

9<sup>th</sup> May 2018

# **MEMORANDUM OF UNDERSTANDING**

## **GERMANY**

Bundesanstalt  
für  
Finanzdienstleistungsaufsicht

## **HONG KONG**

Securities and  
Futures  
Commission

In view of the growing globalization of the world's financial markets and the increase in cross-border operations and activities of regulated entities, the Securities and Futures Commission in Hong Kong (SFC) and Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) have reached this Memorandum of Understanding (MOU) regarding mutual assistance in the supervision and oversight of Regulated Entities in the jurisdictions of both Authorities, according to their respective domestic laws. The Authorities express, through this MOU, their willingness to cooperate with each other in the interest of fulfilling their respective regulatory mandates, particularly in the areas of: investor protection; promoting the integrity of Cross-Border Regulated Entities; fostering market and financial integrity; reducing systemic risk and maintaining financial stability.

## **ARTICLE ONE: DEFINITIONS**

For purposes of this MOU:

1. **"Authority"** means the SFC or BaFin:
  - (a) **"Requested Authority"** means the Authority to whom a request is made pursuant to Article Five of this MoU; and
  - (b) **"Requesting Authority"** means the Authority making a request pursuant to Article Five of this MoU.
2. **"Cross-border On-site Visit"** means any regulatory visit by one Authority to the premises of a Cross-Border Regulated Entity located in the other Authority's jurisdiction, for the purposes of ongoing supervision and oversight.
3. **"Cross-Border Regulated Entity"** means
  - (a) a Regulated Entity which is regulated in the jurisdiction of one Authority that is a branch, a subsidiary, a holding company, a subsidiary of the holding company, or a representative office of another Regulated Entity which is regulated in the jurisdiction of the other Authority; and
  - (b) a Regulated Entity that is regulated by both Authorities.
4. **"Onward Recipient"** means:
  - (a) in respect of BaFin: Stock Exchange Supervisory Offices of the federal states, and the Trading Surveillance Offices of the Exchanges (HÜST); and
  - (b) in respect of the SFC: the Hong Kong Monetary Authority and the Hong Kong Financial Services and the Treasury Bureau.
5. **"Person"** means a natural person or legal person, or an unincorporated entity or association, including partnerships.
6. **"Regulated Entity"** means a financial market participant or other Person that is regulated by one of the Authorities.

## **ARTICLE TWO: GENERAL PROVISIONS**

7. This MoU is a statement of intent to consult, cooperate and exchange information in connection with the supervision and oversight of Cross-Border Regulated Entities in the asset management and securities sectors in Hong Kong and Germany, in a manner consistent with, and permitted by, applicable laws in order to facilitate fulfilling the Authorities' respective regulatory mandates. This MoU also seeks to support high standards in Cross-Border Regulated Entities' conduct of business, including but not limited to acting honestly, fairly, in the best interests

of their clients and the integrity of the market, as well as acting with due skill, care and diligence.

8. The provisions of this MoU are intended to support communication on issues of common interest concerning Cross-Border Regulated Entities as well as to facilitate the written exchange of non-public information where necessary.
9. This MoU does not create any legally binding obligations, confer any rights, or supersede domestic laws and regulatory requirements, in force in the jurisdiction of the Authorities. This MoU does not confer upon 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 this MoU.
10. This MoU does not limit an Authority to act unilaterally in fulfillment of its supervisory functions. In particular, this MoU does not affect any right of an Authority to communicate with or to obtain information or documents from any Person subject to its jurisdiction that is located in the jurisdiction of the other Authority. However, an Authority should notify the other Authority by giving a written notice prior to carrying out any Cross-border On-site Visit in the jurisdiction of the other Authority.
11. This MoU complements, but does not alter the terms and conditions of the following existing arrangements:
  - (a) the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU), to which the Authorities are signatories, which covers mutual assistance and the exchange of information for the purpose of enforcing and securing compliance with the Laws and Regulations of the jurisdictions of the Authorities as defined in the MMoU including assistance in the context of enforcement investigations;
  - (b) the Memorandum of Understanding between SFC and BaFin dated 1 March 1998, except that this MoU will supersede the provisions of the Memorandum of Understanding dated 1 March 1998 in so far as it relates to cooperation and exchange of information regarding the supervision and oversight of Cross-Border Regulated Entities;
  - (c) the Memorandum of Understanding between SFC and BaFin dated 22 July 2013 concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities (AIFMD MoU); and
  - (d) any other arrangements concerning cooperation in asset management and securities matters between the Authorities.

