BaFin

Bundesanstalt für
Finanzdienstleistungsaufsicht

Federal Financial
Supervisory Authority

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Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Ref. no.: WA 12-Wp 2055-2019/0026 (please quote in all correspondence)

6 November 2020

Chief Executive Director of Securities Supervision | Asset Management

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Substituted compliance application pursuant to Rules 0-13 and 3a71-6 under the Securities Exchange Act of 1934 ("Exchange Act").

Dear Ms. Countryman,

The Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin") is filing this application to request that the Securities and Exchange Commission ("SEC") make a determination (a "substituted compliance determination") pursuant to Rule 3a71-6(a) under the Exchange Act that compliance with the German law requirements specified below by the class of market participants described below may satisfy the corresponding requirements applicable to a security-based swap dealer or major security-based swap participant registered with the SEC that is not a U.S. person (together, "non-U.S. SBS entities").

This application relates to German law requirements applicable to (1) investment firms and credit institutions that are authorized by BaFin to provide investment services or perform investment activities in Germany and (2) branches of a third-country, non-U.S. firm authorized by BaFin to provide investment services or perform investment activities in Germany, if that firm is subject to authorization and supervision by an authority in the third country where the firm is established for the type of investment services provided and investment activities performed in Germany and that authority has entered into a supervisory and enforcement arrangement with the SEC to address cooperation and other matters arising under the substituted compliance determination (each, a "covered entity").

1. BaFin believes that those German law requirements are comparable to the following areas of the Exchange Act and the rules and regulations thereunder applicable to non-U.S. SBS entities: Risk control: risk management systems, trade acknowledgment and verification, portfolio reconciliation, portfolio compression and trading relationship documentation requirements;

2. Recordkeeping and reporting: record creation, record maintenance, reporting and notice requirements;

3. Internal supervision and compliance: supervision, conflict of interest and chief compliance office requirements; and

4. Counterparty protection: fair and balanced communications, risks and characteristics disclosure, incentives or conflicts of interest disclosure, daily mark disclosure, "know your counterparty," suitability and clearing rights disclosure requirements.

This application describes how German law requirements applicable to covered entities compare to U.S. requirements in the areas listed above. Annex A to this application provides a side-by-side comparison of each of the relevant German and U.S. requirements, as well as an analysis of their comparability.

Information relevant to the SEC's analysis of BaFin's supervision and enforcement frameworks is attached to this letter as Annex B.

In connection with the requirement set out in Exchange Act Rule 3a71-6(c)(3), BaFin has reached with the SEC an understanding in principle with regard to the relevant provisions in the substituted compliance MOU and other arrangements, to be executed concurrently with the substituted compliance order.

Finally, BaFin notes that it has experience working with the SEC and its staff on supervisory and enforcement matters in connection with the regulation of securities and derivatives markets. In this respect, you could contact our team IFR 1- International cooperation).

Kind regards,

Elisabeth Roegele

Elisabeth Roegele
Chief Executive Director of Securities Supervision
and Deputy President

- Annex A_Banking Act Translation - Excerpt October 2020_supplemented
- Annex A_Category 1_FINAL BaFin 25.05.2020
- Annex A_Category 3_FINAL BaFin 19.05.2020
- Annex A_Category 4_FINAL_BaFin 19.05.2020
- Annex A_Category_2_FINAL_BaFin 25.05.2020
- Annex A_Delegated Directive (EU) 2017_593
- Annex A_dl_wa_uebersetzung_rundschreiben_052018_macomp_en
- Annex A_Substituted Compliance Questionnaire - Supervision and Enforcement 03.09.2020 BaFin final
- Annex A_Translation Section 4d FinDAG
- Annex B_BaFin CFD mapping 14.10.2020_final
- Annex B_Questionnaire - final appproved
- BaFin-Scan- Application Letter 6 November

February 21, 2020

25.05.2020: Comments by BaFin with new column "National Measures Germany"

I. Risk Control

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Comparability Assessment of Certain Securities and Exchange Commission and EU Requirements Applicable to Security-

Based Swap Dealers pursuant to SEC Staff Guidance on Substituted Compliance Applications

Master Chart on Substituted Compliance for Security-Based Swap Dealers – SEC Staff Guidance – Information Regarding Foreign Regulatory Requirements for Substituted Compliance Determinations dated December 23, 2019[1] (the **SEC Guidance**)

The purpose of this chart is to facilitate applications to the SEC for a substituted compliance determination with respect to the EU in relation to the SEC requirements contained in the SEC Guidance. The SEC Guidance provides detail on the approach by which SEC Staff will assess substituted compliance applications and poses questions for applicants to consider regarding the regulatory interests reflected in the relevant foreign requirements and asks how those are comparable to the interests associated with the analogous requirements under the Exchange Act. The chart below summarizes the relevant SEC requirements (including Exchange Act requirements) applicable to security-based swap dealers (**dealers**) without prudential regulators (i.e. nonbanks) and with prudential regulators (i.e. banks), in accordance with the discussion of these requirements in the SEC Guidance, and provides a summary of the relevant comparable EU requirements. The chart is organized by the regulatory categories set out in the SEC Guidance. This chart does not include category five of the SEC Guidance.

Throughout column 1 of this chart, requirements applicable to (i) all dealers are denoted in standard text, (ii) only dealers without prudential regulators (i.e. nonbanks) are denoted in bold text, and (iii) only dealers with prudential regulators (i.e. banks) are denoted in italicized text. Although certain SEC requirements may apply differently to banks and nonbanks, unless otherwise stated in column 2 or column 3, the analogous EU requirements apply equally to both banks and nonbanks.

Terms used in the chart are defined in the Glossary in Annex II.

Approach

This chart is organized following the order of the questions in the SEC Guidance. Column 1 sets out the relevant SEC requirements and a summary of the SEC's policy goals, generally tracking closely the language provided in the SEC Guidance. These are followed by the EU law requirements, and a summary of the EU's policy goals, that correspond to the SEC requirements (column 2). Finally, an assessment of the comparability of outcomes (or of requirements, where appropriate) is set out in the third column.[2]

Statements on EU law requirements and policy goals are drafted on the basis of requirements that apply to dealers when established in the EU (i.e. a direct comparison is made between how the US regime applies to dealers and how the EU regime applies to equivalent types of EU firms).

Regulation of EU firms in a comparable position to dealers

Scope of EU legislation

The activities of dealers established in the EU in relation to security-based swaps is regulated in the EU primarily in accordance with five sets of legislation:

[1] SEC Staff Guidance (Dec. 23, 2019), *available at* https://www.sec.gov/files/staff-guidance-substituted-compliance-applications.pdf.

[2] We note that comparability of outcomes alone is sufficient under the SEC's holistic approach to assessing substituted compliance because such approach "will focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity." *See* SEC Guidance at p. 3 (quoting Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30074 (May 13,2016) (**Business Conduct Adopting Release**) *available at* https://www.govinfo.gov/content/pkg/FR-2016-05-13/pdf/2016-10918.pdf. Comparability of requirements is included, where applicable, for completeness.

1. the Markets in Financial Instruments Regulation (**MiFIR**) and the recast Markets in Financial Instruments Directive (**MiFID**) (also known as "MiFID II"): MiFIR is a regulation and MiFID is a directive which both entered into force on July 2, 2014 (see below for the distinction between regulations and directives as a matter of EU law).

   MiFIR and MiFID apply to "investment firms", which comprise any legal person whose regular occupation or business is the provision of one or more investment services to third-parties and/or the performance of one or more investment activities on a professional basis. Investment services and activities means any of the services and activities listed in Section A of Annex I of MiFID (e.g. dealing as principal or agent, advising on transactions) relating to any of the instruments listed in Section C of Annex I of MiFID. Section C of Annex 1 refers explicitly to swaps as well as "other derivative financial instruments".

   Credit institutions are also subject to MiFIR and MiFID when providing investment services or conducting investment activities and, accordingly, EU legislation that is stated in this chart to apply to investment firms also applies to Credit Institutions.

2. the European Market Infrastructure Regulation (**EMIR**): EMIR is a regulation which entered into force on August 16, 2012.

   EMIR implements various of the G20 commitments to reform OTC derivatives markets in an effort to promote greater stability and transparency. EMIR applies a G20 mandatory clearing obligation and bilateral risk-management requirements for persons dealing in 'over-the-counter' (**OTC**) derivatives and reporting requirements for derivatives contracts, as well as establishing requirements for central counterparties (**CCPs**), clearing members, trade repositories and, in some respects, trading venues. EMIR applies its requirements differently in certain respects to 'financial counterparties' (**FCs**) and 'non-financial counterparties' (**NFCs**).

3. the Capital Requirements Regulation (**CRR**) and Capital Requirements Directive (**CRD IV**): CRR is a regulation and CRD IV is a directive, which entered into force on June 28, 2013 and July 17, 2013, respectively.

   CRR and CRD IV establish prudential and supervisory requirements for "institutions", which comprise "credit institutions" and certain "investment firms" (together **CRR Firms**). Relevant investment firms include those with permission to deal on own account in and/or underwrite the placing of MiFID financial instruments. CRR and CRD IV together implement the Basel framework in the EU. The term dealing on own account is defined to capture "trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments" (art 4(1)(6)), and extended by recital 24 to include dealing as matched or riskless principal. Any investment firm that will be party as principal to a security based swap will be dealing on own account.

4. the Bank Recovery and Resolution Directive (**BRRD**): BRRD is a directive which entered into force on January 1, 2015.

   BRRD establishes rules and procedures relating to the recovery and resolution of CRR Firms (among other entities – despite the reference to "bank" in this directive's common name, it applies to both Credit Institutions and Investment Firms).

5. the Market Abuse Regulation (**MAR**) and the Criminal Sanctions for Market Abuse Directive (**CSMAD**): MAR is a regulation and CSMAD is a directive which both entered into force on July 2, 2014.

   MAR establishes restrictions on insider dealing and market manipulation and disclosure requirements for issuers of financial instruments. CSMAD establishes related criminal sanctions.[3]

EU member states can implement EU legislative requirements in a more onerous manner, and/or can impose additional requirements, through member state law (these are known as "gold-plating" of EU requirements).

