MoU concerning consultation, cooperation and the exchange of information related to the supervision of covered entities in the alternative investment fund industry

In view of the growing globalization of the world's financial markets and the increase in cross-border operations and activities of AIFMs, Commodity Pool Operators, and Commodity Trading Advisors of AIFs and Commodity Pools, the United States Commodity Futures Trading Commission (CFTC) and the Bundesanstalt für Finanzdienstleistungsaufsicht (Germany) have reached this Memorandum of Understanding (MoU) regarding mutual assistance in the supervision and oversight of AIFMs, Commodity Pool Operators, Commodity Trading Advisors, Delegates, AIFs and Commodity Pools that operate on a cross-border basis between the European Union (EU) and the United States. 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, fostering market and financial integrity, and maintaining confidence and systemic stability. This MoU is a bilateral arrangement between the CFTC and each EU Authority and is not a collective arrangement among the EU Authorities.

Article 1. Definitions

For the purpose of this MoU:

a) "Authority" means a signatory to this MoU or any successor thereto.

b) "Requested Authority" means the Authority to whom a request is made under this MoU;

c) "Requesting Authority" means the Authority making a request under this MoU.

d) "AIFMD" means the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

e) "AIF" means a collective investment undertaking, including investment compartments thereof, which: (i) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) is not a UCITS, which is defined as an undertaking for collective investment in transferable securities authorised in accordance with the UCITS Directive;

f) "AIFM" means a legal Person whose regular business is managing one or more AIFs in accordance with the AIFMD.

g) "Delegate" means an entity to which an AIFM delegates the tasks of carrying out the portfolio management or risk management of one or more Covered Funds under its management in accordance with Article 20 of the AIFMD.

h) "Covered Entity" means a:

   i. AIFM, as defined in Article 1(f);

   ii. Commodity Pool Operator, as defined in the Commodity Exchange Act and relevant regulations;

   iii. Commodity Trading Advisor, as defined in the Commodity Exchange Act and relevant regulations;

iv. AIF, as defined in Article 1(e);

v. Commodity Pool, as defined in the Commodity Exchange Act and relevant regulations; and

vi. Delegates, as defined in Article 1(g).

i) "On-Site Visit" means any regulatory visit by one Authority to, or inspection of the books and records and the premises of, a Covered Entity located in the other Authority's territory, for the purposes of on-going supervision.

j) "Governmental Entity" means:

i. If the Requesting Authority is the CFTC, the U.S. Department of the Treasury or the U.S. Board of Governors of the Federal Reserve System, or the Financial Stability Oversight Council; and

ii. If the Requesting Authority is the Bundesanstalt für Finanzdienstleistungsaufsicht, the Ministry of Finance or the Central Bank.

k) "Local Authority" means the Authority in whose territory a Covered Entity is located.

l) "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a Covered Entity, independently from a decision of the European Council within the meaning of Article 18 of the ESMA Regulation (Regulation 1095/2010/EU).

m) "Person" includes a natural person, unincorporated association, partnership, trust, investment company, or corporation, and may be a Covered Entity.

Article 2. General provisions

1) This MoU is a statement of intent to consult, cooperate and exchange information in connection with the supervision and oversight of Covered Entities that operate on a cross-border basis in the territories of the signatories, in a manner consistent with, and permitted by, the laws and requirements that govern the Authorities. The Authorities anticipate that cooperation will be primarily achieved through on-going, informal, oral consultations, supplemented by more in-depth, ad hoc cooperation. The provisions of this MoU are intended to support such informal and oral consultations as well as to facilitate the written exchange of non-public information where necessary.

2) This MoU does not create any legally binding obligations, confer any rights, or supersede domestic laws. 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.

3) This MoU does not intend to limit an Authority to taking solely those measures described herein in fulfilment of its supervisory or oversight functions. In particular, this MoU does not affect any right of any Authority to communicate with, or obtain information or documents from, any Person or Covered Entity subject to its jurisdiction that is established in the territory of another Authority.

