

PRINCIPLES FOR MEMORANDA OF UNDERSTANDING

Technical Committee

International Organization of Securities Commissions

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DES OPERATIONS DE BOURSE
Service de l'Inspection

PREAMBLE

The International Organization of Securities Commissions ("IOSCO") has long recognized the impact of internationalization on the enforcement of domestic securities and futures laws and the corresponding need for cooperation among securities and futures regulators in enforcement matters. In 1986, IOSCO adopted a resolution calling for its member organizations to provide reciprocal assistance in obtaining information pertaining to market oversight and the prevention of fraud.

The Technical Committee established Working Party n^o 4, the Working Party on Enforcement and the Exchange of Information, to facilitate multilateral efforts to enhance international cooperation in securities and futures matters. The Working Party is composed of 14 delegations representing 10 countries¹. The group thus represents different types of securities and futures markets regulators and includes authorities with a wide range of powers.

For the past two years the Working Party has centered its efforts on the study of issues related to the exchange of information, for investigative purposes, between administrative authorities regulating securities and futures markets. In November 1990, the Technical Committee released a report by Working Party n^o 4, entitled "Report addressing the difficulties encountered while negotiating and implementing Memoranda of Understanding ("MOUs")² (the "1990 Report").

¹ The Working Party's members includes the Australian Securities Commission the Ontario Securities Commission, and the Commission des Valeurs Mobilières du Québec of Canada the Commission des Opérations de Bourse of France; the Ministry Of. Finance of Germany; the Commissione Nazionale per la Società e la Borsa of Italy; the Securities Bureau of Ministry of Finance Of Japan; the Stichting Toezicht Effectenverkeer of the Netherlands; the Swiss Bankers Association, and the Federal Department for Foreign Affairs of Switzerland; the Department of Trade and Industry and the Securities and Investments Board of the United Kingdom; the Securities and Exchange Commission, and the Commodity Futures Trading Commission of the United States of America.

² The term "MOU" has become a generic term commonly used to refer to a bilateral or multilateral understanding that facilitates cooperation between securities and futures regulators.

MOUs are statements of intent which do not impose legally binding obligations on signatories. As such, they have no power to overcome domestic laws and regulations, nor do they affect other channels of cooperation, such as mutual assistance in criminal matters. The strength of MOUs, however, is that they facilitate the exchange of information by accommodating the differences between regulators and by responding to changing legal environments.

The 1990 Report was intended to help signatories focus on the areas of potential difficulties that should be analyzed and discussed in the negotiation process. It identified and discussed various issues which arise in connection with the development and implementation of MOUs. In March 1991, the Working Party proposed to build on the work done in the 1990 Report¹ and to develop a comprehensive set of ten Principles that identify the specific components necessary for an optimal MOU.

The Principles contained in this Report provide a blueprint for use by securities and futures regulatory authorities in developing MOUs with their foreign counterparts. The Principles (shown in bold type) generally are short and are complemented by a few lines of comments that explain their meaning and implications. The Working Party believes that the 1990 Report and the Principles set out in this Report together provide substantial guidance regarding the terms and operation of MOUs.

In preparing the Principles, the Working Party worked to develop a consensus among regulators about provisions that should be included in MOUs in order to develop effective tools for fighting fraud and other abuses in the securities and futures markets. That consensus was possible¹ despite differences between the various regulators' legal and regulatory regimes, in large part because of the unanimous agreement about the need for international cooperation to maintain safe and secure market

The Principles set high standards and goals to be incorporated into MOUs in a broad range of securities and futures matters. The Working Party recognizes that, in some cases, the differing laws and regulatory structures of various countries currently may preclude the implementation of some elements of the Principles.

The Working Party hopes that the Principles contained herein will stimulate efforts to further develop and enhance international cooperation and thereby protect the integrity of the world's securities and futures markets.

1. SUBJECT MATTER

MOUs should provide that investigatory assistance will be granted without regard to whether the type of conduct under investigation would be a violation of the laws of the

Requested Authority unless the Requested Authority is not permitted to provide assistance where the type of conduct under investigation would not be a violation of the laws of the Requested Authority.

In 1989, the Technical Committee endorsed a resolution calling for member organizations to enter into MOUs on information sharing in which they would undertake to provide each other with information on a reciprocal basis¹ without regard to whether the matter under investigation would be a violation of the laws of the Requested Authority. Most of the existing MOUs cover the broad range of subject matters supported by the Technical Committee. By providing in an MOU for a broad range of matters for which assistance will be provided, each Authority is assured that it will receive as much assistance as possible with respect to all matters falling within its jurisdiction.

If a Requested Authority is not able to provide assistance with respect to matters which would not constitute violations within its own state without breaching its domestic legislation, the Requested Authority should consider recommending that appropriate amendments be made to this legislation to enable the assistance to be given, if it has the power to make such recommendations.

2. CONFIDENTIALITY

An MOU should provide that an Authority that receives information pursuant to an MOU request will protect the information with the highest possible level of confidentiality which, at a minimum, should provide that the information will be treated with the same level of confidentiality that is given to similar information that it collects in investigations of possible domestic violations. In addition, an MOU should provide the Requested Authority with the opportunity to identify the level of confidentiality that it expects to be attached to information that it transmits pursuant to an MOU request.

The primary purpose of MOUs is to provide information for use in investigations, which are, in most instances, non-public inquiries. In fact, most securities and futures regulators are subject to domestic laws and regulations governing the confidential treatment of information. The confidentiality requirements, however, vary by country and it is possible that the procedures of one authority for maintaining confidentiality will not be consistent with the disclosure or confidentiality provisions of its foreign counterparts. This, in turn, may lead to restrictions on the requested authority's ability to transmit information.

