

**Memorandum of Understanding**

between

**Financial Markets Authority**

and

**Serious Fraud Office**

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## **Memorandum of Understanding dated 20 December 2011**

### **Between**

**Financial Markets Authority**, an independent Crown entity established under the Financial Markets Authority Act 2011 (“FMA”);

### **And**

**Serious Fraud Office**, a Government Department established by the Serious Fraud Office Act 1990 (“SFO”).

### **Background**

- A FMA has statutory functions under Financial Markets Legislation, which include the detection, investigation and prosecution of offences under those and other enactments.
- B SFO has statutory functions under the Serious Fraud Office Act (“SFO Act”) relating to the detection, investigation and prosecution of offences involving serious or complex fraud.
- C The statutory functions of both FMA and SFO are commonly required to be exercised in relation to the same entities or circumstances.
- D FMA and SFO wish to record in this Memorandum the procedures and the policies to be adopted by them when dealing with such cases of common discharge of statutory functions.

### **Understanding**

#### **1. Relationship management**

- 1.1. The parties recognise that they each have a critical role to play in promoting the confidence of investors and other stakeholders in, and contributing to the efficiency of, New Zealand’s financial markets (“Shared Goal”).
- 1.2. The parties also recognise the government’s desire to ensure activity among agencies involved in investigating and prosecuting financial crime is cost effective and efficient (“Efficiency Objective”).
- 1.3. The parties agree that in order to achieve the Shared Goal and the Efficiency Objective they must work collaboratively with each other. The parties have agreed on principles that are important to the success of the collaborative relationship and with which they will comply in order to achieve the Shared Goal.
- 1.4. Having regard to the Shared Goal and the Efficiency Objective, the parties will:
  - a. communicate in an open, honest, and timely manner;

- b. respond promptly to requests by the other;
- c. exchange information and ideas to improve the performance of each party's statutory functions;
- d. work together, so far as is practicable, to avoid duplication of expenditure of tax payer funded resources;
- e. forewarn each other of actions taken, or proposed to be taken, of which the other might reasonably expect to be advised;
- f. co-ordinate actions taken to achieve the most efficient and optimal regulatory and law enforcement outcomes;
- g. aim to ensure that the most appropriate party, recognising the relative statutory and structural issues of each party, responds to a regulatory or law enforcement issue;
- h. provide feedback after an investigation to ensure the parties are learning and updating knowledge and enhancing processes; and
- i. share training and staff development opportunities, and provide mutual operational support.

## **2. Areas of Primary Responsibility**

2.1. The parties acknowledge that the following are their primary areas of responsibility:

- a. FMA is primarily responsible for the detection, investigation and prosecution of offences under Financial Markets Legislation;
- b. SFO is primarily responsible for the detection, investigation and prosecution of offences that constitute serious or complex fraud, or involve matters of bribery or corruption.

## **3. Strategic Coordination**

3.1. The parties agree that strategic coordination is required to enhance management of investigations and prosecutions that may arise in relation to cases where the statutory functions of both parties are required to be exercised in relation to the same entities or circumstances.

3.2. The Director of the SFO and the Chief Executive of FMA will meet quarterly (or more or less frequently as agreed by the parties) to:

- a. discuss the general strategic co-ordination of the parties activities, the sharing of knowledge and resources between the parties and other matters relevant to the performance of the parties respective statutory functions;
- b. review cases that might engage both the investigative or prosecutorial remit of the SFO and FMA, or raise issues otherwise impacting upon the capacity of both agencies to discharge their statutory mandates; and



- c. provide a forum to monitor and coordinate the investigation and prosecution of such cases.

#### **4. Tactical coordination**

- 4.1. The Primary Contacts will meet each month to discuss, and to review the progress of, their inquiries or investigations into Joint Interest Matters. The Primary Contacts will:
- a. discuss Joint Interest Matters identified in accordance with clause 5.1;
  - b. identify opportunities for the parties to provide mutual assistance or support and to co-operate in the conduct of their investigations;
  - c. seek to identify those Joint Interest Matters which are suitable to be jointly investigated by the parties in accordance with clause 5.2;
  - d. discuss and report on the progress of each investigation and prosecution being carried out into a Joint Interest Matter;
  - e. periodically assess the effectiveness and practicality of the processes established under this Memorandum and recommend changes to the Memorandum that will assist day to day operations under it; and
  - f. discuss any other matters arising under this Memorandum.

#### **5. Operational coordination**

- 5.1. If either party identifies in the course of any activities undertaken by it in exercise of its statutory functions, a matter, transaction or circumstance that falls within the others party's area of primary responsibility it will as soon as practicable:
- a. notify the other party; and
  - b. provide that other party with a copy of all documents, reports and other materials currently held by that party in relation to the matter and thereafter provide to the other party with a copy of all other information, documents, reports and other materials it obtains in relation to the matter.
- 5.2. Where the parties agree to undertake a joint investigation in relation to a Joint Interest Matter, that investigation will be carried out in accordance with a Joint Investigation Protocol to be formulated by the Primary Contacts, approved by the Director of the SFO and the Chief Executive of the FMA.
- 5.3. Where the parties determine that a Joint Interest Matter will be separately investigated, the Primary Contacts will also agree a process for interviewing witnesses or suspects who may need to be interviewed by both agencies in relations to their respective investigations.
- 5.4. The parties will have particular regard to the possibility that an interview conducted by one party could prejudice the outcome of a later interview

conducted by the other. The parties will use their best efforts to co-ordinate the interview process to:

- a. avoid prejudice to the respective investigations;
  - b. ensure that all evidence relevant to each party's investigation is obtained; and
  - c. ensure that the most appropriate statutory notice requiring attendance for an interview is used.
- 5.5. Where the parties have completed either a joint or separate investigation of a Joint Interest Matter and have both determined that charges should be laid, the Primary Contacts will as meet as soon as practicable and agree the most efficient and effective means of co-ordinating those prosecutions.
- 5.6. The parties acknowledge that there may be circumstances where the taking of a prosecution by one party in its area of primary responsibility may preclude or seriously jeopardise the subsequent taking of a prosecution by the other in its area of primary responsibility, whether by reason of exposing the accused to double jeopardy, excluding the use of critical evidence, or delaying a prosecution.
- 5.7. Where either party believes that the decision of the other to lay charges will give rise to such circumstances, the following procedures shall apply:
- a. The party who believes the circumstances will arise will advise the other setting out the grounds for its belief and the date by which it will (if it has not already done so) determine in accordance with the requirements of its empowering legislation whether that party should commence a prosecution;
  - b. the Primary Contacts and the Director of the SFO and the Chief Executive of FMA will convene within 10 working days of such advice with a view to agreeing which charges will be laid by which party and the timeframe within which those charges will be laid;
  - c. If those parties are unable to reach agreement, the Solicitor General will be asked to make a determination on the matter and each party agrees to accept the Solicitors General's determination as to the appropriate party to lay of criminal charges.
- 5.8. Nothing in clause 5.7 will preclude FMA from commencing civil proceedings under Financial Markets Legislation.

## **6. General Liaison**

- 6.1. All correspondence and notices required by this Memorandum will be directed to the Primary Contact.

## **7. Public Statements**

- 7.1. The parties recognise the confidentiality and sensitivity of information concerning active investigations by either body.
- 7.2. The parties agree that wherever feasible and appropriate no public comment will be made about the Joint Interest Matters without prior notification to the other

party of the proposed comment and prior consultation as to the form and timing of the comment being made.

- 7.3. The parties agree that any media releases that may affect the other party will be disclosed and coordinated in accordance with a communications protocol to be formulated by the Primary Contacts.

## **8. Confidentiality**

- 8.1. Without prejudice to or limitation of the provisions of either Financial Markets Legislation or the SFO Act, both parties will observe the strictest secrecy in relation to information or materials supplied to it under this Memorandum by the other, or derived from or based on any such information ("Protected Information").
- 8.2. Neither party shall use or disclose any Protected Information unless the use or disclosure is:
- a. required by law;
  - b. authorised by the other party; or
  - c. for the purpose of the party's primary responsibility under clause 2.1.

## **9. Mutual Assistance Agreements**

- 9.1. Where either party has entered into or proposed to enter into an arrangement with another agency within New Zealand or overseas which is or may be relevant to the other parties area of primary responsibility it will notify the other party of the nature and terms of that arrangement and (within the limitations of the terms of that arrangement):
- a. take reasonable steps to use the arrangement to assist the other party in relation to its area of primary responsibility; or
  - b. notify the other party of any information or other assistance received under the arrangement that may be relevant to matters within that other party's area of primary responsibility.

## **10. Term and Review**

- 10.1. This Memorandum has an initial term of 12 months, and shall be automatically renewed for further terms of 12 months unless either party gives notice under clause 10.2 terminating it.
- 10.2. The parties will meet three months prior to expiry of the term of the Memorandum to discuss the operation of the Memorandum and the need for any changes to the terms of the Memorandum. At the review meeting, either party may give notice terminating the Memorandum at expiry of its term.

## **11. Legal Nature of Memorandum**

- 11.1. Nothing in this Memorandum is intended to limit or affect the independence of either body. The parties acknowledge that the terms and conditions of this



Memorandum are not in substitution for and do not replace the requirements of the Financial Markets Legislation or the SFO Act and nothing:

- a. Limits or affects the statutory powers of either party or its ability to perform its functions and act where necessary in the public interest; or
- b. Requires or obliges either party to provide any information to the other except as required by law; or
- c. Binds either parties in the exercise of any discretion conferred on it by law or obliges either party to do any other act or thing with goes beyond its legal rights powers and obligations under Financial Markets Legislation or the SFO Act respectively.

11.2. In particular, this Memorandum is intended to be facilitative only and to assist with the mechanics and implementation of the statutory functions conferred on the parties, and is not intended to create legally enforceable rights or obligations.

## 12. Definitions

12.1. In this Memorandum, except where otherwise required by the context, the following terms bear the following meanings:

**“Efficiency Objective”** has the meaning ascribed in clause 1.2;

**“FMA Act”** means the Financial Markets Authority Act 2011

**“Financial Markets Legislation”** means the FMA Act and the Acts listed in Schedule 1 of that Act;

**“Joint Interest Matters”** means investigations and prosecutions that may arise in relation to cases where the statutory functions of both FMA and SFO are required to be exercised in relation to the same entities or circumstances;

**“Primary Contacts”** means the General Manager, Financial Markets and Corporate Fraud of the SFO and the Head of Enforcement of FMA;

**“Protected Information”** has the meaning ascribed in clause 8.1;

**“SFO Act”** means the Serious Fraud Office Act 1990;

**“Shared Goal”** has the meaning ascribed in clause 1.1

## Execution

**Signed by Sean Hughes**  
Chief Executive Officer of the  
Financial Markets Authority



**Signed by Adam Feeley**  
Director of the  
Serious Fraud Office

