

PUBLIC

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MEMORANDUM OF UNDERSTANDING  
BETWEEN THE UNITED STATES COMMODITY  
FUTURES TRADING COMMISSION AND THE  
AUSTRALIAN SECURITIES COMMISSION  
CONCERNING CONSULTATION AND  
COOPERATION IN THE  
ADMINISTRATION AND ENFORCEMENT OF FUTURES LAWS  
OCTOBER 19, 1994

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The United States Commodity Futures Trading Commission and the Australian Securities Commission, recognizing the increasing international activity in the futures markets and the corresponding need for mutual cooperation as a means for improving their effectiveness in administering and enforcing the futures laws of their respective countries, have reached the following understanding:

Clause 1: Definitions

1. For the purposes of this Memorandum of Understanding:

(a) "Authority" means:

(i) the Commodity Futures Trading Commission of the United States;

or

(ii) the Australian Securities Commission.

The United States Commodity Futures Trading Commission (CFTC) was established pursuant to the Commodity Futures Trading Commission Act of 1974. The CFTC is the U.S. national regulator responsible for implementing, administering and enforcing the Commodity Exchange Act.

The Australian Securities Commission (ASC) is the national corporate and securities regulator established under the Australian Securities Commission Act 1989. The ASC is responsible for administering and enforcing the Corporations Law and the Australian Securities Commission Act 1989 which provide for the regulation of corporations and the securities and futures industries. The ASC's ability to exercise

coercive powers on behalf of foreign regulators is governed by the Mutual Assistance in Business Regulation Act 1992.

- (b) "requested Authority" means an Authority to whom a request is made under this Memorandum of Understanding.
- (c) "requesting Authority" means an Authority making a request under this Memorandum of Understanding.
- (d) "person" includes a natural person, unincorporated association, partnership, or body corporate, government or political subdivision, agency, or instrumentality of a government.
- (e) "futures business" means any business which involves, in whole or in part, effecting transactions in futures and options for the accounts of others; buying and selling futures and options for one's own account; advising others for compensation, either directly or through publications, as to the desirability of investing in, purchasing or selling futures and options, the management, promotion, offer or sale of any collective investment scheme; or equivalent activities conducted by persons or entities; and includes commodity trading advisors, commodity pool operators, futures commission merchants, introducing brokers, associated persons and floor brokers, floor traders, and futures and options brokers and dealers.
- (f) "futures processing business" means a clearing corporation.
- (g) "futures market" means an exchange or other market for futures and

options that is recognized, supervised or subject to regulation by the Authorities; and

(h) "laws or regulations" means:

- (i) the provisions of the laws, or regulations promulgated thereunder, of the United States and;
- (ii) the provisions of the laws, or regulations promulgated thereunder, of Australia, including those laws, and regulations or other delegated legislation, promulgated thereunder, of any Australian State or Territory, which are from time to time administered by the Australian Securities Commission;

concerning:

- (a) insider trading, misrepresentation or the use of fraudulent, deceptive or manipulative practices in connection with the offer, purchase or sale of any futures or options contract or the conduct of futures business;
- (b) the duties of persons to comply with periodic reporting requirements;
- (c) the making of a false or misleading statement or any material omission in any application or report made to the Authorities;
- (d) the duties of persons or futures businesses to make full and fair disclosure of information to investors;

- (e) the duties of futures businesses and futures processing businesses pertaining to their financial, operational or other requirements and their duties of fair dealing in the offer and sale of futures and options, the execution of transactions and the conduct of their businesses;
- (f) the financial and other qualifications of those engaged in, or in control of, futures businesses, futures processing businesses or futures markets.

2. The Authorities will consult, pursuant to Clause 9, in the event of a dispute over the meaning of any term used in this Memorandum of Understanding.

**Clause 2: Establishment of a Framework for Consultations  
Regarding Matters of Mutual Interest**

The Authorities intend to engage in consultations about matters of mutual interest designed to further enhance cooperation and to protect investors by ensuring the stability, efficiency, and integrity of the futures markets of the United States and Australia. Such consultations will also enhance the exercise of market oversight functions and the administration of United States and Australian futures laws.

The purpose of such consultations is to assist in the development of mutually acceptable approaches for strengthening the futures markets of the United States and Australia, while avoiding, whenever possible, conflicts that may arise from the application of differing regulatory practices.

Clause 3: General Principles

1. This Memorandum of Understanding sets forth a statement of intent of the Authorities to establish a framework for mutual assistance and to facilitate the exchange of information between the Authorities to enforce or secure compliance with any law or regulation, as that term is defined herein, and does not impose any legally binding obligation on the Authorities or supersede domestic law. This Memorandum of Understanding does not create any enforceable rights, and does not modify or supersede any laws or regulations in force in, or applying to, the United States or Australia.