Application of EU legislation

The various parts of EU legislation considered in this chart each apply where instruments are MiFID financial instruments and each cover different topics in relation to the relevant subject matter and are designed to operate in conjunction with each other. Transactions will be subject to EMIR, MiFIR, MIFID, CRR, CRD IV, BRRD, MAR and CSMAD requirements except where a particular transaction is exempt from a particular regime are specifically noted in the chart below. EU legislation does not vary on a product-specific basis (within the broader set of instruments treated in EU law as MiFID financial instruments) – i.e. there is no distinction between what would be categorized in the US as swaps and security-based swaps.

EU regulations are binding with direct effect in all EU member states (i.e. no transposition into the national law of each EU member state is required to give effect to them). All Member States of the EU are legally bound to implement the provisions of EU directives, in accordance with the Treaty on the Functioning of the European Union, by transposing them into their national law. For each directive referred to, we have assumed that each EU member state has completed the process of transposing that directive into its national law on identical terms set out in the directive and such transposed law is in full force and effect.

MiFIR, MiFID, EMIR, CRR, CRD IV, MAR and CSMAD are so-called 'Level 1' legislation. These are supplemented by a range of subordinate 'Level 2' legislation and 'Level 3' guidance. All such legislation and guidance is referenced in this chart where relevant.

The EU regulations and directives considered in this document are intended to establish a high degree of minimum harmonisation and consistency across the laws of EU member states, with only limited scope for local discretion or deviation. This chart is limited to matters of EU law and does not address the laws of each EU member state.

All of the EU legislation considered in this chart is currently in force. This chart does not address upcoming or potential future revisions to such EU legislation.

Application to dealers covered in this chart

We would expect that the dealers would generally be treated by the EU regime as:

[3] CSMAD does not apply in the UK and Denmark.

- ***For the purposes of CRR and CRD IV:*** CRR Firms (either Credit Institutions or Investment Firms, as appropriate – in the context of this chart, there are some limited cases where CRR distinguishes between Credit Institutions and Investment Firms: these points have been expressly noted in the relevant responses;

- ***For the purposes of MiFIR and MiFID:*** Investment Firms; and

- ***For the purposes of EMIR:*** Financial Counterparties.

We have expressly noted in the relevant responses how MAR and CSMAD apply to dealers.

Some obligations under EMIR are also affected by EMIR's so-called 'clearing threshold'. FCs that exceed the clearing threshold (**FC+s**) are subject to the mandatory clearing requirement, whereas FCs that do not exceed the clearing threshold (**FC-s**) are not. We have noted where this is relevant in the chart. Whether a dealer would be a FC+ or an FC- will depend upon their individual trading activity and so no statement of general application can be made. How the clearing threshold applies to counterparties is dealt with in each relevant response.

Scope of Instruments

Pursuant to Exchange Act section 3(68), security-based swaps encompass any agreement, contract or transaction that is a swap as defined under section 1a of the Exchange Act (without regard to paragraph (47)(B)(x) of such section) and is based on (i) an index that is a narrow-based security index, including any interests therein or on the value thereof; (ii) a single security or loan, including any interest therein or on the value thereof; or (iii) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.[4]

For the rules discussed in this chart, we would expect security-based-swaps to fall within the scope of MiFID financial instruments and that the provisions of EMIR would apply to security-based-swaps.

[4] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78c.pdf

1. Category: Risk Control Requirements

a. Executive Summary

The risk control requirements of the Exchange Act promote market stability by requiring that registered entities have adequate financial resources and follow risk mitigation and documentation practices that are appropriate to manage the market, counterparty, operational and legal risks associated with their security-based swap business.

b. Subcategory: Capital Requirements for Nonbank[5] Firms

[***TO BE INSERTED***]

[5] Note that the SEC's capital and margin rules (including certain risk-management system rules) only apply to dealers that do not have a prudential regulator, and that prudential regulators are responsible for capital and margin rules applicable to dealers that are banks. *See* Exchange Act section 15F(e)(1) [15 U.S.C. 78o-10(e)(1)] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf.

c. Subcategory: Margin Requirements for Nonbank Firms

[*TO BE INSERTED*]

d. Subcategory: Internal Risk Management Requirements

Dealers are obligated to follow policies and procedures reasonably designed to assist them in managing the risks associated with their business activities.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
Firms must "establish robust and professional risk management systems adequate for managing [their] day-to-day business." Exchange Act section 15F(j)(2) [15 U.S.C. 78o-10(j)(2)].[6] Firms are generally required, as part of their supervisory systems, to establish, maintain and enforce written policies and procedures addressing the obligations to, *inter alia*, monitor trading, establish a day-to-day business risk management system,	**MiFID** Investment Firms must establish, implement and maintain adequate risk management policies and procedures that identify the risks relating to the Investment Firm's activities, processes and systems and, where appropriate, set the level of risk tolerated by the Investment Firm. The requirement goes beyond this to encompass monitoring the effectiveness and adequacy of the Investment Firm's risk management policies and procedures, together with the level of compliance by the Investment Firm and its personnel with the arrangements, processes and mechanisms adopted and the	**Comparability of outcomes**: The EU's requirements to implement internal risk management controls provide a similar regulatory outcome to the SEC requirements for risk management controls. In particular, the regulatory outcomes pursued under Exchange Act section 15F(j)(2) and MiFID are consistent in that each require Investment Firms to establish robust internal risk management systems to manage risks associated with their business activities. While we believe that the SEC as a market regulator regulating derivatives activity should find the directly equivalent MiFID requirements alone sufficient, we have, for background, also listed additional risk management requirements relevant EU regulated entities are subject to, as they	**Banking Supervision confirmed implementation for their supervision**

[6] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
disclose trading information to the SEC, establish internal recordkeeping systems, and implement systems to safeguard against conflicts of interest. Exchange Act rule 15Fh-3(h)(2)(iii)(I) [17 CFR 240.15Fh-3(h)(2)(iii)(I)].[7] **The capital rule for nonbank firms imposes a requirement that firms comply with a separate rule related to internal risk management control systems that requires firms to establish, document, and maintain a system of internal risk management controls to assist them in managing the risks associated with their business activities.**	adequacy and effectiveness of measures taken to address deficiencies in them. Article 23 MiFID Org Reg. A specific risk management function is required where appropriate and proportionate that must: (i) operate independently, (ii) implement the Investment Firm's risk management policies and procedures, and (iii) provide required reports and advice to senior management. Article 23(2) MiFID Org Reg. Investment Firms must have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for	contribute to the regulatory landscape on the topic of risk management. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways: • **Policies and procedures**. Article 23 MiFID Org Reg. requires Investment Firms to establish and maintain policies and procedures to identify risk, set risk tolerance levels, and monitor the effectiveness of such policies and procedures and address deficiencies in them, while Article 23(2) MiFID Org Reg. requires an independent risk management function to be established	**Art. 16 (5) MiFID has been transposed to Section 80 (6) of the German Securities Trading Act (Wertpapierhandelsgesetz – WpHG)**

[7] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
Exchange Act rule 18a-1(f) [17 CFR 240.18a-1(f)].[8] **Firms must comply with Exchange Act rule 15c3-4 [17 CFR 240.15c3-4][9] as if they were an OTC derivatives dealer, with the exclusion of select provisions. Dealers must comply with rule 15c3-4 with respect to all of their business activities.** **The margin rule requires that dealers must monitor the risk of each account and establish, maintain and document procedures and guidelines for monitoring the risk of accounts as part of their required risk**	information processing systems. Article 16(5) MiFID. **<u>EMIR Margin RTS</u>** Counterparties must establish, apply and document risk management procedures for the exchange of collateral for non-centrally cleared OTC derivative contracts. EMIR Margin RTS, Article 2(1). The risk management procedures must include procedures providing for or specifying the following: (a) the eligibility of collateral for non-centrally cleared OTC derivative contracts in accordance with Section 2 of Chapter 1 of the EMIR Margin RTS; (b) the calculation and collection of margins for non-centrally cleared OTC derivative contracts in accordance with Section 3 of Chapter 1 of the EMIR Margin RTS;	to implement risk management policies and procedures. Counterparties are required to establish a thorough and dynamic internal governance processes to assess the appropriateness of the initial margin model on a continuous basis and document associated risk management procedures under RTS, Articles 1, 18(2) and 18(3). Article 74 CRD IV requires CRR Firms to establish robust internal risk management systems, including internal administrative and accounting procedures. Article 76(1) CRD IV requires management bodies of CRR Firms to review and approve internal risk management strategies and policies. Article 76(3) CRD IV requires CRR Firms that are sufficiently large and complex to establish a risk committee which we would expect to encompass most dealers. Article 16(5) MiFID requires Investment Firms to establish robust internal risk management assessment procedures. These	**EMIR as regulation is directly applicable in Germany**

[8] https://www.ecfr.gov/cgi-bin/text-idx?SID=f21356649423aa2f17ac838f9928d337&mc=true&node=sg17.4.240_117ad_622.sg51&rgn=div7
[9] https://www.govinfo.gov/content/pkg/CFR-2011-title17-vol3/pdf/CFR-2011-title17-vol3-sec240-15c3-4.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
management and control systems. The rule specifies minimum requirements for associated policies and procedures including, *inter alia*, requirements related to the review or monitoring of financial information, counterparty credit limits and credit risk exposure, the use of stress tests, determinations regarding the need to collect collateral, and the maintenance of sufficient equity in each counterparty account. Exchange Act rule 18a-3(e) [17 CFR 240.18a-3(e)].[10]	(c) the management and segregation of collateral for non-centrally cleared OTC derivative contracts in accordance with Section 5 of Chapter 1 of the EMIR Margin RTS; (d) the calculation of the adjusted value of collateral in accordance with Section 6 of Chapter 1 of the EMIR Margin RTS; (e) the exchange of information between counterparties and the authorisation and recording of any exceptions to the risk management procedures Art 11 Abs. 1 EMIR; (f) the reporting of the exceptions in Chapter II of the EMIR Margin RTS to senior management Article 2(2) f) Margin RTS; (g) the terms of all necessary agreements to be entered into by counterparties before the time in which a non-centrally cleared OTC derivative contract is concluded, including the terms of the netting agreement and the terms of the exchange of collateral agreement	requirements are consistent with the policy and procedure requirements set forth in Exchange Act rule 15Fh-3(h)(2)(iii)(I). • **Internal risk management systems**. Article 16(5) MiFID requires Investment Firms to establish robust internal risk management assessment procedures. Article 23 MiFID Org Reg. requires Investment Firms to establish and maintain policies and procedures to identify risk, set risk tolerance levels, and monitor the effectiveness of such policies and procedures and address deficiencies in them, while Article 23(2) MiFID Org Reg. requires an independent risk management function be established to implement risk management policies and procedures. These requirements are comparable to the internal risk management requirements set forth in Exchange Act rules 15c3-4, 15F(j)(2) and 18a-1(f). Furthermore, Article 74 CRD IV requires CRR Firms to establish robust internal	