It may be possible to overcome differences between the confidentiality requirements and procedures of the authorities by including confidentiality provisions in the MOU that satisfy the

needs of both authorities. In certain instances, however, legislative action may be required to increase the level of confidentiality to encourage the widest possible exchange of

3. IMPLEMENTATION PROCEDURES

In a mutually agreeable form, the signatories to an MOU should describe the procedures that they will follow in making and executing requests for information pursuant to the MOU; those procedures should be consistent with both signatories' legal requirements or impediments.

One of the main purposes of an MOU is to create a framework of procedures for exchanging information between regulators. Therefore, it is important that the parties to an MOU clearly set out the manner in which requests will be made and executed.

4. THE RIGHTS OF PERSONS SUBJECT TO AN MOU REQUEST

The fact that an investigation is conducted on behalf of a foreign authority pursuant to an MOU request should not alter the legal rights and privileges granted to persons in the State of the Requested Authority.

Because it is essential that the legal rights and privileges of witnesses be protected, the signatories to an MOU should make sure that the means of executing a request is consistent with the laws, methods and requirements of the Requested Authority. When the laws and policies of the requested authority provide a range of options, requests should be executed in the manner most consistent with the needs of the requesting authority.

Authorities negotiating information-sharing agreements may find it useful to examine the scope and implications of other agreements or treaties between the states of the signatories so that, among other things, they can ensure that the citizens of the signatory countries receive similar guarantees and protections.

5. CONSULTATION

MOUs should contain a provision in which the Authorities agree to consult on relevant issues that arise during the operation of the MOU. Moreover, authorities should consult frequently to discuss developments or proposals likely to affect the other Authority's interests or the available means for cooperation.

Since MOUs are designed to facilitate assistance, and not to create overly formal relations between the signatory authorities, they should contain a provision on consultations. Such a provision could specify circumstances under which it would assist the operation of the MOU to consult, such as where assistance may be or has been denied, and may also provide for consultation when requested by a signatory. By consulting about, for example, a denial of a request for assistance, the Requested Authority may be able to identify certain assistance that it is able to provide, and the Requesting Authority may benefit from learning more about why assistance was denied.

Such consultations also may promote cooperation and avoid misunderstandings and conflicts in situations involving:

- unforeseen circumstances
- overlapping jurisdiction, and
- changes in one authority's laws or procedures.

6. PUBLIC POLICY EXCEPTION

An MOU should provide that the Requested Authority maintains the right to refuse to provide assistance in instances where the provision of assistance would violate the public policy of its state. The concept of public policy would include issues affecting sovereignty, national security, or other essential interests.

Although it is optimal for the scope of an MOU to be as broad as possible, there may be limited instances where, notwithstanding the fact that a request falls within the scope of the MOU, providing assistance would be contrary to the public policy of the state of the Requested Authority. For this reason MOUs should provide a mechanism for dealing with this potential conflict so that the Requested Authority will be able to rely on a public policy exception to the MOU in denying assistance.

7. TYPES OF ASSISTANCE

MOUs should provide that the Authorities will take all reasonable steps to ensure that they can utilize their full domestic powers to execute requests for assistance. The available assistance should include, where the Requested Authority has such powers, obtaining documents and the statements or testimony of witnesses, granting access to the Requested Authority's non-public files, and conducting inspections of regulated

entities.

Both before and since the Technical Committee's 1989 resolution on information-sharing, several member organizations have obtained the authority to use their full domestic powers to compel the production of documents and statements or testimony on behalf of foreign authorities. In the absence of such authority, a Requested Authority may be limited to providing only information that it can obtain voluntarily or from public files in response to a request for assistance. Since law violators may refuse to produce incriminating information on a voluntary basis, and legal impediments may prevent an innocent intermediary from voluntarily providing information, the Requesting Authority may be unable to obtain critical information at the investigative stage of a matter if production of such information cannot be compelled by the Requested Authority.

Therefore, the ability to compel production of documents and statements or testimony on behalf of a foreign authority greatly enhances the value of MOUs. Authorities that do not have such an ability should take all reasonable steps, including considering recommending amendments to their legislation, where they have such power to recommend, to remove impediments that keep them from utilizing their full domestic powers for providing assistance to foreign authorities.

9. PARTICIPATION BY THE REQUESTING AUTHORITY

MOUs should provide that, to the extent permitted by the laws and policies of the Requested Authority, the Requesting Authority may be permitted to participate directly in the execution of a request for assistance.

Participation by the Requesting Authority, to the extent permitted by the laws and policies of the State of the Requested Authority, may be desirable to ensure that resources are used effectively in executing requests for assistance.

For example, in executing an MOU request that involves document review and/or the questioning of witnesses, a high degree of familiarity with the investigative record may be necessary in order to elicit the necessary information from witnesses and documents. In many cases, MOU requests are preceded by complex, long-term investigations by the Requesting Authority and the files of the investigation may include far more information than can reasonably be included in a particular MOU request. In such cases, the Requested Authority should consider permitting the persons most familiar with the investigative record to assist in the execution of the request.

10. COST-SHARING

MOUs should provide that, under certain circumstances, the Requested Authority can, if it deems it necessary, initiate a process for having the Requesting Authority share the costs of providing assistance that are incurred by the Requested Authority.

Requests for assistance may involve extensive use of investigative resources by the Requested Authority. Sharing costs may be appropriate where the cost of a particular request is substantial or where a substantial imbalance has arisen in the cumulative costs incurred by the signatories. Therefore, to minimize the burden that such investigations might place on the Requested Authority, an MOU should provide a mechanism by which the Requesting Authority may be asked to reimburse the Requested Authority for extraordinary costs. An MOU also should provide that the Authorities will consult about the handling of costs in such cases.

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