, *Five major banks agree to parent-level guilty pleas*, 20 May 2015, www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas
 - Swiss Financial Markets Supervisory Authority (FINMA), press release, *FINMA sanctions foreign exchange manipulation at UBS*, 12 November 2014, www.finma.ch/en/news/2014/11/mm-ubs-devisenhandel-20141112/
9. ASIC's consideration of which enforcement tool is appropriate in a particular case always involves close consideration of the circumstances of each case. In this instance, the enforceable undertakings provided timely outcomes which effectively addressed ASIC's principal concerns relating to systems and controls failings, by providing that the banks will strengthen the systems and controls in their wholesale foreign exchange businesses globally and then provide annual attestations to ASIC as to the ongoing adequacy of those controls for a period of three years. Jurisdictional complexities would have been one of a number of factors which were considered by ASIC in determining that enforceable undertakings provided the most effective and appropriate regulatory outcome in the circumstances of these cases.
10. ASIC's foreign exchange investigations identified instances of misconduct across a number of geographic locations, including in Australia. Under the enforceable undertakings, the banks will develop and implement a program of changes to their systems and controls which will apply to their domestic and offshore wholesale foreign exchange businesses.
11. ASIC is not presently contemplating taking action against the individuals involved. Please refer to responses to parts 6 and 7 above.

12. The individuals involved in the misconduct described were former employees of those banks and were located offshore. As a consequence of this conduct and as required under the enforceable undertakings, the banks involved will develop and implement a program of changes to their existing systems, controls, training, guidance and framework for monitoring and supervision of employees in their spot foreign exchange businesses, to prevent, detect and respond to this type of misconduct.
13. Each bank was provided with a first draft of the media release at the following times and dates:

Commonwealth Bank of Australia	11:57 PM, 20 December 2016
National Australia Bank Limited	11:43 PM, 20 December 2016
Westpac Banking Corporation	12:24 PM, 14 March 2017
ANZ Banking Group Limited	12:24 PM, 14 March 2017
Macquarie Bank Limited	09:45 AM, 19 May 2017

14. (a) ASIC was concerned that the banks failed to comply with their obligations as Australian Financial Services licensees under section 912A of the Corporations Act. Each of the banks acknowledged this concern as part of the enforceable undertakings. ASIC also considers that some of the conduct described in the media releases share similar features to insider trading or market manipulation and, in appropriate cases where there is sufficient evidence, these may constitute insider trading or market manipulation under the Corporations Act.
- (b) Please refer to response to (a) above.
- (c) Please refer to response to (a) above.
- (d) Please refer to response to (a) above. ‘Spoofing’ may be considered a form of market manipulation.