The provisions of the AIFMD MoU shall prevail over the provisions of this MoU in relation to consultation, cooperation and the exchange of information related to the supervision of AIFMD entities.
12. Each Authority will, within the framework of this MoU and subject to each Authority's laws and regulations, use reasonable endeavors to provide the other Authority with the fullest cooperation permissible in relation to the supervision and oversight of Cross-Border Regulated Entities. Nevertheless, cooperation may be denied in the following circumstances:
  - (a) where the cooperation would require an Authority to act in a manner that would violate domestic laws or regulations;
  - (b) where a request for assistance is not made in accordance with the terms of this MoU; or

- (c) where the request for assistance would otherwise be contrary to the public interest.
- 13. The Authorities will periodically review the functioning and effectiveness of the cooperation arrangements under this MoU with a view, *inter alia*, to expanding or altering the scope or operation of this MoU should that be judged necessary.
- 14. Communications made under this MoU, including but not limited to written requests and notices, shall be in English.
- 15. To facilitate cooperation under this MoU, the Authorities hereby designate contact persons as set forth in the Appendix.

### **ARTICLE THREE: SCOPE OF SUPERVISORY COOPERATION**

- 16. The Authorities recognize the importance of close communication concerning Cross-Border Regulated Entities, and intend to consult and update regularly at the staff level regarding:
  - (a) general supervisory issues, including with respect to regulatory, oversight or other program developments;
  - (b) issues relevant to the operations, activities, and regulation of Cross-Border Regulated Entities; and
  - (c) any other areas of mutual supervisory interest.
- 17. Cooperation will be most useful in, but is not limited to, the following circumstances where issues of common regulatory concern may arise:
  - (a) the initial application of a Regulated Entity in one jurisdiction also to be regulated by the other Authority;
  - (b) the initial application to become a Regulated Entity in one jurisdiction submitted by an entity that is a branch, a subsidiary, a holding company, a subsidiary of a holding company, or a representative office of another Regulated Entity which is regulated in the jurisdiction of the other Authority;
  - (c) the ongoing supervision and oversight of a Cross-Border Regulated Entity;
  - (d) regulatory approvals or supervisory actions taken in relation to a Cross-Border Regulated Entity by one Authority that may impact the operations of the Cross-Border Regulated Entity in the other jurisdiction;
  - (e) any updates on the Authorities' respective functions, and regulatory oversight programs, as deemed appropriate; or
  - (f) general supervisory developments where considered necessary.
- 18. **Advance Notification.** Each Authority will inform the other Authority in advance, or as soon as possible of:
  - (a) information that may, in its reasonable opinion, have a material adverse impact on a Cross-Border Regulated Entity, such as changes in the ownership, operating environment, operations, financial resources, management, or systems and control of a Cross-Border Regulated Entity; and
  - (b) the status of efforts to address any material financial or operational difficulties experienced by a Cross-Border Regulated Entity as described in paragraph 18 (a) above.
- 19. Where an Authority considers it appropriate and necessary, it may inform the other Authority on a voluntary basis in advance, where practicable or as soon as

possible thereafter, of pending regulatory changes that may have a significant impact on the operations, activities, or reputation of a Cross-Border Regulated Entity.