[10] https://www.ecfr.gov/cgi-bin/text-idx?SID=f21356649423aa2f17ac838f9928d337&mc=true&node=se17.4.240_118a_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
	in accordance with Article 3 of the EMIR Margin RTS; (h) the periodic verification of the liquidity of the collateral to be exchanged Article 2(2) h) Margin RTS;; (i) the timely re-appropriation of the collateral in the event of default by the posting counterparty from the collecting counterparty Article 2(2) i) Margin RTS; and (j) the regular monitoring of the exposures arising from OTC derivative contracts that are intragroup transactions and the timely settlement of the obligations resulting from those contracts. EMIR Margin RTS, Article 2(2) j). Risk management procedures must be tested, reviewed and updated as necessary and at least annually. EMIR Margin RTS, Article 2(5). Upon request, counterparties using initial margin models shall provide the competent authorities	risk management systems, including internal administrative and accounting procedures. Article 76(1) CRD IV requires management bodies of CRR Firms to review and approve internal risk management strategies and policies. Article 76(3) CRD IV requires CRR Firms that are sufficiently large and complex, which we would expect to encompass most dealers, to establish a risk committee. • **Managing account risk**. CRR Firms are obliged by Article 79(b) CRD IV to monitor the risk of accounts as part of their assessment of the credit risk of exposures. More specifically: • Article 103 and 103(b)(ii) CRR require CRR Firms to have policies and procedures for the active management of trading book positions, which must include the monitoring of position limits for such positions. – Account risk is also managed by stress testing of exposures when using models for the	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
	with any documentation relating to the risk management procedures regarding the calculation and collection of margins for non-centrally cleared OTC derivative contracts at any time. EMIR Margin RTS, Article 2(6). Counterparties shall establish an internal governance process to assess the appropriateness of the initial margin model on a continuous basis, including all of the following: (a) an initial validation of the model by suitably qualified persons who are independent from the persons developing the model; (b) a follow up validation whenever a significant change is made to the initial margin model and at least annually; and (c) a regular audit process to assess the following: (i) the integrity and reliability of the data sources; (ii) the management information system used to run the model; (iii) the accuracy and	purpose of credit risk, CCR, market risk, as well as for exposures to CCPs and credit risk concentrations, including in relation to the realizable value of any collateral taken. – The EMIR Margin RTS requires an account level review to be taken in the calculation, collection and adjustment of the value of collateral for non-centrally cleared OTC derivative contracts and the management and segregation of collateral for such contracts. Taken together these requirements are comparable to the account risk requirements set forth in Exchange Act rule 18a-3(e).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
	completeness of data used; and (iv) the accuracy and appropriateness of volatility and correlation assumptions. EMIR Margin RTS, Article 18(1). The documentation of the risk management procedures relating to the initial margin model needs to meet all of the following conditions: (a) it shall allow a knowledgeable third-party to understand the design and operational detail of the initial margin model, (b) it shall contain the key assumptions and the limitations of the initial margin model, and (c) it shall define the circumstances under which the assumptions of the initial margin model are no longer valid. EMIR Margin RTS, Article 18(2). Counterparties must document all changes to the initial margin model. That documentation shall also detail the results of the validations carried out after those		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
	changes. EMIR Margin RTS, Article 18(3). The risk management procedures referred to in Article 2(1) of the EMIR Margin RTS (i) ensure that the performance of an initial margin model is monitored on a continuous basis including by back-testing the model at least every three months; (ii) outline the methodologies used for undertaking back-testing, including statistical tests of performance; (iii) describe what results of the back-testing would lead to a model change, recalibration or other remediation action; and (iv) ensure that counterparties retain records of the results of the back-testing. EMIR Margin RTS, Article 14. **<u>EMIR risk mitigation (other than margin)</u>** See below discussion of risk mitigation techniques set out in		**Margin-RTS (2016/2251) Art. 14 (2) is not mentioned** **(2) the model incorporates interest rate risk factors corresponding to the individual currencies in which those contracts in the netting set are denominated**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
	RTS 149/2013 ~~in section 1(e) and (1)(f).~~ Article 11, 13, 14 and 15 EMIR **<u>CRR & CRD IV</u>** The management body of a CRR Firm must approve and periodically review the strategies and policies for taking up, managing, monitoring and mitigating the risks the entity is or might be exposed to, including those posed by the macroeconomic environment in which it operates in relation to the status of the business cycle. Article 76(1) CRD IV. CRR Firms are required to have robust governance arrangements, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks it is or might be exposed to,		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
	and adequate internal control mechanisms, including sound administrative and accounting procedures. Article 74 CRD IV. CRR Firms must have in place clearly defined policies and procedures for the active management of trading book positions and must set and monitor position limits for trading book positions. Article 103 and 103(b)(ii) CRR. CRR Firms that are significant in terms of size, internal organisation and nature, scope and complexity of their activities must establish a risk committee composed of members of the management body who do not perform any executive function in the entity concerned. Article 76(3) CRD IV. CRR Firms must have internal methodologies that enable them		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
1. To what extent are firms required to implement internal risk management controls?			
	to assess the credit risk of exposures. Article 79(b) CRD IV. CRR Firms must revalue their trading book positions at least daily. Article 105(3) CRR. CRR Firms must conduct stress testing on their exposures when using models for the purpose of credit risk, CCR, market risk, as well as for their exposures to CCPs and credit-risk concentrations, including in relation to the realisable value of any collateral taken. Articles 177, 286(8), 290, 302, 369, 376 and 401 CRR.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
2. What types of risks are those internal controls required to address?			
The capital rules related to internal risk	**MiFID**	**Comparability of outcomes**:	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
2. What types of risks are those internal controls required to address?			
management control systems are meant to address risks associated with their business activities, including market, credit, leverage, liquidity, legal, and operational risks. Exchange Act rule 18a-1(f) [17 CFR 240.18a-1(f)].[11] **The margin rules are meant to address risks associated with the review or monitoring of financial information, counterparty credit limits and credit risk exposure, the use of stress tests, determinations regarding the need to collect collateral, and the maintenance of sufficient equity in each counterparty account.**	Investment Firms must establish, implement and maintain adequate risk management policies and procedures that identify the risks relating to the Investment Firm's activities, processes and systems and, where appropriate, set the level of risk tolerated by the Investment Firm. Article 23(1) MiFID Org Reg. **EMIR** **Margin**: The EMIR Margin RTS ~~are~~ is intended to protect counterparties from the risk of a potential default of the other counterparty. EMIR Margin RTS, Recital (3). **CRR & CRD IV** An Investment Firm's risk management strategy will, amongst other things, be required to cover: credit and	The EU's risk management requirements provide for similar outcomes with respect to the types of risks that must be managed as the SEC's risk management requirements. In particular, the regulatory outcomes pursued under Exchange Act rules 18a-1(f) and 18a-3(e) and MiFID Org Reg, EMIR, CRD IV [and Article 290 CRR] are consistent in that each requires Investment Firms to ensure that their internal risk management structures address all varieties of risk. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:	

[11] https://www.ecfr.gov/cgi-bin/text-idx?SID=f21356649423aa2f17ac838f9928d337&mc=true&node=sg17.4.240_117ad_622.sg51&rgn=div7

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Internal Risk Management Requirements			
2. What types of risks are those internal controls required to address?			
Exchange Act rule 18a-3(e) [17 CFR 240.18a-3(e)].[12]	counterparty risk, residual risk, concentration risk, securitisation risk, market risk, interest rate risk, operational risk, liquidity risk, risk of excessive leverage, etc. Articles 79-87 CRD IV.	• **Risks addressed**. Article 23(1) MiFID Org Reg. requires Investment Firms to establish risk management policies and procedures addressing risks relating to an Investment Firm's activities, processes and systems. Articles 79-87 CRD IV require Investment Firms to implement risk management strategies to address, *inter alia*, credit and counterparty risk, residual risk, concentration risk, securitization risk, market risk, interest rate risk, operational risk, liquidity risk and risk of excessive leverage. These requirements are consistent with the risks addressed in Exchange Act rules 18a-1(f) and 18a-3(e).	