4) This MoU complements, but does not alter the terms and conditions of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation

and the Exchange of Information (revised May 2012) (IOSCO MMoU), to which the Authorities are signatories, which covers information-sharing in the context of enforcement investigations; and any of the existing arrangements concerning cooperation in matters between the signatories.

5) The Authorities intend to, within the framework of this MoU, provide one another with the fullest cooperation permissible under the law in relation to the supervision and oversight of Covered Entities. Following consultation, cooperation may be denied:

    a) Where the cooperation would require an Authority to act in a manner that would violate its domestic law;

    b) Where a request for assistance is not made in accordance with the terms of this MoU; or

    c) On the grounds of the national public interest.

6) No domestic banking secrecy, blocking laws or regulations should prevent an Authority from providing assistance to another Authority.

7) To facilitate cooperation under this MoU, the Authorities hereby designate contact persons as set forth in Appendix A.

Article 3. Scope of cooperation

1) The Authorities recognize the importance of close communication concerning Covered Entities, and intend to consult where appropriate regarding: (i) general supervisory issues, including with respect to regulatory, oversight or other program developments; (ii) issues relevant to the operations, activities, and regulation of Covered Entities; and (iii) any other areas of mutual supervisory interest.

2) Cooperation will be most useful in, but is not limited to, the following circumstances where issues of regulatory concern may arise:

    a) The initial application of a Covered Entity for authorization, registration or exemption from registration in another jurisdiction;

    b) The on-going oversight of a Covered Entity; or

    c) Regulatory approvals or supervisory actions taken in relation to a Covered Entity by one Authority that may impact the operations of the Covered Entity in the other territory.

3) *Notification*. Each Authority will, where reasonable, seek to inform the other relevant Authority as soon as practicable of:

    a) Any known material event that could adversely impact a known Covered Entity; and

    b) Enforcement or regulatory actions or sanctions, including the revocation, suspension or modification of relevant licenses or registration, concerning or related to a known Covered Entity which may have, a material effect on the Covered Entity.

The information to be provided by one Authority pursuant to this paragraph shall refer to Covered Entities registered or authorized by the Authority. The determination of what constitutes "material event," "adversely impact," or "material effect" shall be left to the reasonable discretion of the relevant Authority that determines to notify another Authority.

4) *Exchange of Information.* To supplement informal consultations, each Authority intends to provide the other Authority, upon written request, with assistance in endeavouring to obtain information not otherwise available to the Requesting Authority, and, where needed, interpreting such information so as to enable the Requesting Authority to assess compliance with its laws and regulations, provided that the Authority is authorized to collect such information.

    a) The information covered by this paragraph includes:

        i. Information that would permit the Requesting Authority to verify that the Covered Entities covered by this MoU comply with the relevant obligations and requirements of the national law of the Requesting Authority;

        ii. Information relevant for monitoring and responding to the potential implications of the activities of Covered Entities, including, for example, disclosure reports and investor complaints;

        iii. Information relevant to the financial and operational condition of a Covered Entity;

        iv. Relevant regulatory information and filings that a Covered Entity is required to submit to an Authority; and

        v. Regulatory reports prepared by an Authority relating to a Covered Entity.

    b) The information to be provided by one Authority pursuant to this paragraph shall refer to Covered Entities registered or authorised by the Authority.

Article 4. On-Site Visits

1) Each Authority may need to conduct, itself or by a third party commissioned by it, On-Site Visits of the Covered Entities subject to its supervisory authority that are located in the Local Authority's territory. Authorities should discuss and reach understanding on the terms regarding On-Site Visits, taking into full account each other's sovereignty, legal framework and statutory obligations, in particular, in determining the respective roles and responsibilities of the Authorities. The Authorities will act in accordance with the following procedure before conducting an On-Site Visit.

    a) The Authority seeking to conduct an On-Site Visit will provide advance notice to the Local Authority of its intent for conducting an On-Site Visit and the intended time frame for, and the scope of, such a visit. The Authorities will consult with a view to reaching an understanding on the intended timeframe for, and scope of, any On-Site Visit.

    b) The Local Authority may, in its discretion, accompany the other Authority during the On-Site Visit, or conduct joint inspections where appropriate.

