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**MEMORANDUM OF UNDERSTANDING**

**BETWEEN**

**THE DEPARTMENT OF JUSTICE  
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION**

**AND**

**THE SECURITIES AND FUTURES COMMISSION**

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## **1. Background**

1.1 This Memorandum of Understanding (MOU) sets out the framework of arrangement between the Department of Justice (DoJ) and the Securities and Futures Commission (SFC) in relation to the handling of criminal cases under the Securities and Futures Ordinance, Cap. 571 (SFO) and certain offences under the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap. 32 (CWUMPO), the Companies Ordinance, Cap. 622 (CO) and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, Cap. 615 (AMLCTFFIO). It supersedes any previous agreements between the DoJ and the SFC which dealt with the same matters.

## **2. Purpose**

2.1 The Hong Kong Special Administrative Region is an international financial centre. It is of utmost importance that the probity and integrity of the Hong Kong securities and futures markets are maintained. The DoJ and the SFC have a mutual interest as well as duties in ensuring that corporate and financial services wrongdoing is dealt with in a timely and effective manner.

2.2 This MOU records the DoJ's and the SFC's recognition of the need for the fullest collaboration and co-operation in order to discharge their respective functions in relation to the prosecution of corporate and financial services wrongdoing.

2.3 The DoJ and the SFC recognise that proper and appropriate communication and liaison at all levels is essential to facilitate their working relationship.

2.4 This MOU outlines the liaison arrangements between the DoJ and the SFC and sets out the areas for guidance by the DoJ and collaboration and co-operation between them.

2.5 Where a matter is not dealt with explicitly in this MOU, the DoJ and the SFC agree to work together to resolve it quickly in accordance with the principles of collaboration and co-operation.

### **3. The DoJ**

3.1 Article 63 of the Basic Law of the Hong Kong Special Administrative Region provides that the DoJ shall control criminal prosecutions, free from any interference. That constitutional guarantee of independence ensures that prosecutors act independently without any political or other influence. Prosecutors are guided by the Prosecution Code, published by the DoJ, in making all prosecutorial decisions and in conducting prosecutions irrespective of which investigating agency is involved. The Prosecution Code can be found in the DoJ's website: <http://www.doj.gov.hk/eng/index.html>.

3.2 Section 388 of the SFO provides for the prosecution by the SFC, in its own name, of offences under the SFO and certain offences under the CWUMPO, CO and AMLCTFFIO (and conspiracy to commit those offences). When it does so, the SFC can only prosecute those cases summarily before a magistrate. As set out in section 388(3), the power of the SFC to prosecute in its own name does not derogate from the powers of the Secretary for Justice in respect of the prosecution of criminal offences.

#### 4. The SFC

4.1 The SFC is an independent statutory body. The SFC's work is defined and governed by the SFO, which sets out its powers, roles and responsibilities. The SFC's regulatory objectives as set out in the SFO are:

- to develop and maintain competitive, efficient, fair, orderly and transparent securities and futures markets;
- to help the public understand the workings of the securities and futures industry;
- to provide protection for the investing public;
- to minimise crime and misconduct in the markets;
- to reduce systemic risks in the industry; and
- to assist the Government in maintaining Hong Kong's financial stability.

4.2 The functions and powers of the SFC reflect its regulatory objectives and includes suppressing illegal, dishonourable and improper practices in the securities and futures industry.

4.3 In order to perform its functions, the SFC has the power to investigate and prosecute offences under the SFO and certain criminal offences under the CWUMPO, CO and AMLCTFFIO.

- 4.4 The SFC's power to prosecute is set out in section 388 of the SFO and is limited to prosecuting offences before a magistrate. The SFC's power to prosecute certain offences does not derogate from the powers of the Secretary for Justice in respect of the prosecution of criminal offences. Section 388 of the SFO therefore reflects the DoJ's constitutional power under Article 63 of the Basic Law to control criminal prosecutions, free from any interference.
- 4.5 In addition to its power to prosecute offences, the SFC has a number of other powers which can be used in the performance of its regulatory functions, including commencing proceedings in the Market Misconduct Tribunal under section 252 of the SFO, initiating civil proceedings under sections 185, 211, 212, 213 and 214 of the SFO, intervening in civil proceedings under section 385 of the SFO and commencing disciplinary proceedings under sections 194 and 196 of the SFO.
- 4.6 The powers that can be exercised by the SFC may need to be used at different times in order to combat corporate and financial services wrongdoing. Civil action to preserve or protect will often need to be commenced expeditiously and may therefore be the priority at the initial stages of an investigation. There may be both civil and criminal proceedings arising out of the same investigation.
- 4.7 The SFC acknowledges that the public interest requires that criminal proceedings be instituted as soon as practicable.

- 4.8 The SFC will continue its policy of not using civil proceedings as a substitute for criminal proceedings, where criminal proceedings should be commenced in accordance with the Prosecution Code.

### **Guidance by the DoJ and co-operation and collaboration between the DoJ and the SFC**

#### **5. Referral of cases by the SFC to the DoJ**

- 5.1 The SFC will refer the following types of cases to the DoJ for advice on whether criminal prosecution should be instituted according to the Prosecution Code and/or to determine whether the case should be prosecuted in the Court of First Instance, District Court or Magistrates' Courts:

- (i) market misconduct offences under Part XIV of the SFO and offences to fraudulently or recklessly induce others to invest money under section 107 of the SFO;
- (ii) offences under the SFO and its subsidiary legislation which involve an element of intent to defraud (other than those under Part XIV and section 107 of the SFO);
- (iii) offences under the CWUMPO, CO and AMLCTFFIO which fall within the purview of the SFC;
- (iv) indictable offences which may be dealt with summarily where the maximum term of imprisonment following conviction on indictment exceeds 2 years imprisonment; and

- (v) any other cases where the SFC considers it necessary to seek advice from the DoJ on whether the case should be prosecuted on indictment.