2. The entry into effect of this Memorandum of Understanding does not affect any right of either Authority arising under the law of its State or any other arrangement to take measures otherwise than as provided herein to obtain information necessary to ensure compliance with, or to enforce, the laws or regulations of its State. In particular, this Memorandum of Understanding does not affect any right of either Authority to communicate with, or obtain information or documents from, any person, on a voluntary basis, in the State of the other Authority.

3. Where one Authority wishes to make enquiries of, or seek information from, a person within the territory of the other Authority on a voluntary basis, the enquiries will be conducted in accordance with arrangements agreed between the Authorities.

4. This Memorandum of Understanding is intended solely for mutual legal assistance between the Authorities. No provision of this Memorandum of Understanding shall be construed as conferring the right to ask for, or challenge, the execution of a request for assistance upon any person other than the Authorities defined herein.

5. The Authorities recognize the need for and the desirability of providing mutual assistance and exchanging information to assist each other in securing compliance with the laws or regulations of their respective States. The requested Authority may, however, deny assistance requested under this Memorandum of Understanding on the ground that:

- (a) provision of the assistance would be contrary to the national or public interest or the law of the State of the requested Authority; or
- (b) the request is not in accordance with the provisions of this Memorandum of Understanding.

**Clause 4: Scope of Assistance**

1. The Authorities will provide the fullest mutual assistance, within the framework of this Memorandum of Understanding. Such assistance will be provided to facilitate the administration and enforcement of the laws or regulations applicable to futures. Such assistance may be provided notwithstanding that the type of conduct described in the request for assistance would not constitute a violation of the laws or regulations of the State of the requested Authority.

2. Assistance available under this Memorandum of Understanding may include:
- (a) providing access to information in the files of the requested Authority;
  - (b) taking the testimony and statements of persons;
  - (c) obtaining information and documents from persons; and

- (d) conducting compliance inspections or examinations of futures businesses, futures processing businesses and futures markets.

**Clause 5: Requests for Assistance**

1. Requests for assistance will be made in writing and addressed to the requested Authority's contact officer listed in Appendix A.

2. A request for assistance will specify the following:

- (a) a general description of both the subject matter of the request and the purpose for which the information and/or testimony is sought;
- (b) a general description of the assistance, information, documents or testimony of persons sought by the requesting Authority;
- (c) information in the possession of the requesting Authority that might assist the requested Authority in identifying the persons or entities believed by the requesting Authority to possess the information sought, or the places where such information may be obtained;
- (d) the legal provisions pertaining to the matter that is the subject of the request;
- (e) the desired time period for the reply; and
- (f) information in the possession of the requesting Authority that supports an inference that the subject matter of the request concerns a breach of the law administered by the requesting Authority.

3. In urgent circumstances, a request for assistance and a reply to such a request may be effected by summary procedures or by means of communication other than the exchange of letters, provided that they are confirmed in the manner prescribed in this Clause.

**Clause 6: Execution of Requests**

1. Access to information held in the files of the requested Authority will be provided upon the request of the requesting Authority.

2. The requested Authority will, in response to a request, take the testimony of persons involved, directly or indirectly, in the activities underlying the request, or holding information that may assist in carrying out the request. The requesting Authority may, in its discretion, request the taking of the testimony or statements of specific persons. The requested Authority also may require the production of other evidence from any other person or persons designated by the requesting Authority.

3. The testimony of persons will be taken in accordance with the laws and practices of the State of the requested Authority. Any person providing information or evidence as a result of a request made under this Memorandum of Understanding will be entitled to all of the rights and protections of the laws of the State of the requested Authority. Where assertions are made regarding other rights and privileges arising exclusively pursuant to the laws of the State of the requesting Authority, the Authorities will consult to determine the appropriate way to proceed.

4. When requested by the requesting Authority, testimony or statements will be taken under oath or affirmation and a transcript will be made. In addition, a representative of the requesting Authority may be present at the taking of testimony or statements and may prescribe specific questions to be asked of any witness.

5. When requested by the requesting Authority, an inspection or examination will be conducted of the books and records of a futures business or its custodian or agent, a futures processing business or a futures market. In addition, a representative of the requesting Authority may be present at the inspection or examination and, subject to approval by the requested Authority, may participate in conducting that inspection or examination.

6. In addition to assisting in the taking of testimony or statements pursuant to paragraph 4, or an inspection or examination pursuant to paragraph 5 of this Clause, the requesting Authority may submit to the requested Authority a request, with reasons, that a person or persons designated by the requesting Authority be permitted to conduct the testimony or take a statement of any person, or conduct an inspection or examination.

- (a) The request may be granted, modified or denied by the requested Authority in its discretion. The requested Authority may impose such conditions on the participation of the requesting Authority as it deems appropriate.
- (b) Where a request specifies that the laws of the State of the requesting Authority require the opportunity for counsel for the witness or any party to the proceeding, to pose questions to the witness, the requested Authority

will use its best efforts to ensure that such an opportunity will be given.

- (c) Clause 9 applies to the denial of a request referred to in this Clause.