[12] https://www.ecfr.gov/cgi-bin/text-idx?SID=f21356649423aa2f17ac838f9928d337&mc=true&node=se17.4.240_118a_63&rgn=div8

e. Subcategory: Trade Acknowledgement and Verification Requirements

Trade acknowledgment and verification rules are intended to help avoid legal and operations risks by providing for definitive written records of transactions and procedures to avoid disputes.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
1. To what extent are transactions subject to trade acknowledgment, confirmation, or similar requirements that provide for the creation of definitive written records of the transaction?			
The trade acknowledgment rules apply to any transaction in which a firm "purchases from or sells to any counterparty a security-based swap." Exchange Act rule 15Fi-2(a) [17 CFR 240.15Fi-2(a)].[13]	**<u>MiFID requirements</u>** An Investment Firm that has carried out an order on behalf of a client (including by executing an order as principal with its client) must promptly provide the client, in a durable medium, with the essential information concerning the execution of that order and send a notice to the client in a durable medium confirming execution of the order. In addition, Investment Firms must supply the client, on request, with information about the status of its order. Article 25(6) MiFID and Article 59 MiFID Org Reg. **<u>EMIR: timely confirmation</u>**	**<u>Comparability of outcomes</u>**: The timely confirmation requirement under EMIR and the MiFID requirements provide a comparable regulatory outcome to the SEC trade acknowledgement and confirmation requirements. In particular, the regulatory outcomes pursued under the Exchange Act rule 15Fi-2(a) and Article 11(1)(a) of EMIR and MiFID are consistent, in that each requires the timely confirmation of relevant details of a trade in order to promote effective risk management and minimize legal and operational risks. In the CFTC Substituted Compliance Decision on Transaction-Level Requirements, the CFTC found that the	**Sections 63 (12), 64 WpHG in conjunction with Article 59 MiFID Org. Reg.**

[13] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
1. To what extent are transactions subject to trade acknowledgment, confirmation, or similar requirements that provide for the creation of definitive written records of the transaction?			
	FCs and NFCs are required to confirm the terms of each uncleared OTC derivative contract in a timely manner and by electronic means where available. EMIR, Article 11(1)(a).	EMIR timely confirmation requirements were "[g]enerally identical in intent", as well "comparable to and as comprehensive as the swap transaction confirmation requirements of Commission regulation 23.501".	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
2. To what extent are transactions further subject to verification or similar requirements intended to identify disagreements regarding transaction terms?			
A firm must verify[14] the accuracy of, or dispute with the counterparty, the terms of the trade acknowledgment. Exchange Act rule 15Fi-	**EMIR** Both counterparties to an uncleared OTC derivative transaction are equally subject to the timely confirmation obligation described in question 1 of section 1(e). EMIR, Article 11(1)(a).	**Comparability of outcomes**: Although the timely confirmation requirements under EMIR apply in a different manner to the SEC's transaction verification requirements, the risk management objectives pursued under Exchange Act rule 15Fi-2(d)(2) and Article	

[14] "Trade verification" means "the process by which a trade acknowledgment has been manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty." Exchange Act rule 15Fi-1(i) [17 CFR 240.15Fi-1(i)].

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
2. To what extent are transactions further subject to verification or similar requirements intended to identify disagreements regarding transaction terms?			
2(d)(2) [17 CFR 240.15Fi-2(d)(2)].[15] The trade verification requirement applies to security-based swap transactions for which a firm has received a trade acknowledgment (subject to certain exceptions). Exchange Act rule 15Fi-2(d)(2) [17 CFR 240.15Fi-2(d)(2)].[16]		11(1)(a) of EMIR are consistent and comparable, in that each regulation is designed to ensure that both parties to a transaction are informed of, and agree upon, all terms of that transaction in writing and in a timely manner following execution. The SEC requirement with respect to timely confirmation is substantially the same as the CFTC requirement and the CFTC noted in the CFTC Substituted Compliance Decision on Transaction-Level Requirements that "the trade confirmation requirements of the EMIR standards are comparable to and as comprehensive as the swap transaction confirmation requirements of CFTC Regulation 23.501."	

[15] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8
[16] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
3. What requirements govern the persons responsible for providing trade acknowledgments, confirmations or equivalent records? What requirements govern their contents, delivery and timing?			
Responsible Parties (Exchange Act rule 15Fi-2(a) [17 CFR 240.15Fi-2(a)]):[17] – For transactions between a dealer and a participant, the dealer will provide the trade acknowledgment. – For transactions in which only one counterparty is a dealer or participant, the dealer or participant	**<u>EMIR: timely confirmation (responsible parties)</u>** Both counterparties to an uncleared OTC derivative transaction are equally subject to the timely confirmation obligation described in question 1 of section 1(e). Article 11(1)(a). **<u>EMIR: timely confirmation (contents)</u>** A confirmation is defined in RTS 149/2013 as the documentation of the agreement of the counterparties to all the terms of an OTC derivative contract. RTS 149/2013, Article 1(c). To comply with the timely confirmation obligation, counterparties must therefore reach a legally binding agreement as to all the terms of an OTC derivative	**<u>Comparability of outcomes</u>**: The timely confirmation requirement under EMIR provides for a comparable regulatory outcome to the SEC's responsible parties and trade acknowledgment requirements. In particular, the regulatory outcomes pursued under Exchange Act rules 15Fi-1 and 15Fi-2 and Article 11(1)(a) of EMIR, along with RTS 149/2013, are consistent and comparable in that each requires parties to promptly provide a confirmation containing all details of a transaction to their counterparty following execution. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.	

[17] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
3. What requirements govern the persons responsible for providing trade acknowledgments, confirmations or equivalent records? What requirements govern their contents, delivery and timing?			
will provide the trade acknowledgment. – For all other transactions in which a dealer or participant purchases or sells a security-based swap, the counterparties will agree as to who provides the trade acknowledgment. **Contents**: Trade acknowledgments are comprised of written or electronic records of a	contract. ESMA Q&A on EMIR, OTC Answer 4 5(a) Level 3 regulation?. **EMIR: timely confirmation (delivery)** A timely confirmation may take the form of an electronically executed contract or a document signed by both counterparties. RTS 149/2013, Recital 26. **EMIR: timely confirmation (timing)** Confirmation for contracts concluded after 31 August 2014 is required within two working days if one or both of the parties to the transaction is an NFC- and otherwise within one working day. RTS 149/2013, Article 12 Where a transaction is concluded after 4:00 PM. local time or with a counterparty located in a different time zone which does not allow for confirmation by the set deadline, confirmation shall take place as	**Comparability of specific requirements**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways: • **Responsible parties**. The timely confirmation requirement under Article 11(1)(a) of EMIR applies equally in respect of both counterparties. Article 25(6) of MiFID and Article 59 of MiFID Org Reg. require Investment Firms to provide confirmations to their clients following the execution of transactions with those clients. While the requirements under EMIR do not align exactly with the SEC requirements, the EMIR, MiFID and SEC obligations all promote the same underlying policy goal of providing an agreed confirmation following the execution of a transaction.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
3. What requirements govern the persons responsible for providing trade acknowledgments, confirmations or equivalent records? What requirements govern their contents, delivery and timing?			
security- based swap transaction sent by one counterparty to the other (Exchange Act rule 15Fi-1(h) [17 CFR 240.15Fi-1(h)]),[18] that disclose all the terms of the transaction (Exchange Act rule 15Fi-2(c) [17 CFR 240.15Fi-2(c)]).[19] **Delivery**: Trade acknowledgments must be provided through electronic means that provide reasonable assurance of delivery and a record of transmittal. Exchange Act rule 15Fi-2(c) [17 CFR 240.15Fi-2(c)].[20] **Timing**: Trade acknowledgments "must	soon as possible and, at the latest, one business day after the expiration of the confirmation time limit which would otherwise have applied. RTS 149/2013, Article 12(3); ESMA Q&A on EMIR, OTC Answer **4** 5(d). **<u>MiFID</u>** **Responsible parties:** All Investment Firms must provide confirmations to their clients following the execution of orders on behalf of such clients (including by executing an order as principal with its client). Article 25(6) MiFID and Article 59 MiFID Org Reg. **Contents:** An Investment Firm must provide the client with the essential information concerning the execution of orders and to send a notice to the client in a durable	• **Contents**. ESMA has clarified in the ESMA Q&A on EMIR that compliance with the timely confirmation requirement as defined in RTS 149/2013, requires counterparties to reach a legally binding agreement as to all the terms of an OTC derivative contract. Article 25(6) MiFID and Article 59 MiFID Org Reg. require an Investment Firm to confirm a plethora of essential information concerning the execution of that order (including all material terms of the transaction). These requirements are comparable to the requirements of Exchange Act rule 15Fi-2(c) [17 CFR 240.15Fi-2(c)], which requires the trade acknowledgement to disclose all the terms of the transaction. • **Delivery**. Article 11(1)(a) of EMIR requires a confirmation to be	

[18] https://www.govinfo.gov/content/pkg/CFR-2018-title17-vol4/pdf/CFR-2018-title17-vol4-sec240-15Fb6-1.pdf
[19] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8
[20] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
3. What requirements govern the persons responsible for providing trade acknowledgments, confirmations or equivalent records? What requirements govern their contents, delivery and timing?			
be provided promptly, but in any event by the end of the first business day[21] following the day of execution." Exchange Act rule 15Fi-2(b) [17 CFR 240.15Fi-2(b)].[22]	medium confirming execution of orders. The confirmation must include: the reporting firm identification; the name or other designation of the client; the trading day; the trading time; the type of order; venue identification; instrument identification; a buy/sell indicator; the nature of the order if other than buy/sell; the quantity; the unit price; the total consideration; information on commissions and expenses charged; the rate of exchange (where relevant); the client's responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as the appropriate account details where these details and responsibilities have not previously been notified to the client; and, where the client's	provided by electronic means where available. Article 3 MiFID Org Reg. allows for the use of electronic communications where the client provides an email address in order to ensure that the client is reasonably likely to receive the electronic communication. These requirements are comparable to Exchange Act rule 15Fi-2(c) which requires delivery of a trade acknowledgment through electronic means. • **Timing**. Article 12 of RTS 149/2013 requires counterparties Confirmation for contracts concluded after 31 August 2014 to confirm the terms of each uncleared OTC derivative contract within one or two working days, depending on the nature of the counterparties.	

[21] For those purposes: the term "business day" means any day other than a Saturday, Sunday or legal holiday; the term "execution" means the point at which the counterparties become irrevocably bound to a transaction under applicable law; and the term "day of execution" means the calendar day of the counterparty to the security-based swap transaction that ends the latest, with special accommodations for late-afternoon and non-business day transactions. *See* Exchange Act rules 15Fi-1(a), (d) and (e) [17 C.F.R. 240.15Fi-1(a), (d) and (e)].

