

SEC and BaFin Sign Regulatory Cooperation Arrangement

Overview

The U.S. Securities and Exchange Commission (SEC) and the German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) have signed a Memorandum of Understanding (MOU) setting forth a framework for consultation, cooperation and the exchange of information regarding the oversight of markets and the supervision of financial services firms. In the MOU, the SEC and the BaFin (the "Authorities") have expressed their willingness to cooperate with each other in the interests of fulfilling their respective regulatory mandates, particularly in the areas of investor protection, fostering market integrity, and maintaining confidence and systemic stability.

Cooperation between the Authorities will be achieved primarily through ongoing informal oral consultations, supplemented by more in-depth, ad hoc cooperation. The MOU does not create any legally binding obligations, confer any rights, or supersede domestic laws and it does not confer on any person the right or ability directly or indirectly to obtain, suppress, or exclude any information or to challenge the execution of a request for assistance under the MOU. In particular, the MOU does not affect any right of either Authority to communicate with, conduct an on-site visit of, or obtain information or documents from, any person subject to its jurisdiction that is located in the territory of the other Authority.

The MOU is intended to complement, but does not alter the terms and conditions of, the existing arrangements concerning cooperation in securities matters, namely the *Memorandum of Understanding on Mutual Assistance and the Exchange of Information* between the SEC and the BaFin signed on October 17 1997, which primarily covers information-sharing in the context of enforcement investigations; and the *IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the*

Exchange of Information, to which the SEC and BaFin are signatories, which also covers information-sharing in the context of enforcement investigations.

The Authorities intend to review the functioning and effectiveness of the cooperation arrangements periodically with a view to, among other things, expanding or altering the scope or operation of the MOU should it be judged necessary.

Scope of Supervisory Consultation, Cooperation And Exchange of Information Relating to Firms, Related Entities or Dual-Regulated Entities

The Authorities recognize the importance of close communication regarding the global operations of firms, and intend to consult regularly regarding general supervisory developments and issues relevant to the operations, activities and regulation of such firms. As far as practicable and appropriate in the particular circumstances, including the status of efforts to address any difficulties experienced by a firm, each Authority endeavors to inform the other in advance of:

- pending regulatory changes that may have a significant impact on the operations, activities, or reputation of a firm in the other jurisdiction, and
- any material event that could adversely impact each other's markets or the stability of a firm in the other jurisdiction. Such events include known changes in the operating environment, operations, management, or systems and controls.

To the extent necessary to supplement periodic and ad hoc oral consultations, each Authority

intends to provide the other, on written request, with the fullest possible cooperation in assisting with the oversight of a firm, and ensuring compliance with the laws or regulations of the Requesting Authority. Such requests will relate to information that is not otherwise available to the Requesting Authority.

The assistance covered by the MOU includes, as appropriate, providing information based on documents held in the files of the Requested Authority relevant to the Requesting Authority's oversight of the operations or activities of a firm. The Requested Authority will provide maximum assistance in interpreting such information. Such information includes, without limitation:

- information relating to the financial and operational condition of a firm, including, for example, its capital structure, liquidity and funding profiles, and internal controls procedures, and
- relevant regulatory information, including, for example, interim and annual financial statements, information drawn from regulatory reports and filings, early warning notices that a firm is required to submit to an Authority, and information drawn from examination reports as may be deemed appropriate or relevant by the Requested Authority.

The Requesting Authority may (exceptionally) ask to see copies of regulatory reports, filings or other information held in the files of the Requested Authority or other information located in the Requested Authority's jurisdiction that may be relevant to the Requesting Authority's oversight of a firm. It will be incumbent upon the Requesting Authority to specify why direct access is required to information in this form.

With regard to asset management, the Authorities have agreed that they will provide each other, on request, with copies of inspection reports of entities regulated by both Authorities ("Dual-Regulated Entities") that are involved in asset management, including investment advisers, investment fund managers, fund administrators, fund trustees, investment companies and investment funds.

