

Suggested Revised Statement on Mutual Assistance Between Business Regulatory Agencies

Paper Prepared by the Commonwealth Secretariat

EXPLANATORY NOTE

Following the Meeting of Senior Officials from Commonwealth Law Ministries held on Sunday 14 November 1993 a number of delegations made suggestions for alterations to the wording of the Proposed Statement on Mutual Assistance Between Business Regulatory Agencies (LMM(93)23). After a process of informal consultations, the attached suggested revised statement was formulated. It seeks to meet certain of the suggestions which were made without disturbing in a significant manner the delicate balance of the existing text. The changes, which are marked in bold and appear in square brackets, are to be found in the second preambular paragraph (p.1), substantive paragraph 3(p.2), and in the final paragraph of the text (p.3).

The attached suggested revised version was formulated prior to the receipt of the proposals for amendment made by Singapore and circulated separately as LMM(93)63.

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SUGGESTED REVISED STATEMENT ON MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

At the Meeting of Commonwealth Law Ministers held at Mauritius from 15-19 November 1993 note was taken of the considerable progress achieved towards the effective implementation of the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth. Ministers recognised, however, that the increasing international activity in the securities, futures and investment markets brought with it a corresponding need for an enhanced level of international co-operation in this specialised area. Given the traditional availability to Business Regulatory Agencies of administrative and civil sanctions in addition to those of the criminal law, this need could not be adequately satisfied by exclusive reliance on the Commonwealth Scheme or other established mechanisms for the provision of mutual assistance in traditional criminal matters.

Ministers reiterated the view expressed in the Communique which concluded their April 1990 Meeting at Christchurch, New Zealand, that there was a need for the extension of mutual assistance in the area of business regulation. This was best achieved by provisions, which would be complementary to **[and compatible with]** those giving effect to the Harare Scheme, to enable a regulatory agency to respond to requests for assistance from a counterpart agency in another Commonwealth country and to use for that purpose ap-

propriate powers available to it in a purely domestic context.

It was agreed that those Commonwealth countries contemplating the development of administrative structures and the enactment of legislation in this area should, subject to the general principles of their domestic legal systems, be guided by the following general principles and considerations:

1. That systems devised to respond to requests for assistance by counterpart regulatory authorities for the purpose of the exercise of their regulatory functions should be simple, quick and flexible and be capable of use with the minimum of formality.
2. Assistance would be provided subject to compliance by the requesting authority with appropriate conditions concerning the use, confidentiality and return of documents and information.
3. That the decision of whether or not to grant assistance in any case would be discretionary. In the exercise of this discretion the requested party could consider, among other matters, the seriousness of the alleged breach of the law, regulation or requirement; whether the assistance **[is obtainable by more appropriate means and, in particular, via existing channels for the provision of mutual assistance in criminal matters]**; issues of international law and comity; and the resource costs involved. Assistance would not normally be refused solely on the ground that the circumstances which gave rise to the request for assistance did not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of public interest.
4. That in providing for the granting of assistance for the purpose of facilitating the performance of the functions of a requesting authority as provided under the laws, regulations and requirements of the requesting country, the law of the requested country should permit (subject to appropriate civil liberties and other safeguards) a regulatory agency in that country to use appropriate powers available to it in a domestic context. This would include in particular:
 - (a) gaining access to, or supplying, information in its files;
 - (b) obtaining information or documents from any person or entity subject to its jurisdiction; and
 - (c) exercising appropriate powers of investigation or inspection.

5. That the law of the requested country should make it possible in appropriate cases to invoke sanctions or take other enforcement proceedings in cases in which a person or entity withheld information, documents or other assistance which the regulatory agency was entitled to obtain in the context of responding to a request for assistance.

6. There should be no legal impediment to the spontaneous provision by a regulatory agency (subject to appropriate safeguards) of information to a counterpart agency in another Commonwealth country where that information clearly gave rise to a suspicion of a breach of a legal provision, regulation or requirement of that counterpart agency. The decision of whether or not to provide such information in any particular case would be at the sole discretion of the agency in possession of it.

Ministers were confident that the introduction by relevant jurisdictions of mechanisms of co-operation **[in relation to the securities, futures and investment markets]** which conformed to the above general principles and considerations would provide a sound and modern basis from which to combat fraud and other abuses, thus ensuring a more orderly international market place.

Suggested Further Revision of the Draft Statement on Mutual Assistance Between Business Regulatory Agencies

Paper Prepared by the Commonwealth Secretariat at the Request of the Chairman of the Meeting

PRELIMINARY NOTE BY THE COMMONWEALTH SECRETARIAT

In the Plenary Session on Tuesday afternoon, the Commonwealth Secretariat was asked to prepare a further revised version of the draft statement taking account of the proposals made by the delegation of Singapore and the views of Ministers expressed in discussion.