[22] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
3. What requirements govern the persons responsible for providing trade acknowledgments, confirmations or equivalent records? What requirements govern their contents, delivery and timing?			
	counterparty was the Investment Firm itself or any person in the Investment Firm's group or another client of the Investment Firm, the fact that this was the case unless the order was executed through a trading system that facilitates anonymous trading. In addition, Investment Firms must supply the client, on request, with information about the status of its order. Article 25(6) MiFID and Article 59 MiFID Org Reg. **Delivery:** This information must be provided to the client in a 'durable medium'. This means any instrument which: (a) enables a client to store information addressed personally to that client in a way accessible for future reference, and (b) allows the unchanged reproduction of the information stored. Article 4(1)(62) MiFID.	Article 59 MiFID Org Reg. requires an Investment Firm to promptly provide the client with a confirmation as soon as possible and no later than the first business day following execution or, where the confirmation is received by the Investment Firm from a third-party, no later than the first business day following receipt of the confirmation from the third-party. These requirements are comparable to the timing requirements set forth in Exchange Act rule 15Fi-2(b), which requires confirmation by the end of the first business day following the day of execution. The CFTC also noted in their Substituted Compliance Decision on Transaction-Level Requirements that the specific timing requirements under the EMIR and the relevant US rules were comparable.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
3. What requirements govern the persons responsible for providing trade acknowledgments, confirmations or equivalent records? What requirements govern their contents, delivery and timing?			
	Investment Firms can use a medium other than on paper only if: (a) the provision of that information in that medium is appropriate to the context in which the business between the Investment Firm and the client is, or is to be, conducted; and (b) the person to whom the information is to be provided, when offered the choice between information on paper or in that other durable medium, specifically chooses the provision of the information in that other medium. For this purpose, the provision of information by means of electronic communications shall be treated as appropriate to the context in which the business between the Investment Firm and the client is, or is to be, conducted where there is evidence that the client has regular access to the internet. The provision by the client of an e-mail address for the purposes of conducting business		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
3. What requirements govern the persons responsible for providing trade acknowledgments, confirmations or equivalent records? What requirements govern their contents, delivery and timing?			
	shall be treated as such evidence. Article 3 MiFID Org Reg. **Timing:** This information must be provided to the client promptly, meaning as soon as possible and no later than the first business day following execution or, where the confirmation is received by the Investment Firm from a third-party, no later than the first business day following receipt of the confirmation from the third-party. Article 25(6) MiFID and Article 59 MiFID Org Reg.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
4. What requirements govern the substance, policies and procedures, and timing associated with trade verifications?			
Policies and Procedures: Firms are required to "establish, maintain, and enforce written policies and procedures that are reasonably designed to obtain prompt verification of the terms of a trade acknowledgment", regardless of whether the counterparty is also subject to the trade acknowledgment requirement. Exchange Act rule 15Fi-2(d)(1) [17 CFR 240.15Fi-2(d)(1)].[23] **Negative affirmation**: The SEC has clarified that the policies and procedures may rely on a counterparty's "negative affirmation" to the terms	**EMIR: timely confirmation (policies and procedures) & negative affirmation** Both counterparties must comply with the timely confirmation requirement and the obligations contained in RTS 149/2013 and must agree in advance on the specific process for this compliance. Processes under which documentation is deemed to be finalised and accepted by both parties after a fixed deadline has expired (i.e. negative affirmation) are compliant with RTS 149/2013, provided that both counterparties have agreed in advance to provide for negative affirmation. ESMA Q&A on EMIR, OTC Answer 4-5(a). FCs and NFCs are also obliged, in relation to uncleared OTC derivative contracts, to have agreed detailed	**Comparability of outcomes**: The timely confirmation requirement under EMIR provides for a comparable regulatory outcome to the SEC trade verification requirements. In particular, both Exchange Act rules 15Fi-1 and 15Fi-2 and RTS 149/2013 require parties to have processes in place to provide trade confirmations and promptly resolve any disputes which may arise in respect of such trade confirmations. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements**: The below EU requirements are comparable to analogous SEC requirements in the following ways:	

[23] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
4. What requirements govern the substance, policies and procedures, and timing associated with trade verifications?			
of a trade acknowledgment. *See* Exchange Act Release No. 78011 (Jun. 8, 2016), 81 FR at 39820 (Jun. 17, 2019) (**Trade Acknowledgment and Verification Adopting Release**).[24] **Timing**: Firms must "promptly" verify or dispute the terms of trade acknowledgments they receive. Exchange Act rule 15Fi-2(d)(2) [17 CFR 240.15Fi-2(d)(2)].[25] Exchange Act rule 15Fi-1(i) defines trade verification as "the	procedures and processes in relation to: (a) the identification, recording and monitoring of disputes relating to the recognition of the contract;[26] and (b) the resolution of disputes in a timely manner, with a specific process for those disputes which are not resolved within five business days. RTS 149/2013, Article 15(1). **<u>EMIR: timely confirmation (timing)</u>** As the timely confirmation obligation under Article 11(1)(a) of **EMIR** applies equally to both counterparties, the information on timing in question 3 of section 1(e)	• **Negative affirmation.** Both the SEC and ESMA have clarified that negative affirmation is possible, although the ability for counterparties to rely on a negative affirmation under the EMIR Margin RTS is required to be agreed by the counterparties in advance. • **Timing**. Article 12 of RTS 149/2013 requires parties to confirm the terms of each uncleared OTC derivative contract concluded after 31 August 2014 within one or two working days, depending on the nature of the counterparties. This is comparable to the timing requirements in Exchange Act rule 15Fi-2(d)(2) [17 CFR 240.15Fi-2(d)(2)], which require firms to	

[24] The SEC generally would consider negative affirmation policies and procedures reasonable if they require the counterparty to agree to be bound by negative affirmation before or at the time of execution, and provide adequate time after the counterparty receives the trade acknowledgment to dispute its terms or otherwise respond, and adding that the policies and procedures generally should require the entity to document its counterparty's agreement to rely on negative affirmation. Trade Acknowledgment and Verification Adopting Release, 81 FR at 39820. https://www.govinfo.gov/content/pkg/FR-2016-06-17/pdf/2016-13915.pdf

[25] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

[26] This requirement has been widely interpreted to include questions as to whether the contract exists and if so, what its terms are.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
4. What requirements govern the substance, policies and procedures, and timing associated with trade verifications?			
process by which a trade acknowledgement has been manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty."	applies equally in response to question 4 of section 1(e).	"promptly" verify or dispute the terms of trade acknowledgments they receive.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
5. To what extent are those requirements subject to exceptions with regard to particular types of transactions?			
The trade acknowledgment and verification requirements are subject to exceptions regarding: • Transactions with a clearing agency as counterparty: An exception applies to	The timely confirmation requirement under Article 11(1)(a) of **EMIR** only applies to uncleared OTC derivative contracts and does not apply to derivative contracts entered into on a regulated market (whether in the EU or in a non-EEA market considered as equivalent).	**Comparability of outcomes**: The exceptions to the timely confirmation obligation under Article 11(1)(a) of EMIR provide a comparable regulatory outcome to the SEC transaction exceptions to the trade acknowledgement and verification rules.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
5. To what extent are those requirements subject to exceptions with regard to particular types of transactions?			
any "clearing transaction," which is defined as a security-based swap "that has a clearing agency as a direct counterparty." Exchange Act rules 15Fi-1(b), 15Fi-1(c), 15Fi-2(e) [17 CFR 240.15Fi-1(b), (c),[27] 240.15Fi-2(e)];[28] • Transactions on execution facilities: An exception applies to transactions executed on a security-based swap execution facility or national securities	Exempt entities under EMIR, as specified in Articles 1(4) and (5) of EMIR,[32] are not subject to these requirements and accordingly, counterparties to such exempt entities are not subject to the Article 11(1)(a) timely confirmation obligation in respect of transactions with these exempt entities.[33] In the context where the Investment Firm deals as principal with its client, it is only not required to provide a confirmation if the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the client by another person (e.g. a clearing broker).	In particular, there are comparable exceptions under EMIR and the Exchange Act rules for cleared derivative contracts and derivative contracts entered into on a regulated market. In addition: (1) exemptions from MiFID confirmation requirements exist where the confirmation would be duplicative of a confirmation provided by another party involved in the transaction; and (2) the timing and content of MiFID confirmation may be adjusted as agreed with the client where the client is an ECP.	

[27] https://www.govinfo.gov/content/pkg/CFR-2018-title17-vol4/pdf/CFR-2018-title17-vol4-sec240-15Fb6-1.pdf
[28] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8
[32] This includes: (i) a member of the European System of Central Banks (**ESCB**) or other Member State body performing similar functions or other EU public body charged with or intervening in the management of the public debt; (ii) the Bank for International Settlements; (iii) the central banks and public bodies charged with or intervening in the management of the public debt in Japan; United States of America; Australia; Canada; Hong Kong; Mexico; Singapore and Switzerland; (iv) certain multilateral development banks, (v) certain public sector entities within the meaning of point (18) of Article 4 of Directive 2006/48/EC where they are owned by central governments and have explicit guarantee arrangements provided by central governments; and (vi) the European Financial Stability Facility and the European Stability Mechanism
[33] OTC Answer 12(g) in the ESMA Q&A on EMIR provides additional guidance on this point.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
5. To what extent are those requirements subject to exceptions with regard to particular types of transactions?			
exchange, provided that the facility's rules, procedures or processes provide for the acknowledgment and verification of all terms of the transaction "no later than" the time otherwise required by the rule. Exchange Act rule 15Fi-2(f)(1) [17 CFR 240.15Fi-2(f)(1)];[29] • Transactions accepted for clearing: An exception applies to transactions that are submitted for clearing to a clearing agency, provided: (i) the transaction is submitted "as soon as technologically	Investment Firms are permitted to enter into agreements with ECPs to determine the content and timing of the reports required by art 59 delegated regulation (see above) and reports required relating to holdings of client assets and client money. Article 61 MiFID Org Reg.		