c) When establishing the scope of any proposed On-Site Visit, the Authority seeking to conduct the On-Site Visit will give due and full consideration to the supervisory activities of the Local Authority and any information that was made available or is capable of being made available by such Local Authority.

d) The Authorities will assist each other in reviewing, interpreting and analysing the contents of public and non-public documents and obtaining information from directors and senior management of Covered Entities or any other relevant Person, provided that the Authorities are authorized to collect such information.

e) It is understood that the Local Authority will provide assistance in connection with an On-Site Visit as described in this Article 4 only with respect to Covered Entities that are registered with the Local Authority.

Article 5. Execution of requests for assistance

1) To the extent possible, a request for written information pursuant to Article 3, Paragraph 3 should be made in writing, and addressed to the relevant contact person identified in Appendix A. A request generally should specify the following:

   a) The information sought by the Requesting Authority, including specific questions to be asked and an indication of any sensitivity about the request;

   b) A concise description of the facts underlying the request and the supervisory purpose for which the information is sought, including the applicable regulations and relevant provisions applicable to the supervisory activity; and

   c) The desired time period for reply and, where appropriate, the urgency thereof.

2) If a Local Authority becomes aware of an Emergency Situation through its supervisory activities, such Local Authority will endeavour to notify the other Authorities of the Emergency Situation and communicate information to the others as would be appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During Emergency Situations, 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. Notwithstanding the foregoing, the notification obligation for the Local Authority pursuant to this Article 5 Paragraph 2 shall be limited to Covered Entities that are registered with the Local Authority.

Article 6. Cooperation on enforcement.

As the Authorities are signatories to the IOSCO MMoU (and, in some cases, other enforcement arrangements or bilateral enforcement MoUs), the Authorities note that these enforcement MoUs recognize the importance and desirability of providing mutual assistance and exchanging information for the purpose of enforcing, and securing compliance with, the securities laws and regulations applicable in their respective jurisdictions. These laws and regulations include those concerning Covered Entities. Accordingly, where information relating to an enforcement investigation or action is necessary, the Authorities will request this information via the frameworks established under the IOSCO MMoU, other enforcement arrangements or a relevant bilateral enforcement MoU. The types of information available to be shared under the IOSCO MMoU, other enforcement arrangements, or applicable bilateral MoUs include information that will assist Requesting Authorities in investigating whether a Covered

Entity is violating any relevant laws, regulations and orders that apply to it in the Requesting Authorities' jurisdictions.

Article 7. Permissible uses of information.

1) The Requesting Authority may use non-public information obtained under this MoU solely for the purpose of supervising Covered Entities and seeking to ensure compliance with the laws or regulations of the Requesting Authority.

2) This MoU is intended to complement, but does not alter the terms and conditions of the existing arrangements between Authorities, including the IOSCO MMoU. The Authorities recognize that, while information is not to be gathered under this MoU for enforcement purposes, subsequently the Authorities may want to use the non-public information provided pursuant to this MOU for enforcement purposes. In such cases, further use of the information should be governed by the terms and conditions of the IOSCO MMoU or other applicable enforcement MoUs.

Article 8. Confidentiality and onward sharing of information.

1) Except for onward sharing and disclosures in accordance with this MoU, including permissible uses of information under Article 7, each Authority will keep confidential to the extent permitted by law non-public information shared under this MoU, requests made under this MoU, the contents of such requests, and any other matters arising under this MoU.

2) To the extent legally permissible, the Requesting Authority intends to notify the Requested Authority of any legally enforceable demand from a third party for non-public information that has been furnished under this MoU. Prior to compliance with the demand, the Requesting Authority intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.

3) In extraordinary circumstances, it may become necessary for a Requesting Authority to share non-public information obtained under this MoU with a Governmental Entity. In these circumstances and to the extent permitted by law:

   a) The Requesting Authority intends to notify the Requested Authority; and

   b) Prior to the Requesting Authority sharing the non-public information, the Requesting Authority will provide adequate assurances to the Requested Authority concerning the use and confidential treatment of the information by the Governmental Entity, including, as necessary, assurances that:

      i. The Governmental Entity has confirmed that it requires the information for a purpose within the scope of its jurisdiction; and

      ii. The information will not be shared by the Governmental Entity with other parties without getting the prior written consent of the Requested Authority.