On-site Visits of Related Entities and Dual-Regulated Entities

The SEC may conduct on-site visits of persons located in Germany that are either (a) legal entities

or sub-groups of a Firm, including affiliates, branches or subsidiaries, regulated by one or both Authorities that have their global headquarters in the U.S. ("Related Entities") or (b) Dual-Regulated Entities. The BaFin, or the examiners commissioned by it, may conduct on-site visits of persons located in the U.S. that are either (a) Related Entities that have their global headquarters in Germany or (b) Dual-Regulated Entities.

The Authorities intend to comply with the following procedures before conducting on-site visits:

- the Inspecting Authority will notify the Host Authority of its intention to conduct an on-site visit (either itself or through a third party commissioned by it) and the proposed time frame and scope of the visit. If practicable, the Inspecting Authority will attempt to notify the Host Authority at least one week prior to notifying the Related Entity or Dual-Regulated Entity,
- the Authorities intend to assist each other with on-site visits, including cooperation and consultation in reviewing, interpreting and analyzing the content of public and non-public documents, books and records of, and other information about, a firm, and obtaining information from directors and senior management of the respective Related Entity or Dual-Regulated Entity, and
- the Host Authority may, at its discretion, accompany the Inspecting Authority during the on-site visit and assist with it.

Framework for Cooperation with Regard to Affiliated Markets

In view of the growing trend toward cross-border affiliation of markets, the SEC and the BaFin recognize the importance of establishing a framework for coordination and cooperation with regard to the oversight of markets in the U.S. and Germany that are affiliated through a common ownership structure located in either jurisdiction or in a third jurisdiction ("Affiliated Markets"). For the U.S., "Market" means a national securities exchange registered under Section 6 of the Securities and Exchange Act of 1934 (a "US Market"). For Germany, "Market" means a multilateral system for buying and selling interests in financial instruments which is authorized in Germany and functions regularly and in accordance with the provisions of

Title III of the European Markets in Financial Instruments Directive (2004/39/EC) (a “German Market”).

In the event of the affiliation of a US Market and a German Market, the SEC and the BaFin will endeavor to enter into practical arrangements governing the scope of and terms and conditions for consultation, cooperation and the exchange of information regarding the oversight of the Affiliated Markets. Such arrangements, once concluded and signed by the Authorities, will become part of the MOU.

The Exchange Supervisory Authorities (ESA) of the respective German federal states (“Bundesländer”) where the exchanges are located are directly responsible for exchange supervision, the BaFin being charged with cooperation with foreign authorities in matters relating to the supervision of securities exchanges. Accordingly, in the event of a market affiliation, the SEC and the BaFin will consult with the relevant ESA with a view to its becoming a party to any practical arrangements developed under the MOU relating to the oversight of the Affiliated Markets.

Execution of Requests for Assistance

As far as possible, a request for written information should be made in writing. During emergency situations (i.e. the occurrence of an event that could materially impair the financial or operational condition of a firm or market) requests for information may be made in any form, including orally, provided such communication is confirmed in writing.

Permissible Uses and Confidentiality of Information

Except for disclosures in accordance with the MOU (including permissible uses of information under the provisions of the MOU), each Authority intends to keep confidential, to the extent permitted by law, information shared under the MOU, requests made under the MOU, the contents of such requests, and any other matters arising under the MOU.

The Requesting Authority may, however, use non-public information obtained under the MOU solely for the purpose of conducting supervision of firms and markets, and seeking to ensure compliance with the laws or regulations of the Requesting Authority. In cases where an Authority seeks to share non-

public information obtained pursuant to the MOU with a third party securities, insurance, banking or other regulatory authority (including a relevant self-regulatory organization), the Requesting Authority undertakes to consult with the Requested Authority prior to providing the information to the third party authority. It also undertakes:

- to provide assurances that the third party authority has confirmed that it requires the non public information for a relevant supervisory purpose related to a material affiliate of a firm, and
- to obtain confirmation from the Requested Authority that the third party authority has in place information sharing arrangements with the Requested Authority relating to supervisory matters which govern the use and confidentiality of any non-public information shared under such arrangement.