[29] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
5. To what extent are those requirements subject to exceptions with regard to particular types of transactions?			
practicable, but in any event no later than the time established for providing a trade acknowledgment" under the rule; and (ii) the clearing agency's rules, procedures or processes provide for acknowledgment and verification of all terms of the transaction "prior to or at the same time" the transaction is accepted for clearing. Exchange Act rule 15Fi-2(f)(2) [17 CFR 240.15Fi-2(f)(2)];[30] and • Additional provisions for transactions that have not been			

[30] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
5. To what extent are those requirements subject to exceptions with regard to particular types of transactions?			
acknowledged, verified or accepted for clearing: If a firm receives notice that a transaction has not been acknowledged and verified pursuant to the rules, procedures or processes of an execution facility or exchange, or accepted for clearing by a clearing agency (per the above exceptions), the firm must comply with the applicable trade acknowledgment and verification requirements "as if" the transaction were executed at the time it receives the notice. Exchange Act rule			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Trade Acknowledgement and Verification Requirements			
5. To what extent are those requirements subject to exceptions with regard to particular types of transactions?			
15Fi-2(f)(3) [17 CFR 240.15Fi-2(f)(3)].[31]			

[31] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fi_62&rgn=div8

f. Subcategory: Risk Mitigation Requirements

Registered entities are required to take steps to identify and resolve discrepancies in transaction terms and valuations, reduce offsetting or redundant security-based swaps, and document their trading relationships in order to mitigate market, credit, operational and legal risks by, *inter alia*, increasing the likelihood that parties (i) remain in agreement with existing material terms, and (ii) identify problems with parties' internal valuation systems, models or internal controls. SEC Guidance at Category I.F;[34] *see* Exchange Act Release No. 87782 (Dec. 18, 2019) at 10-11 (**Risk Mitigation Adopting Release**).[35]

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	**EU Requirement and/or Policy Goal Summary**	**Comparability Assessment**	**National Measures Germany**
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
Portfolio reconciliation requirements do not apply to cleared security-based swaps. Exchange Act rule 15Fi-3(d) [17 CFR 240.15Fi-3(d)].[36] Firms are required to take the following actions to engage in portfolio reconciliation with their counterparties: 1. Portfolios and security-based swap transactions	**<u>EMIR: portfolio reconciliation</u>** FCs and NFCs to an OTC derivative contract not cleared by a CCP are required to establish formalised processes which are robust, resilient and auditable in order to reconcile portfolios. EMIR, Article 11(1)(b), 11 (14) (a). FCs and NFCs to an OTC derivative contract shall agree in writing or other equivalent electronic means with each of their counterparties on the arrangements under which portfolios should be reconciled before entering	**<u>Comparability of outcomes</u>**: The EU reconciliation and dispute resolution requirements provide a similar regulatory outcome to the corresponding SEC requirements. In particular, the regulatory outcomes pursued under Exchange Act rules 15Fi-3 and Articles 13 and 15 of RTS 149/2013 are consistent, in that each require parties to agree to develop procedures to comply with extensive reconciliation requirements tailored to the type of firm at issue, in order to identify and resolve any discrepancies or disputes between counterparties regarding the valuation of the transaction in a timely manner. By identifying and managing mismatches in key economic terms and	

[34] https://www.sec.gov/files/staff-guidance-substituted-compliance-applications.pdf
[35] https://www.govinfo.gov/content/pkg/FR-2020-02-04/pdf/2019-27762.pdf
[36] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
with counterparties that are dealers or participants: – The two counterparties must engage in portfolio reconciliation in the manner specified in paragraph (a) to Exchange Act rule 15Fi-3 [17 CFR 240.15Fi-3];[37] – Firms must establish, maintain, and follow written policies and procedures	into that OTC derivative contract. RTS 149/2013, Article 13(1). This reconciliation shall be performed by the counterparties to the OTC derivative contract or by a qualified third-party duly mandated to this effect by a counterparty (for example, a third-party service provider). It shall cover key trade terms that identify each particular OTC derivative contract and shall include at least the valuation attributed to each contract in accordance with Article 11(2) of EMIR. RTS 149/2013, Article 13(2). In addition to the valuation attributed to each contract, key trade terms may also include other relevant details such as the effective date, the notional value of the contract and currency of the transaction, the underlying instrument, the position of the counterparties, the business day convention and any	valuation for individual transactions across an entire portfolio, both the EU and SEC rules are aimed at achieving a process in which overall risk can be identified and reduced. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are comparable to analogous SEC requirements in the following ways: • **General reconciliation requirement framework**. Article 13(1) of RTS 149/2013 provides that FCs and NFCs to an OTC derivative contract shall agree in writing or other equivalent electronic means with each of their counterparties on the arrangements under which portfolios should be reconciled before	

[37] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
reasonably designed to ensure that they engage in portfolio reconciliation for transactions with all other counterparties in the manner set forth in paragraph (b) to Exchange Act rule 15Fi-3 [17 CFR 240.15Fi-3];[38] – Rule 15Fi-3(a) and (b) address the potential use of third-party service providers to	relevant fixed or floating rates. RTS 149/2013, Recital 28. Reconciliation shall be performed: (a) for an FC or NFC+: (i) On each business day when the counterparties have 500 or more OTC derivative contracts outstanding with each other; (ii) Once per week when the counterparties have between fifty-one and 499 OTC derivative contracts outstanding with each other at any time during the week; and (iii) Once per quarter when the counterparties have fifty or less OTC	entering into that OTC derivative contract. Under Article 13(2) of RTS 149/2013, the reconciliation shall cover key trade terms that identify each particular OTC derivative contract and shall include at least the valuation attributed to each contract. These requirements are comparable to the portfolio reconciliation requirements in Exchange Act rule 15Fi-3. • **Policies and procedures**. Article 11(1)(b) of EMIR requires that FCs and NFCs to an OTC derivative contract not cleared by a CCP establish formalized processes which are robust, resilient and auditable, in order to reconcile portfolios. This requirement is comparable to Exchange Act rule 15Fi-3. • **Third-party service providers**. Article 13(2) of RTS 149/2013 prescribes that reconciliation shall be performed by the counterparties to the OTC derivative contract with each other or by a qualified third-party duly mandated to	

[38] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
perform the reconciliations, and require firms to agree in writing on the terms of portfolio reconciliation with their counterparties. Exchange Act rule 15Fi-3(a), (b) [17 CFR 240.15Fi-3(a), (b)];[39] – Portfolio reconciliation must be performed no less frequently than once per business day for portfolios that include	derivative contracts outstanding with each other at any time during the quarter. (b) for a NFC-: (i) Once per quarter when the counterparties have more than 100 OTC derivative contracts outstanding with each other at any time during the quarter; or (ii) Once per year when the counterparties have 100 or less OTC derivative contracts outstanding with each other. RTS 149/2013, Article 13(3). **EMIR: dispute resolution**	this effect by a counterparty. This requirement is comparable to Exchange Act rules 15Fi-3(a) and 15Fi-3(b). • **Frequency**. Article 13(3) of RTS 149/2013 sets out the frequency with which reconciliation be performed for FCs and NFCs. These frequency requirements are comparable to those set out in Exchange Act rules 15Fi-3(a)(3) and 15Fi-3(b)(3). • **Resolving discrepancies**. Article 15(1) of RTS 149/2013 requires parties to agree to detailed procedures and processes to identify, record, monitor and resolve disputes relating to the recognition or valuation of the contract. This requirement is comparable to Exchange Act rules 15Fi-3(a)(5), 15Fi-3(c) and 15Fi-3(b)(4). • **Regulator notification**. Article 15 of RTS 149/2013 requires FCs to report to relevant competent authorities any disputes between counterparties	

[39] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
500 or more security-based swaps, once each week for portfolios that include more than fifty security-based swaps, and once each calendar quarter for portfolios that include no more than fifty security-based swaps at any time during the quarter. Exchange Act rule 15Fi-3(a)(3) [17	FCs and NFCs to an OTC derivative contract not cleared by a CCP are also required to establish formalised processes which are robust, resilient and auditable in order to identify disputes early and resolve them. EMIR, Article 11(1)(b), 11 (14) (a). In relation to uncleared OTC derivative contracts, RTS 149/2013 requires FCs and NFCs to have agreed detailed procedures and processes in relation to: (a) the identification, recording and monitoring of disputes relating to the recognition or valuation of the contract (recording at least the length of time for which the dispute remains outstanding, the counterparty and the amount which is disputed); and (b) the resolution of disputes in a timely manner, with a specific process for those disputes that are not resolved within five business days. RTS 149/2013, Article 15(1).	relating to an OTC derivative contract, its valuation or the exchange of collateral for an amount or value higher than EUR 15 million and outstanding for at least fifteen business days. While the equivalent requirement under Exchange Act rules 15Fi-3(a)(5) and 15Fi-3(c) is slightly different, in that firms must notify the SEC and any applicable prudential regulator of valuation disputes in excess of $20 million if not resolved within a specified period of time, we note that in the CFTC Substituted Compliance Decision on Transaction-Level Requirements the CFTC acknowledged this discrepancy and nonetheless considered that the EU and relevant US requirements were comparable. Overall, in the CFTC Substituted Compliance Decision on Transaction-Level Requirements, the CFTC found that the EMIR portfolio reconciliation requirements were "[g]enerally identical in intent" and further "comparable to and as comprehensive as	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
CFR 240.15Fi-3(a)(3)];[40] – Firms must resolve discrepancies in material terms[41] immediately. Exchange Act rule 15Fi-3(a)(4) [17 CFR 240.15Fi-3(a)(4)];[42] – Firms must establish, maintain and follow written policies and procedures reasonably	FCs shall report to the competent authority designated in accordance with Article 48 of MiFID any disputes between counterparties relating to an OTC derivative contract, its valuation or the exchange of collateral for an amount or value higher than EUR 15 million and outstanding for at least fifteen business days. RTS 149/2013, Article 15(2). As a minimum, FCs are expected to make a monthly notification of any disputes outstanding in the preceding month.[51] ESMA Q&A on EMIR, OTC Answer ~~13(d~~) 15(d).	the portfolio reconciliation requirements of Commission regulation 23.502".	

[40] https://www.sec.gov/rules/final/2019/34-87782.pdf

[41] In this context, and in the same context where the counterparties are not dealers or participants, a "material term" includes the terms required to be reported to security-based swap data repositories or the SEC pursuant to Regulation SBSR rule 901, and excludes terms that are not relevant to the ongoing rights and obligations of the parties and the valuation of the security-based swap. 17 CFR 242.901; *see* Exchange Act rule 15Fi-1(i) [17 CFR 240.15Fi-1(i)].