4) Except as provided in this Article, the Requesting Authority must obtain the prior consent of the Requested Authority before disclosing non-public information received under this MoU to any non-signatory to this MoU. If consent is not obtained from the Requested Authority, the Authorities will discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.

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

6) In certain circumstances, and as required by the AIFMD, it may become necessary for an EU Authority to share information obtained under this MoU with another EU Authority that is a signatory to this MoU. In these circumstances:

   a) The EU Authority will notify the CFTC prior to sharing the information and indicate the purpose for which the information is passed to other EU Authority.

   b) Prior to sharing the information, the CFTC will receive adequate assurances that the terms of this MoU, including those terms regarding permissible uses, confidentiality and onward sharing of information, will be observed by the other Authority.

7) In certain circumstances, and as required by the AIFMD, it may become necessary for an EU Authority to share information obtained under this MoU with the European Securities and Markets Authority (ESMA) or the European Systemic Risk Board (ESRB). In these circumstances:

   a) The Requesting Authority will notify the CFTC prior to sharing the information and indicate the purpose for which the information is passed to ESMA and the ESRB.

   b) ESMA and ESRB will use the information only for a purpose within the scope of their jurisdiction.

   c) The information will not be shared by ESMA or the ESRB with other parties without getting the prior written consent of the CFTC.

8) In certain circumstances, the CFTC may wish to share information obtained under this MoU with a futures association registered under the Commodity Exchange Act. In these circumstances:

   a) The CFTC will notify the Requested Authority prior to sharing the information and indicate the purpose for which the information is passed to the registered futures association.

   b) The registered futures association will use the information only for a purpose within the scope of its authority .

   c) The information will not be shared by the registered futures association with other parties without getting the prior written consent of the Requested Authority.

Article 9. Termination of the MoU; Successor authorities

1) CFTC may terminate this MoU in respect of one or more EU Authorities. EU Authorities may also terminate this MoU. If a signatory to this MoU wishes to no longer be a signatory to this MoU, it shall give written notice to all signatories to this MoU. ESMA shall, as necessary and pursuant to European Union law, coordinate the action of EU Authorities in this regard. Cooperation in accordance with this MoU will continue until the expiration of 30 days after an Authority gives written notice to the others. If an Authority gives such notice, cooperation will continue with respect to all requests for assistance that were made under the MoU before the effective date of notification until the Requesting Authority terminates the matter for which assistance was requested. In the event a signatory to this

MoU gives written notice as provided in this Paragraph, information obtained under this MoU will continue to be treated in a manner prescribed under Articles 7 and 8.

2) Where the relevant functions of a signatory to this MoU are transferred or assigned to another Authority or Authorities, the terms of this MoU shall apply to the successor Authority or Authorities performing those relevant functions without the need for any further amendment to this MoU, and notice shall be provided to the Authorities. This shall not affect the right of the successor Authority or Authorities or any signatory to this MoU to give written notice as provided in Article 9(1) that it no longer wishes to be a signatory to this MoU if it wishes to do so. Notwithstanding the foregoing, such successor Authority or Authorities shall become a signatory or signatories to this MoU.

3) Other EU competent authorities, designated as such in accordance with Article 44 of the AIFMD, may become signatories to this MoU, by obtaining the written agreement of the CFTC.

Article 10. Amendment

The Authorities intend to periodically review the functioning and effectiveness of the cooperation arrangements between the Authorities with a view, inter alia, to expanding or altering the scope or operation of this MoU should that be judged necessary. This MoU may be amended with the written consent of the CFTC and one or more of the EU Authorities.

Article 11. Execution of the MoU

Cooperation in accordance with this MOU will become effective on 22 July 2013.

Signatures

Bundesanstalt für Finanzdienstleistungsaufsicht (Germany)

U.S. Commodity Futures Trading Commission