**Clause 7: Permissible Use of Information**

1. The requesting Authority may use the information furnished pursuant to this Memorandum of Understanding solely:

- (a) for the purposes stated in the request, including ensuring compliance with or enforcement of the laws or regulations of the requesting Authority specified in the request, and related provisions; and
- (b) for related purposes, including conducting a civil or administrative enforcement proceeding, assisting in a self-regulatory enforcement proceeding, conducting or assisting in a criminal prosecution, or conducting any investigation related thereto for any general charge applicable to the violation of the provision specified in the request.

2. To use the information furnished for any purpose other than those stated in paragraph 1 of this Clause, the requesting Authority will first inform the requested Authority of its intention and provide the requested Authority the opportunity to oppose such use. The requested Authority will raise its objections to such use, if any, within 14 days of receipt of the requesting Authority's notice. If the requested Authority opposes such use of the information the Authorities agree to consult pursuant to Clause 9 concerning the reasons for the objections.

Clause 8: Confidentiality of Requests

1. To the extent permitted by law, except for disclosures in accordance with Clause 7, or those necessary for the furtherance of the request:

- (a) each Authority will keep confidential requests made under this Memorandum of Understanding, the contents of such requests, and any other matters arising during the operation of this Memorandum of Understanding, including consultations between the Authorities and unsolicited assistance; and
- (b) the requesting Authority will keep confidential any information received pursuant to this Memorandum of Understanding.

2. Except as contemplated by Clause 7, the requesting Authority will not offer the information to, and will use its best efforts to ensure that it is not obtained by, any other person. Unless otherwise agreed, in the event that any other person obtains such information the requesting Authority will use its best efforts to ensure that such information is not used by that person in any way that involves disclosure to any other person.

3. The requesting Authority will notify the requested Authority of any legally enforceable demand for information prior to complying with the demand and will assert such appropriate legal exemptions or privileges with respect to such information as may be available.

4. In response to a request by the requested Authority and to the extent permitted by law, as soon as the requesting Authority has terminated the matter for

which assistance has been requested under this Memorandum of Understanding, it will return to the requested Authority all documents and copies thereof not already disclosed in proceedings referred to in Clause 7 and other material disclosing the contents of such documents, other than material generated as part of the deliberative or internal analytical processes of the requesting Authority, which may be retained.

**Clause 9: Consultations Regarding Mutual Assistance Pursuant to this Memorandum of Understanding**

1. The Authorities will keep the operation of this Memorandum of Understanding under continuous review and will consult with a view to improving its operation and resolving any matters which may arise. In particular, the Authorities will consult upon request in the event of:

- (a) a denial by one Authority of, or opposition by one Authority to, a request or proposal made by the other Authority pursuant to this Memorandum of Understanding; or
- (b) a change in market or business conditions, or in the laws and regulations of the State of either Authority, or any other development which makes it necessary to amend or extend this Memorandum of Understanding in order to achieve its purposes.

2. In cases where the requested Authority is the CFTC, denial of a request under Clause 3(5)(a) will be made by its Commission after consultation with relevant officials within the United States Government, and in cases where the requested

Authority is the ASC, such a denial will be made by its Commission, or by the Australian Attorney-General, or his or her delegate ("Attorney-General"), in consultation with the ASC. If the Attorney-General denies assistance, the ASC will forward to the CFTC the reasons given by the Attorney-General (if any) for such denial.

3. The Authorities may determine such practical measures as may be necessary to facilitate the implementation of this Memorandum of Understanding.

4. Any of the terms of this Memorandum of Understanding may be amended, relaxed or waived by mutual consent.

**Clause 10: Unsolicited Assistance**

To the extent permitted by law, each Authority will use reasonable efforts to provide the other Authority with any information it discovers that gives rise to a suspicion of a breach, or anticipated breach, of the laws or regulations of the other Authority.

**Clause 11: Costs of Investigation**

If it appears to the requested Authority that it will incur substantial costs in responding to a request for assistance under this Memorandum of Understanding, the requested Authority and the requesting Authority will establish a cost sharing arrangement before continuing to respond to such request for assistance.

**Clause 12: Effective Date**

This Memorandum of Understanding will be effective from the date of its signature by the Authorities.

**Clause 13: Termination**

This Memorandum of Understanding will continue in effect until the expiration of 30 days after either Authority gives written notice to the other Authority of its intention to terminate the Memorandum of Understanding. If either Authority gives such notice, this Memorandum of Understanding will continue to have effect with respect to all requests for assistance that were made before the effective date of notification until the requesting Authority terminates the matter for which assistance was requested.

SIGNED this 19<sup>th</sup> day of October 1994.

FOR THE:

UNITED STATES COMMODITY  
FUTURES TRADING COMMISSION

AUSTRALIAN SECURITIES  
COMMISSION

*Mary L. Schapiro*

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MARY L. SCHAPIRO  
CHAIRMAN

*Alan Cameron*

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ALAN CAMERON  
CHAIRMAN