[42] https://www.sec.gov/rules/final/2019/34-87782.pdf

[51] Although national competent authorities may require more frequent reporting of outstanding disputes

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
designed to resolve valuation discrepancies of 10% or more as soon as possible but in any event within five business days.[43] Exchange Act rule 15Fi-3(a)(5), (c) [17 CFR 240.15Fi-3(a)(5), (c)];[44] and – Firms must promptly notify the SEC and any applicable prudential regulation			

[43] Provided that the firm has procedures to identify how it will comply with applicable variation margin requirements pending resolution of the discrepancy.
[44] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
regarding valuation disputes, at the transaction or portfolio level, in excess of $20 million, if not resolved within a specified period of time. Exchange Act rule 15Fi-3(a)(5), (c) [17 CFR 240.15Fi-3(a)(5), (c)].[45] Firms must report such valuation disputes within three business days, and must			

[45] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
provide amended notices if the amount of any valuation dispute that was the subject of a previous notice increases or decreases by more than $20 million at the transaction or portfolio level. Exchange Act rules 15Fi-3(c)(1), (2) [17 CFR 240.15Fi-3(c)(1), (2)].[46]			
2. Portfolios and security-			

[46] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
based swap transactions with counterparties that are not dealers or participants: – Timing: Portfolio reconciliation must be performed no less frequently than once each calendar quarter for portfolios that include no more than 100 security-based swaps at any time during the quarter, and once annually for portfolios			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
that include no more than 100 security-based swaps at any time during the calendar year. Exchange Act rule 15Fi-3(b)(3) [17 CFR 240.15Fi-3(b)(3)];[47] – Firms must resolve discrepancies in the material terms or valuation of security-based swaps, and must establish, maintain and follow written			

[47] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
procedures reasonably designed to resolve discrepancies in valuation (of 10% or less) or in the material terms of security-based swaps in a timely fashion. Exchange Act rule 15Fi-3(b)(4) [17 CFR 240.15Fi-3(b)(4)];[48] and – Firms must promptly notify the SEC and any applicable prudential			

[48] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
regulation regarding security-based swap valuation disputes, at the transaction or portfolio level, in excess of $20 million, if not resolved within a specified period of time. Exchange Act rule 15Fi-3 [17 CFR 240.15Fi-3].[49] Firms must report such valuation disputes within five			

[49] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?			
business days, and must provide amended notices if the amount of any valuation dispute that was the subject of a previous notice increases or decreases by more than $20 million. Exchange Act rule 15Fi-3(c)(1), (2) [17 CFR 240.15Fi-3(c)(1), (2)].[50]			

[50] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
2. To what extent are parties to transactions required to engage in bilateral offset, bilateral or multilateral compression, or similar exercises to reduce offsetting or redundant instruments?			
Portfolio compression Firms must establish, maintain and follow written policies and procedures addressing bilateral offset, bilateral compression and multilateral compression. For counterparties that are dealers or participants, Exchange Act rule 15Fi-4(a) addresses bilateral offset, bilateral compression and multilateral compression requirements. Exchange Act rule 15Fi-4(a) [17 CFR 240.15Fi-4(a)].[52] Compression rules do not apply to cleared security-based swaps. Exchange	**EMIR: portfolio compression** FCs and NFCs to an OTC derivative contract not cleared by a CCP are required to establish formalised processes which are robust, resilient and auditable to manage the risk associated with portfolios. EMIR, Article 11(1)(b), 11 (14) (a) FCs and NFCs with 500 or more uncleared OTC derivative contracts outstanding with a counterparty shall have in place procedures to regularly and, at least twice a year, analyse the possibility of a portfolio compression exercise in order to decrease counterparty risk and either: (i) engage in such an exercise; or (ii) be able to provide a reasonable and valid explanation to the relevant competent authority if they conclude such exercise is not appropriate. RTS 149/2013, Article 14.	**Comparability of outcomes**: The EU portfolio compression requirements provide a similar regulatory outcome to the SEC portfolio compression requirements. In particular, the regulatory outcomes pursued under Exchange Act rules 15Fi-4 and Article 14 of RTS 149/2013 are consistent, in that each require regular determinations of whether portfolio compression is appropriate and policies and procedures to be put in place to engage in such exercise. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements**: The below EU requirements are comparable to analogous SEC requirements in the following ways:	

[52] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
2. To what extent are parties to transactions required to engage in bilateral offset, bilateral or multilateral compression, or similar exercises to reduce offsetting or redundant instruments?			
Act rule 15Fi-4(c) [17 CFR 240.15Fi-4(c)].[53] Compression rules may reduce a market participant's "gross exposure to its direct counterparties," and may provide "important operational benefits and efficiencies for market participants . . . ." Risk Mitigation Adopting Release at 12-13.[54]		• **Policies and Procedures**. Pursuant to the Article 11(1)(b) of EMIR requirement that parties to an OTC derivative contract not cleared by a CCP establish formalized risk management processes, Article 14 of RTS 149/2013 provides that FCs and NFCs with 500 or more uncleared OTC derivative contracts outstanding with a counterparty shall have procedures in place to regularly and, at least twice a year, analyze the possibility of a portfolio compression exercise in order to decrease counterparty risk and either: (i) engage in such an exercise; or (ii) be able to provide a reasonable and valid explanation to the relevant competent authority if they conclude such exercise is not appropriate. This requirement is comparable to the policies and procedures required by Exchange Act rule 15Fi-4(a) to be put into place to analyze and effect compression.	

[53] https://www.sec.gov/rules/final/2019/34-87782.pdf
[54] https://www.govinfo.gov/content/pkg/FR-2020-02-04/pdf/2019-27762.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
2. To what extent are parties to transactions required to engage in bilateral offset, bilateral or multilateral compression, or similar exercises to reduce offsetting or redundant instruments?			
		• **Applicability**. The portfolio compression rules created pursuant to Article 11(1)(b) of EMIR only apply to parties to an OTC derivative contract not cleared by a CCP. This is comparable to Exchange Act rule 15Fi-4(c). • In the CFTC Substituted Compliance Decision on Transaction-Level Requirements, the CFTC found that the EMIR portfolio compression requirements were "[g]enerally identical in intent" and further "comparable to and as comprehensive as the portfolio compression requirements of Commission regulation 23.503".	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
3. To what extent are parties to transactions required to document the terms of their trading relationships?			
Except for pre-existing security-based swaps,	**MiFID requirements**	**Comparability of outcomes**:	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
3. To what extent are parties to transactions required to document the terms of their trading relationships?			
cleared security-based swaps, or certain security-based swaps executed anonymously on a national securities exchange or security-based swap execution facility, firms must establish, maintain and follow policies and procedures reasonably designed to ensure that they execute written security-based swap trading relationship documentation with each of their counterparties prior to, or contemporaneously with, executing a security-based swap. Exchange Act rule 15Fi-5(a)(1), (2), (b)(1)-(3) [17 CFR 240.15Fi-5(a)(1), (2), (b)(1)-(3)].[55]	MiFID requires counterparties to be classified as retail clients, professional clients, and eligible counterparties, and corresponding different conduct of business rules apply. Investment firms have to correctly categorize clients and notify those clients of their classification; furthermore, investment firms should be able to demonstrate the correctness of the classification. Articles 24 and 30 and Annex II MiFID and Article 45 MiFID Org Reg. An Investment Firm must establish a record that includes the document or documents agreed between the Investment Firm and the client that set out the rights and obligations of the parties, and the other terms on which the Investment Firm will provide services to the client. Article 25(5) MiFID. This must be in writing and on paper or another durable medium. Article 58 MiFID Org Reg. In practice, Investment Firms meet this obligation through their standard client-facing	The EU documentation requirements applicable to OTC derivatives trading relationships provide a similar regulatory outcome to the SEC trading relationship documentation requirements. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fi-5, EMIR and MiFID are consistent in that each provide for documentation requirements in order to mitigate the risks associated with entering into transactions. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are comparable to analogous SEC requirements in the following ways:	**Sections 63, 67, 83 (2) WpHG**

[55] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
3. To what extent are parties to transactions required to document the terms of their trading relationships?			
These requirements should: – promote sound collateral and risk management practices; – reduce counterparty credit risk; and – promote certainty regarding the agreed-upon valuation and other material terms of a security-based swap. Risk Mitigation Adopting	terms of business (addressing MiFID client protection requirements amongst other things), in combination with derivatives master agreements and related collateral documentation where appropriate. An Investment Firm that has carried out an order on behalf of a client (including by executing an order as principal with its client) must promptly provide the client, in a durable medium, with the essential information concerning the execution of that order and send a notice to the client in a durable medium confirming execution of the order. In addition, Investment Firms must supply the client, on request, with information about the status of its order. Article 25(6) MiFID and Article 59 MiFID Org Reg. Investment Firms must, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of	• **Creation of trading records**. Article 25(5) MiFID requires an Investment Firm to establish a record that includes the document or documents agreed between the Investment Firm and the client that set out the rights and obligations of the parties, and the other terms on which the Investment Firm will provide services to the client. Article 59 MiFID Org Reg. requires an Investment Firm that has carried out an order on behalf of a client, other than for portfolio management (which means the provision of discretionary investment management), to promptly provide the client a confirmation, in a durable medium, with the essential information concerning the execution of that order. Articles 74 and 75 MiFID Org Reg. require Investment Firms to keep detailed records in relation to every client order and decision to deal, and every client order executed or transmitted. These requirements are comparable to Exchange Act rules 15Fi-5(a) and 15Fi-5(b).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
3. To what extent are parties to transactions required to document the terms of their trading relationships?			
Release at 14.[56] Where both counterparties are dealers or financial counterparties,[57] or upon counterparty request – documentation must include: – Written documentation regarding the process for determining the value of security-based swaps for purposes of complying with margin and risk management	that business, establish and maintain an internal audit function which is separate and independent from the other functions and activities of the Investment Firm. The responsibilities of this function must include to: establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the Investment Firm's systems, internal control mechanisms and arrangements; issue recommendations based on the result of this work and verify compliance with those recommendations; and report to senior management in relation to internal audit matters. Article 24 MiFID Org Reg. **<u>EMIR: netting and collateral agreements</u>** FCs and NFCs subject to the margin requirement will generally be required to enter into netting agreements and exchange collateral agreements, at the	• Article 24 MiFID Org Reg. requires Investment Firms, where appropriate and proportionate, to establish an internal audit function, the remit of which includes reviewing the effectiveness of internal controls – these internal controls would normally include, among other matters, the Investment Firm's documentation policies and procedures. These requirements are comparable to Exchange Act rules 15Fi-5. • **Required terms**: Article 2(2)(g) of the EMIR Margin RTS requires, at a minimum, that the terms of all necessary agreement (including as relevant the terms of any netting or collateral agreements) document, *inter alia*, payment obligations, the conditions for netting, termination events and the transfer of rights and obligations upon termination. These requirements are comparable to the trading relationship	

[56] https://www.govinfo.gov/content/pkg/FR-2020-02-04/pdf/2019-27762.pdf

[57] For those purposes, the term "financial counterparty" includes swap dealers, major swap participants, certain commodity pools, private funds and employee benefit plans, and persons predominately engaged in activities that are in the business of banking or that are financial in nature. Exchange Act rule 15Fi-1(g) [17 CFR 240.15Fi-1(g)].

