Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

23 September 2013

Re: Inquiry into the performance of the Australian Securities and Investments Commission and the investigation of possible misconduct by J.P. Morgan Bank in the OTC derivative trading markets

Dear Senators,

I refer to the Senate's inquiry into the Australian Securities and Investments Commission (ASIC) due to concerns over the performance of the regulator.

To assist the Senate in its inquiry I have provided a submission which responds to several terms of reference which the Senate believes are of particular importance. These are:

- the accountability of ASIC and whether this needs to be strengthened,
- the workings of ASIC's collaboration and working relationships, with other regulators and law enforcement bodies, and
- protections afforded by ASIC to corporate and private whistleblowers.

I understand that my submission to the Senate is protected. I also understand that protection should be expected in accordance with Part 9.4AAA of the Corporations Act 2001, as well as the Public Interest Disclosure Act 2013.

I believe my submission will assist the Senate in understanding how things are done at ASIC. In turn this may assist ASIC in its performance.

My background is in the finance and banking industries. I am also a former employee of ASIC.

The following is background information so the Senate may understand the reasons for my report to ASIC

I was employed at the Sydney office of J.P. Morgan between 2004 and 2007. My role was within a team that was involved in the post-trade management of J.P. Morgan's OTC equity derivative business for the Asia-Pacific region.

J.P. Morgan is one of the world's biggest investment banks and advises that it is one of the largest operators in the OTC equity derivative markets. In 2006 the Bank of International Settlements estimated the total outstanding notional amount for OTC equity derivatives to be approximately USD550 billion for the Asia region. J.P. Morgan is considered "*too big to fail".*

In the year prior to the GFC, I became increasingly concerned by certain practices within the bank that appeared to circumvent regulatory commitments and risk management expectations. Briefly these include:

- misleading reports being provided to head-office and the Federal Reserve Bank of New York on the number of outstanding trades,
- trades not being booked into the system until they were "in-the-money",

- trades not booked into systems and only being tracked by paper-based legal agreements which would be "torn-up" if required thereby leaving no trace,

- by-passing or attempting to by-pass the opinions of in-house lawyers to complete work faster, even if this resulted in incorrect legal agreements being signed by the traders and sent to other major banks as final confirmation of the terms of the trade.

I sought to discuss my concerns with lower and middle management but was warned that front-office would "*get rid of me*" if I persisted.

JPMorgan's *"Worldwide Rules of Conduct*" state *"The most important rule is also the most general: Never sacrifice integrity, or give the impression you have, even if you think that it would help JPMorgan Chase's business".*

In support of this policy, I lodged a complaint with senior management fully expecting to be able to discuss all my concerns and receive guidance from the relevant departments including legal and compliance. This did not occur and instead I immediately stopped being paid.

My enquiries regarding these matters resulted in my being threatened that my employment would be terminated because of this complaint. I was informed that I would not be paid my outstanding salary and any future salary until I signed a new employment contract reducing my notice period from one month to one week. My contract was terminated shortly after for "economic reasons". I had no contact with senior management or legal and compliance and no opportunity was provided.

I lodged a complaint with the Fair Work Ombudsman and fully authorised and urged the agency to contact ASIC due to the sequence of events.

The handling of the investigation by the Fair Work Ombudsman was largely incompetent even of the agency did find that I was owed over $14,000 in unpaid wages. For reasons which are unclear the Fair Work Ombudsman declined to pursue this matter and closed the file. As far as I am aware the Fair Work Ombudsman never contacted ASIC.

As the Senate inquiry involves ASIC and its processes I will not go into further detail regarding matters involving J.P. Morgan Bank and the Fair Work Ombudsman. For the same reason I will not mention any names.

Reporting to ASIC of possible misconduct by J.P. Morgan Bank in the OTC derivative trading markets.

I formally reported my concerns of possible misconduct to ASIC on 27 November 2008. I subsequently met two ASIC employees on 5 January 2009 at the Martin Place offices of ASIC.

For the meeting I had expected to be asked to provide examples of the processes which were causing me concern, who was involved, what evidence was available, and where that evidence could be found however this did not occur. Indeed the lack of precise questioning suggested there was no understanding or experience of the matters raised.

The interviewers did ask however why I had made a misconduct report to ASIC. The interviewers were surprised and somewhat incredulous by my response that I believed it was the right thing to do. I was also asked why I had risked my employment by trying to raise such matters internally to the bank. My response that it was important to speak up given my role within a bank, the (then current) GFC, and community expectations was also met with surprise and incredulity. The questions were repeated on several occasions.

The overall feeling that the interview conveyed was that ASIC was unprepared to accept reports of misconduct and had no skills to manage such matters. The meeting ended and though I advised I was ready to provide further assistance I was not contacted by ASIC. As far as I am aware ASIC never contacted the Fair Work Ombudsman despite my invitation.

Legislation intended to provide protection for whistleblowers.

On 16 May 2012 I addressed an online inquiry to ASIC (attached) regarding Part 9.4AAA of the Corporations Act 2001. This legislation is intended to provide protection for whistleblowers. ASIC is responsible for administering the Corporations Act.

I asked why ASIC had not mentioned Part 9.4AAA of the Corporations Act 2001 or offered to help or protect me after I had informed ASIC of the reprisals I encountered. I also reminded ASIC that I had given the agency permission to liaise with the Fair Work Ombudsman regarding these matters.

ASIC made contact by telephone and informed me with words to the effect; *that ASIC had done all that it was obliged to do, the matter was closed, and what more did I want*. Believing that I deserved a better response I asked whether ASIC would respond to the concerns raised.