The appended text meets the points raised by Singapore in a number of respects. It makes absolutely clear that the Statement is not a Scheme, and does not bind all Commonwealth countries to a programme of action. The guidelines suggested for those countries deciding to take action now contain an express reference to Constitutional requirements, to reciprocity, and to national security. The existing reference to resource costs is amplified to indicate that the allocation of costs is a matter for negotiation. A new sentence in paragraph 4 seeks to ensure that a requested authority has all the information it needs in considering how to respond to a request (which might include, in some cases, obtaining special authorisations required by its domestic law). The opening of paragraph 5 is softened to an invitation to consider the issue there addressed. It appears to the Secretariat that all the above changes are consistent with the spirit of the existing text, the IOSCO principles relating to this area, and existing bilateral practice involving Commonwealth members.

However, in view of the tenor of Tuesday's discussion, the text retains the principle of direct communication from regulator to regulator and does not interpose a system of central authorities, thus retaining the emphasis on systems being capable of use with the minimum of formality (see paragraph 1 of the text). The revised text retains the earlier listing of powers in paragraph 4; it is pointed out that the availability of particular powers will depend upon the content of the requested authority's domestic legal system and it is not thought that this requires further emphasis in the text.

Singapore's proposal for the deletion of the penultimate sentence of paragraph 3 raises issues as to double criminality and related concepts. In light of the views of Ministers in Tuesday's discussion, the Secretariat sees no ready reconciliation of the position taken by Singapore with that expressed in the existing draft Statement.

TEXT OF SUGGESTED FURTHER REVISED STATEMENT ON MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

Note: Suggested Alterations to LMM(93)67 are underlined and appear in square brackets

At the Meeting of Commonwealth Law Ministers held at Mauritius from 15-19 November 1993 note was taken of the considerable progress achieved towards the effective implementation of the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth. Ministers recognised, however, that the increasing international activity in the securities, futures and investment markets brought with it a corresponding need for an enhanced level of international co-operation in this specialised area. Given the traditional availability to Business Regulatory Agencies of administrative and civil sanctions in addition to those of the criminal law, this need could not be adequately satisfied by exclusive reliance on the Commonwealth Scheme or other established mechanisms for the provision of mutual assistance in traditional criminal matters.

Ministers reiterated the view expressed in the Communique which concluded their April 1990 Meeting at Christchurch, New Zealand, that there was a need for the extension of mutual assistance in the area of business regulation. This was best achieved by provisions, which would be complementary to and compatible with those giving effect to the Harare Scheme, to enable a regulatory agency to respond to requests for assistance from a counterpart agency in another Commonwealth country and to use for that purpose appropriate powers available to it in a purely domestic context.

[It was agreed that not all Commonwealth countries would wish to make fresh arrangements in this area and that the preparation of a Commonwealth Scheme at this stage would be premature. However,] it was agreed that those Commonwealth countries contemplating the development of administrative structures and the enactment of legislation in this area should, subject to [the requirements of their Constitutions] and the general principles of their domestic legal systems, be guided by the following general principles and considerations:

1. That systems devised to respond to requests for assistance by counterpart regulatory authorities for the purpose of the exercise of their regulatory functions should be simple, quick and flexible and be capable of use with the minimum of formality.

2. Assistance would be provided subject to compliance by the requesting authority with appropriate conditions concerning the use, confidentiality and return of documents and information.

3. That the decision of whether or not to grant assistance in any case would be discretionary. In the exercise of this discretion the requested party could consider, among other matters, the seriousness of the alleged breach of the law, regulation or requirement; whether the assistance is obtainable by more appropriate means and, in particular, via existing channels for the provision of mutual assistance in criminal matters; issues of international law, comity and [reciprocity; and the extent to which the resource costs involved would fall to be met by the requested party]. Assistance would not normally be refused solely on the ground that the circumstances which gave rise to the request for assistance did not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of [national security or other essential public interests].

4. That in providing for the granting of assistance for the purpose of facilitating the performance of the functions of a requesting authority as provided under the laws, regulations and requirements of the requesting country, the law of the requested country should permit (subject to appropriate civil liberties and other safeguards) a regulatory agency in that country to use appropriate powers available to it in a domestic context. [These could include inter alia:]

- (a) gaining access to, or supplying, information in its files;
- (b) obtaining information or documents from any person or entity subject to its jurisdiction; and
- (c) exercising appropriate powers of investigation or inspection.

[To facilitate the exercise of the appropriate powers, the requesting authority should provide all necessary information as to the circumstances of the case giving rise to the request].

5. That the law of the requested country should make it possible in appropriate cases to invoke sanctions or take other enforcement proceedings in cases in which a person or entity withheld information, documents or other assistance which the regulatory authority was entitled to obtain in the context of responding to a request for assistance.

6. [Countries should consider the removal of legal impediments to the spontaneous provision of information] by a regulatory authority (subject to appropriate safeguards) to a counterpart authority in another Commonwealth country where that information clearly gives rise to a suspicion of a breach of a legal provision, regulation or requirement of that party. The decision

whether or not to provide such information in any particular case would be at the sole discretion of the authority in possession of it.

Ministers were confident that the introduction by relevant jurisdictions of mechanisms of co-operation in relation to the securities, futures and investment markets which conformed to the above general principles and considerations would provide a sound and modern basis from which to combat fraud and other abuses, thus ensuring a more orderly international market place.