20. **Provision of Unsolicited Information.** Where an Authority has information which will assist or enable the other Authority in the performance of its supervisory functions, the former may provide such information, or arrange for such information to be provided, on a voluntary basis even though no request has been made by the other Authority. The terms and the conditions of this MoU will apply if the providing Authority specifies that the information is provided under this MoU.
21. **Exchange of Information.** Upon written request and as far as their laws and regulations permit, each Authority intends to provide the other Authority with assistance in obtaining information not otherwise available to the Requesting Authority that will enable or assist the Requesting Authority to perform its supervisory functions. In addition, where requested, the Requested Authority will, as far as possible, further explain or elaborate on such information to the Requesting Authority in order to assist the Requesting Authority to perform its supervisory functions. The information covered by this paragraph includes, without limitation:
  - (a) information relevant to the financial and operational condition of a Cross-Border Regulated Entity, including, for example, reports of capital reserves, liquidity or other prudential measures, internal controls procedures, corporate information, license or membership history and status, and regulatory and disciplinary records;
  - (b) relevant regulatory information and filings that a Cross-Border Regulated Entity is required to submit to an Authority including, for example: interim and annual financial statements and early warning notices;
  - (c) information impugning the integrity of a Cross-Border Regulated Entity, such as regulatory reports prepared by an Authority, including for example: examination reports, compliance review reports on investor complaints, self-reported breaches or sundry referrals from other regulators, and findings or information drawn from such reports; and
  - (d) group-level information of Cross-Border Regulated Entities, including (without limitation and subject to the availability) group-wide organizational charts, board and management committee minutes, senior management responsibility maps, business model analysis and risk profiles.
22. **Regular / Periodic Liaison.** To facilitate each Authority in performing its respective supervisory functions, the Authorities intend to liaise with each other concerning the following matters from time to time as far as their laws and regulations permit:
  - (a) any updates on their respective functions, and regulatory oversight programs, where considered necessary, including supervisory priorities and 'best practices' on a regular basis. This may also include, but is not limited to, discussions on conduct risk and control culture, risk trends, thematic and/or cross-sector issues, contingency planning/ crisis management and systemic risk concerns;
  - (b) general supervisory developments where considered necessary; and
  - (c) issues of common interest concerning Cross-Border Regulated Entities.

#### **ARTICLE FOUR: CROSS-BORDER ON-SITE VISITS**

23. Each Authority will notify the other Authority prior to carrying out any Cross-border On-site Visits. The Authority intending to carry out the Cross-border On-site Visit will, before doing so, provide information to the other Authority on the intended time frame, the scope and purpose of the visit, and address any concerns raised by the other Authority.
24. The Authorities may conduct joint on-site visits with a view to possibly leveraging resources in the oversight of the Cross-Border Regulated Entity, in which case these will be led by the Authority in whose jurisdiction the visit takes place.
25. On request, the local Authority will endeavor to share with the Authority conducting the Cross-border On-site Visit any relevant examination reports or compliance reviews it may have in respect of the Cross-Border Regulated Entity.
26. The Authorities will communicate with each other, including conducting meetings as appropriate during the course and the aftermath of the Cross-border On-site Visit. After concluding a Cross-border On-site Visit, the Authority conducting the visit will communicate any material issues to the other Authority that may impact upon the regulatory status of the Cross-Border Regulated Entity.

#### **ARTICLE FIVE: EXECUTION OF REQUESTS FOR ASSISTANCE**

27. A request for information pursuant to paragraph 21 should be made in writing, and addressed to the relevant contact person identified in the Appendix. A request should specify the following:
  - (a) a description of the information sought by the Requesting Authority, including specific questions to be asked, Persons which may possess the information sought and an indication of any sensitivity about the request;
  - (b) a concise description of the facts underlying the request;
  - (c) any information in the possession of the Requesting Authority that might assist the Requested Authority in identifying the places where such information may be obtained; and
  - (d) the desired time period for reply and, where urgent, the reason for the urgency.
28. In urgent matters, requests for information may be made in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.
29. Any original document or other original materials provided in response to a request under this MOU must be returned on request, to the extent permitted by the laws of the Requesting Authority.
30. The Requested Authority may as a condition of agreeing that assistance be given under this MOU, require the Requesting Authority to make a contribution to costs. Such a contribution may, in particular, be required where the cost of executing a request is substantial.