The policy of the agency is not to use reports of misconduct by members of the public unless the person providing the information is considered "*completely altruist*" or "*pure*". Should a member of the public have any possible grievance, or be the subject of an allegation (even if untrue) the information will be cast-aside.

On 17 August 2012, three months after my online inquiry and subsequent discussions I received a letter from ASIC. To my query of why ASIC did not inform me of the relevant whistleblower legislation or seek to help or protect me ASIC replied the following:

"I note that you were a former employee of J.P. Morgan at the time you lodged your report of misconduct in 2008, and you did not raise the issue of being a whistleblower or seek any protection from ASIC". (Letter attached).

ASIC had received a formal report of misconduct, interviewed me, and was fully aware of the reprisals that I had encountered. To assist any investigation I had also authorised ASIC to contact J.P. Morgan to make further inquiries. It is unclear how ASIC could dismiss these actions as inconsistent with those of a whistleblower. Perhaps ASIC could establish some procedures to assist and protect individuals who have provided information to the agency.

ASIC had also been specifically invited and authorised to liaise with the Fair Work Ombudsman where the existence of so-called whistleblower legislation could have been raised to assist that agency. It would also be beneficial for ASIC to establish some sort of procedure for such inter-agency cooperation.

I note the response by ASIC does not explain how the agency would like *"the issue of being a whistleblower"* to be raised and seems more intent on shifting any possible blame from itself. ASIC's inability to grasp the obvious and accept that they could have done better is perhaps symptomatic of its performance.

To assist the Senate in understanding the workings of ASIC I would suggest the Senate obtain all documents generated by ASIC regarding the misconduct report I provided to the agency.

Yours faithfully,

Attachments:
Enquiry to ASIC dated 16 May 2012
Response from ASIC dated 17 August 2012

ASIC
Australian Securities & Investments Commission

Level 24, 120 Collins Street
Melbourne VIC 3000
GPO Box 9827 Melbourne VIC 3001

Telephone: (03) 9280 3200
Facsimile: (03) 9280 3444

17 August 2012

Dear

J.P. Morgan Australia Limited (ACN 002 888 011)

Thank you for your correspondence to ASIC in May 2012 concerning your previous report of misconduct about J.P. Morgan Australia Limited (ACN 002 888 011) **(J.P. Morgan)** in 2008. I also refer to your discussion with S in Misconduct & Breach Reporting on 18 May 2012 and our subsequent emails about this matter. As previously advised, M&BR undertook to review our handling of your report of misconduct. I apologise for the delay in responding to you in writing.

I understand you previously worked with J.P. Morgan, and you raised concerns with ASIC in 2008 about J.P. Morgan's management of operational risks, including:

- directions from managers about contracts for over-the-counter derivatives;
- errors on contracts, delays in settling contracts, and not recording all trades;
- information disclosed to counterparties about contracts; and
- managers' treatment of staff.

At the time, M&BR assessed your report of misconduct and determined to raise your substantive concerns about J.P. Morgan's conduct with our specialist Investment Banks Team for closer consideration. My review confirms the previous M&BR analyst's handling of your misconduct report was appropriate, given the nature of these concerns. I understand that the specialist team met with you to discuss these concerns in January 2009. I am advised that this team ultimately determined to take no further action in relation to your concerns.

In relation to your personal circumstances, you have questioned why ASIC did not protect you as a whistleblower. I note that you were a former employee of J.P. Morgan at the time you lodged your report of misconduct in 2008, and you did not raise the issue of being a whistleblower or seek any protection from ASIC.

I advise that ASIC's role does not extend to providing legal advice to members of the public about their personal circumstances or any rights they may have under the law. As you may know, the whistleblower provisions in the *Corporations Act 2001* **(the Act)** detail the protections afforded to whistleblowers. ASIC has also released

17 August 2012

Information Sheet 52 *Protection for whistleblowers*, available on our website, which provides information about the whistleblower provisions.

Should you require advice about your personal circumstances and whether you would classify as a whistleblower under the Act, you should seek your own legal advice about these issues.

If you have concerns about ASIC's management of your matter you can lodge a complaint with the Commonwealth Ombudsman. The Commonwealth Ombudsman cannot review or re-determine ASIC's decision, but does have the power to investigate misconduct, or review the manner in which a decision has been made to ensure that it was done fairly and in accordance with the law. The contact details for the Commonwealth Ombudsman are as follows:

Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601

Telephone: 1300 362 072
Website: www.comb.gov.au

If you have any questions in relation to this letter please contact me on [redacted] @asic.gov.au or [redacted]

Yours sincerely

Misconduct & Breach Reporting
Stakeholder Services

Dear Sir

Your reference [redacted]

In November and December 2008 I provided information to ASIC regarding the concerns I had of JPMorgan Bank's post-trade management of OTC derivative transactions. My concerns included how the bank would provide misleading data to the Federal Reserve Bank of New York, and how trades would not be booked in the banks system until they were "in-the-money". The transactions (and obligations) of each party would only be tracked by paper based legal agreements which would be "torn-up" if required.

The Federal Bank of New York is part of a global regulatory initiative to reduce the risk of OTC derivative transactions. The major dealers of the OTC derivatives industry have jointly addressed several letters to the Federal Reserve of New York advising of their commitments. These are available here.

I have very recently discovered the existence of whistleblower legislation. Part 9.4AAA of the Corporations Act 2001 provides protection for whistleblowers and victimisation. I informed ASIC of the victimisation that occurred when I raised my concerns to the bank. At no stage did ASIC inform me of this legislation or offer to help or protect me.

I ask why this was not done?

I had also advised ASIC of the complaint I lodged with the Fair Work Ombudsman regarding the reprisals I encountered when I tried to raise my concerns.

I look forward to your reply.
Thank you