5.2 Cases which do not come within 5.1(i), (ii), (iii) or (iv) will generally not be referred to the DoJ for advice. The SFC will obtain legal advice from its Legal Services Division on whether criminal prosecution should be instituted. If so, those cases will be prosecuted by the SFC summarily in the Magistrates' Courts pursuant to section 388 of the SFO. As noted above, the exercise of the SFC's power to commence and conduct prosecutions does not derogate from the powers of the Secretary for Justice in respect of the prosecution of criminal offences. In making prosecutorial decisions and in conducting these prosecutions, the SFC shall act in accordance with the Prosecution Code.

5.3 The DoJ will ensure that timely advice is provided to the SFC in respect of all cases that they are invited to advise on. Where further investigation is required, the SFC will ensure that this is completed expeditiously and that any additional evidence is referred to the DoJ in a timely manner. The DoJ and the SFC both acknowledge that criminal proceedings should be instituted as soon as practicable.

## **6. SFC referrals which the DoJ will prosecute**

6.1 It is the DoJ's decision as to how SFC referrals are to be prosecuted but when making any decisions (including the choice of counsel and the question of bail), the DoJ will consider any views expressed by the SFC.

6.2 The SFC will provide such assistance as may be necessary to the DoJ and counsel instructed to prosecute SFC referrals, including attendance at conferences, the preparation of hearing bundles and submissions, the disclosure of materials (both used and unused by the Prosecution at trial), the liaison with prosecution witnesses and attendance at court hearings.

## **7. Reviews and Appeals**

7.1 Where the SFC prosecutes a case in the Magistrates' Courts in its own name, if it deems fit, it can apply to the magistrate under section 104 of the Magistrates Ordinance, Cap. 227 to review the magistrate's decision in respect of his or her determination of any matter.

7.2 The SFC will notify the DoJ as soon as practicable of its intention to apply for a review pursuant to section 104 of the Magistrates Ordinance (together with the brief reasons for such a decision). The SFC will provide the DoJ with the relevant papers if requested to do so and will inform the DoJ of the outcome of any review.

7.3 Where the SFC prosecutes a case in the Magistrates' Courts in its own name, the SFC can appeal, under section 105 of the Magistrates Ordinance, any conviction, order or determination on the ground that it is erroneous in point of law or that it is in excess of jurisdiction.

- 7.4 The SFC will notify the DoJ as soon as practicable of its intention to initiate an appeal under section 105 of the Magistrates Ordinance (together with the brief reasons for such a decision). The SFC will provide the DoJ with relevant papers including the draft case stated so that the DoJ can consider whether it should take over the conduct of the appeal in order to properly discharge its constitutional duty and exercise its constitutional power. If the appeal is handled by the SFC, it will keep the DoJ informed of significant developments in the proceedings. If the DoJ takes over the appeal, it will keep the SFC informed about the progress of the appeal.
- 7.5 Where a defendant applies for a review under section 104 of the Magistrates Ordinance or lodges an appeal under sections 105 or 113 of the Magistrates Ordinance, the SFC will inform the DoJ as soon as practicable and provide the DoJ with the relevant papers if requested to do so. In the case where a defendant lodges an appeal under sections 105 or 113 of the Magistrates Ordinance, the SFC will seek confirmation from the DoJ as to whether the SFC shall have conduct of the appeal.
- 7.6 In cases where the SFC has conduct of the appeal, whether or not the appeal is initiated by the SFC or the defence, if the SFC intends to and/or the SFC is aware that the defence will take the appeal further to the Court of Final Appeal, the SFC will notify the DoJ as soon as practicable of its intention and/or the defence's further action, as the case may be, and the SFC will provide the DoJ with relevant papers including the proposed point(s) of law sought to be certified and/or the bases upon which substantial and grave injustice is said to have been done. This is to enable the DoJ to consider whether it should take over the conduct of the further appeal in order to properly discharge

its constitutional duty and exercise its constitutional power. If the further appeal is handled by the SFC, it will keep the DoJ informed of all steps taken in the proceedings. If the DoJ takes over the appeal, it will keep the SFC informed about the progress of the appeal.

7.7 Where the DoJ takes over an appeal, the SFC will provide all the case materials to the DoJ and if requested, provide all necessary assistance to the DoJ for the purpose of conducting the appeal.

## **8. Reconsideration of advice or decision**

8.1 If the SFC disagrees with the DoJ in respect of a case referred for advice or decision, the SFC may seek a review.

8.2 None of the above derogates from the powers of the Secretary for Justice in respect of the prosecution of criminal offences.

## **9. Market Misconduct Proceedings and Consent of the Secretary for Justice**

9.1 Section 252A of the SFO requires the SFC to obtain consent of the Secretary for Justice before instituting proceedings under Part XIII in the Market Misconduct Tribunal.

9.2 When seeking consent from the Secretary for Justice the SFC will provide:

- (i) a copy of a draft notice containing a statement specifying (a) the provision or provisions of Part XIII of the SFO by reference to which any person appears to have perpetrated any conduct which constitutes market misconduct; and (b) the identity of the person, and (c) such brief particulars as are sufficient to disclose reasonable information concerning the nature and essential elements of the market misconduct; and
- (ii) confirmation of whether any referral has previously been made to other law enforcement agencies in respect of the same matter.

9.3 The request will be processed in a timely manner. If the request is refused, the SFC will be given the reasons by reference to the statutory bases for refusal set out in section 252A(2) of the SFO.

Dated the 4<sup>th</sup> day of March, 2016.

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