If the conditions described above are not met, the Requesting Authority must obtain consent from the Requested Authority prior to providing non-public information obtained under the MOU to a third party authority. In considering whether to grant consent, the Requested Authority will take into account both the Requesting Authority's obligations under, and the objectives of, the European Directives, with respect to requests by the Requesting Authority to share information with EEA members. The Requested Authority will also take into account the urgency of the request and respond in a timely manner. If an Authority receives, via a third party, information relating to the oversight of firms or markets provided by the other Authority, the first Authority will treat the information in accordance with the terms of the MOU.

In certain circumstances, it may become necessary for the Requesting Authority to share information obtained under the MOU with other Government Entities, such as the U.S. Treasury Department or the U.S. Federal Reserve Board (if the Requesting Authority is the SEC) or the Deutsche Bundesbank or the Exchange Supervisory Authorities (if the Requesting Authority is the BaFin).

In these circumstances, and to the extent permitted by law:

- the Requesting Authority intends to notify the Requested Authority.

- prior to passing on the information, the Requested Authority must receive adequate assurances concerning the Government Entity's use and confidential treatment of the information, including, as necessary, assurances that the information will not be shared with other parties without the prior consent of the Requested Authority.
- in the case of Deutsche Bundesbank, the SEC recognizes the close working relationship between the BaFin and the Deutsche Bundesbank with regard to banking supervision, including some firms covered by the MOU. Pursuant to Section 9 of the German Banking Act ("KWG"), any information obtained by the BaFin under the MOU and passed on to the Deutsche Bundesbank will be kept confidential, can be used only for supervisory purposes under the KWG, and cannot be shared by the Deutsche Bundesbank with other parties without the prior consent of the SEC. Accordingly, subject to the notice requirement, the BaFin may pass information received from the SEC on to the Deutsche Bundesbank.

Before using non-public information provided under the MOU for any purposes other than those stated above, the Requesting Authority must first inform the Requested Authority of the intended use of the information. The Authorities will consult as necessary to discuss the reasons for any denial by the Requested Authority of such use and the circumstances under which such use might be allowed.

Information Gathered Under the Auspices of the MOU for Enforcement Purposes

As mentioned above, the MOU is intended to complement, but not alter in any way, either the *Memorandum of Understanding on Mutual Assistance and the Exchange of Information* between the SEC and the BaFin dated October 17, 1997, or the *IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*. The Authorities recognize that while information is not to be gathered under the auspices of the MOU for enforcement purposes, the Authorities may subsequently wish to use the information for such purposes. In cases where an Authority seeks to use information obtained under the MOU for enforcement purposes, including conducting investigations or bringing administrative,

civil or criminal proceedings, prior consent must be sought from the other Authority. Use will be subject to the terms and conditions of the arrangements referred to above concerning cooperation in enforcement matters.

As far as possible, the Requesting Authority will notify the Requested Authority of any legally enforceable demand for non-public information provided under the MOU. Prior to compliance with the demand, the Requesting Authority intends to assert all appropriate legal exemptions or privileges that may be available with respect to such information.

The Authorities intend that the sharing or the disclosure of non-public information, including, but not limited to, deliberative and consultative materials, pursuant to the terms of the MOU, will not constitute a waiver of privilege or confidentiality of such information.

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This update was authored by Angelo Lercara.

Practice group contacts

For more information, please contact one of the lawyers listed, or the Dechert lawyer with whom you regularly work. Visit us at www.dechert.com/financialservices.

Karen L. Anderberg
London
+44 20 7184 7313
karen.anderberg@dechert.com

Jennifer O. Epstein
London
+44 20 7184 7403
jennifer.epstein@dechert.com

Katharina Ebell
Munich
+49 89 21 21 63 41
katharina.ebell@dechert.com

Angelo Lercara
Munich
+49 89 21 21 63 15
angelo.lercara@dechert.com

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