## **ARTICLE SIX: PERMISSIBLE USES OF INFORMATION**

31. The Requesting Authority may use non-public information obtained under this MoU solely for the purposes of:
- (a) supervising Cross-Border Regulated Entities and
  - (b) seeking to ensure compliance with the laws or regulations of the Requesting Authority or performing its supervisory functions (including but not limited to assessing compliance by a Cross-Border Regulated Entity with the laws and regulations it administers and identifying whether or not a Cross-Border Regulated Entity constitutes a risk to or may affect the financial stability of its jurisdiction).
32. The Authorities recognize that information is not to be gathered under the auspices of this MoU for enforcement purposes. No information received under this MoU will be used in any judicial or other proceedings.
33. In the event that the Requesting Authority intends to use the information obtained for any purpose other than that stated in paragraph 31, the Requesting Authority must notify and seek the prior written consent of the Requested Authority to such use of the information.

## **ARTICLE SEVEN: CONFIDENTIALITY OF INFORMATION AND ONWARD SHARING**

34. Each Authority will, to the extent permitted by domestic laws, keep confidential information shared under this MoU, including requests made under this MoU, the contents of such requests, and any other matters arising under this MoU, including consultations between the Authorities and unsolicited assistance. Subject to paragraphs 35 and 36, the Requesting Authority will not disclose non-public information received under this MoU to any third party, for any purpose unless it has obtained the prior written consent of the Requested Authority.
35. If the Requesting Authority receives a legally enforceable demand from a third party for non-public information furnished under this MoU, the Requesting Authority:
- (a) will notify the Requested Authority of the demand as soon as reasonably practicable; and,
  - (b) will take all appropriate measures to preserve the confidentiality of the information, including asserting legal exemptions or privileges.
36. In certain circumstances, as required by domestic laws, it may become necessary for the Requesting Authority to share any non-public information received under this MoU with an Onward Recipient in its jurisdiction. In these circumstances:
- (a) the Requesting Authority will notify the Requested Authority of what non-public information it intends to share, which Onward Recipient will receive the information and the function in respect of which the Requesting Authority has provided the information to the Onward Recipient;
  - (b) prior to passing on the information, the Requesting Authority will provide the Requested Authority with information concerning the Onward Recipient's professional secrecy regime, including, as necessary, assurances that:
    - (i) the non-public information will be used solely for supervisory purposes, unless the Requested Authority's prior written consent has been obtained;

- (ii) the Onward Recipient is required to maintain a level of confidentiality in respect of the non-public information that is at least equivalent to that which the Requesting Authority is subject to (including, where relevant, restrictions or conditions imposed on it by the Requested Authority); and
- (iii) the non-public information will not be shared by the Onward Recipient with other parties without getting the prior written consent of the Requested Authority.

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

#### **ARTICLE EIGHT: TRANSFER OF PERSONAL DATA**

38. From 25 May 2018 onwards, personal data will be transferred from BaFin to the SFC under this MoU, if appropriate data protection safeguards are in place between the Authorities.
39. Where information provided by the SFC to BaFin involves personal data, the SFC will comply with the applicable domestic law on personal data protection.

#### **ARTICLE NINE: TERMINATION**

40. Cooperation in accordance with this MoU will continue until the expiration of 30 days after either Authority gives written notice to the other Authority of its intention to terminate this MoU. If either Authority gives such notice, cooperation will continue with respect to all requests for assistance that were made under this MoU before the effective date of notification until the Requesting Authority terminates the matter for which assistance was requested. In the event of termination of this MOU, information obtained under this MoU will continue to be treated in a manner prescribed under Articles Six and Seven.

Signed:

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Elisabeth Roegele  
Chief Executive Director of Securities  
Supervision / Asset Management  
Bundesanstalt für  
Finanzdienstleistungsaufsicht

Ashley Alder ✓  
Chief Executive Officer  
Securities and Futures Commission

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Julia Leung  
Deputy Chief Executive Officer and  
Executive Director, Intermediaries  
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