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
3. To what extent are parties to transactions required to document the terms of their trading relationships?			
requirements. Exchange Act rule 15Fi-5(b)(4) [17 CFR 240.15Fi-5(b)(4)];[58] – Information regarding the status of the dealer or its counterparty, as an insured financial institution or financial company. Exchange Act rule 15Fi-5(b)(5) [17 CFR 240.15Fi-5(b)(5)];[59] and – Information regarding	latest, at the moment in which a non-centrally cleared OTC derivative contract is concluded, as further detailed in question 2 of section 1(c) above. The terms of all necessary agreements (including, as relevant, the terms of any netting agreement and any exchange of collateral agreement) must document (at least): (a) any payment obligations arising between counterparties; (b) the conditions for netting payment obligations; (c) events of default or other termination events of the non-centrally cleared OTC derivative contracts; (d) all calculation methods used in relation to payment obligations; (e) the conditions for netting payment obligations upon termination; (f) the transfer of rights and obligations upon termination; and (g) the governing law of the transactions of the non-centrally	documentation requirements under Exchange Act rules 15Fi-5(a)(1) and (b)(1)-(2).	

[58] https://www.sec.gov/rules/final/2019/34-87782.pdf
[59] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
3. To what extent are parties to transactions required to document the terms of their trading relationships?			
security-based swaps that have been accepted for clearing. Exchange Act rule 15Fi-5(b)(6) [17 CFR 240.15Fi-5(b)(6)].[60] Firms must have an independent audit of their documentation policies and procedures. Exchange Act rule 15Fi-5 [17 CFR 240.15Fi-5].[61] Trading relationship documentation must address, in part: payment obligations, netting, termination events, termination obligations,	cleared OTC derivative contracts. EMIR Margin RTS, Article 2(2)(g). **EMIR: dispute resolution** FCs and NFCs are required to agree on detailed written procedures and processes to identify, record, monitor and resolve disputes, in particular in relation to the identification, recording and monitoring of disputes relating to the recognition or valuation of the contract and to the exchange of collateral, as further detailed in question 1 of section 1(f). EMIR, Article 11(1)(b), 11 (14) (b) and RTS 149/2013, Article 15(1). **EMIR: portfolio reconciliation** FCs and NFCs are obliged to agree on procedures for, and carry out, portfolio reconciliation to identify any discrepancies at an early stage. The reconciliation process is required to be agreed in writing or other equivalent		

[60] https://www.sec.gov/rules/final/2019/34-87782.pdf
[61] https://www.sec.gov/rules/final/2019/34-87782.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Risk Mitigation Requirements			
3. To what extent are parties to transactions required to document the terms of their trading relationships?			
transfer of rights and obligations, governing law, valuation, dispute resolution, trade acknowledgments and verifications, and credit support arrangements. Exchange Act rules 15Fi-5(a)(1), (b)(1)-(3) [17 CFR 240.15Fi-5(a)(1), (b)(1)-(3)].[62]	electronic means and cover the key trade terms (including, at least, valuation). Further details are provided in question 1 of section 1(f). EMIR, Article 11(1)(b), 11(14) (b) and RTS 149/2013, Article 13.		

[62] https://www.sec.gov/rules/final/2019/34-87782.pdf

§240.18a-3 Non-cleared security-based swap margin requirements for security-based swap dealers and major security-based swap participants for which there is not a prudential regulator.

(a) Every security-based swap dealer and major security-based swap participant for which there is not a prudential regulator must comply with this section.

(b) *Definitions.* For the purposes of this section:

(1) The term *account* means an account carried by a security-based swap dealer or major security-based swap participant that holds one or more non-cleared security-based swaps for a counterparty.

(2) The term *commercial end user* means a counterparty that qualifies for an exception from clearing under section 3C(g)(1) of the Act (15 U.S.C. 78o-3(g)(1)) and implementing regulations or satisfies the criteria in section 3C(g)(4) of the Act (15 U.S.C. 78o-3(g)(4)) and implementing regulations.

(3) The term *counterparty* means a person with whom the security-based swap dealer or major security-based swap participant has entered into a non-cleared security-based swap transaction.

(4) The term *initial margin amount* means the amount calculated pursuant to paragraph (d) of this section.

(5) The term *non-cleared security-based swap* means a security-based swap that is not, directly or indirectly, submitted to and cleared by a clearing agency registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) or by a clearing agency that the Commission has exempted from registration by rule or order pursuant to section 17A of the Act (15 U.S.C. 78q-1).

(6) The term *security-based swap legacy account* means an account that holds no security-based swaps entered into after the compliance date of this section and that only is used to hold one or more security-based swaps entered into prior to the compliance date of this section and collateral for those security-based swaps.

(c) *Margin requirements*—(1) *Security-based swap dealers*—(i) *Calculation required.* A security-based swap dealer must calculate with respect to each account of a counterparty as of the close of each business day:

(A) The amount of the current exposure in the account of the counterparty; and

(B) The initial margin amount for the account of the counterparty.

(ii) *Account equity requirements.* Except as provided in paragraph (c)(1)(iii) of this section, a security-based swap dealer must take an action required in paragraph (c)(1)(ii)(A) or (B) of this section by no later than the close of business of the first business day following the day of the calculation required under paragraph (c)(1)(i) of this section or, if the counterparty is located in another country and more than four time zones away, the second business day following the day of the calculation required under paragraph (c)(1)(i) of this section:

(A)(*1*) Collect from the counterparty collateral in an amount equal to the current exposure that the security-based swap dealer has to the counterparty; or

(*2)* Deliver to the counterparty collateral in an amount equal to the current exposure that the counterparty has to the security-based swap dealer, provided that such amount does not include the initial margin amount collected from the counterparty under paragraph (c)(1)(ii)(B) of this section; and

(B) Collect from the counterparty collateral in an amount equal to the initial margin amount.

(iii) *Exceptions*—(A) *Commercial end users.* The requirements of paragraph (c)(1)(ii) of this section do not apply to an account of a counterparty that is a commercial end user.

(B) *Counterparties that are financial market intermediaries.* The requirements of paragraph (c)(1)(ii)(B) of this section do not apply to an account of a counterparty that is a security-based swap dealer, swap dealer, broker or dealer, futures commission merchant, bank, foreign bank, or foreign broker or dealer.

(C) *Counterparties that use third-party custodians.* The requirements of paragraph (c)(1)(ii)(B) of this section do not apply to an account of a counterparty that delivers the collateral to meet the initial margin amount to an independent third-party custodian.

(D) *Security-based swap legacy accounts.* The requirements of paragraph (c)(1)(ii) of this section do not apply to a security-based swap legacy account.

(E) *Bank for International Settlements, European Stability Mechanism, and Multilateral development banks.* The requirements of paragraph (c)(1)(ii) of this section do not apply to an account of a counterparty that is the Bank for International Settlements or the European Stability Mechanism, or is the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, or any other multilateral development bank that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member.

(F) *Sovereign entities.* The requirements of paragraph (c)(1)(ii)(B) of this section do not apply to an account of a counterparty that is a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government if the security-based swap dealer has determined that the counterparty has only a minimal amount of credit risk pursuant to policies and procedures or credit risk models established pursuant to §240.15c3-1 or §240.18a-1 (as applicable).

(G) *Affiliates.* The requirements of paragraph (c)(1)(ii)(B) of this section do not apply to an account of a counterparty that is an affiliate of the security-based swap dealer.

(H) *Threshold amount.* (*1*) A security-based swap dealer may elect not to collect the initial margin amount required under paragraph (c)(1)(ii)(B) of this section to the extent that the sum of that amount plus all other credit exposures resulting from non-cleared swaps and non-cleared security-based swaps of the security-based swap dealer and its affiliates with the counterparty and its affiliates does not exceed $50 million. For purposes of this calculation, a security-based swap dealer need not include any exposures arising from non-cleared security based swap transactions with a counterparty that is a commercial end user, and non-cleared swap transactions with a counterparty that qualifies for an exception from margin requirements pursuant to section 4s(e)(4) of the Commodity Exchange Act (7 U.S.C. 6s(e)(4)).

(*2*) *One-time deferral.* Notwithstanding paragraph (c)(1)(iii)(H)(*1*) of this section, a security-based swap dealer may defer collecting the initial margin amount required under paragraph (c)(1)(ii)(B) of this section for up to two months following the month in which a counterparty no longer qualifies for this threshold exception for the first time.

(I) *Minimum transfer amount.* Notwithstanding any other provision of this rule, a security-based swap dealer is not required to collect or deliver collateral pursuant to this section with respect to a particular counterparty unless and until the total amount of collateral that is required to be collected or delivered, and has not yet been collected or delivered, with respect to the counterparty is greater than $500,000.

(2) *Major security-based swap participants*—(i) *Calculation required.* A major security-based swap participant must with respect to each account of a counterparty calculate as of the close of each business day the amount of the current exposure in the account of the counterparty.

(ii) *Account equity requirements.* Except as provided in paragraph (c)(2)(iii) of this section, a major security-based swap participant must take an action required in paragraph (c)(2)(ii)(A) or (B) of this section by no later than the close of business of the first business day following the day of the calculation required under paragraph (c)(2)(i) or, if the counterparty is located in another country and more than four time zones away, the second business day following the day of the calculation required under paragraph (c)(2)(i) of this section:

(A) Collect from the counterparty collateral in an amount equal to the current exposure that the major security-based swap participant has to the counterparty; or

(B) Deliver to the counterparty collateral in an amount equal to the current exposure that the counterparty has to the major security-based swap participant.

(iii) *Exceptions*—(A) *Commercial end users.* The requirements of paragraph (c)(2)(ii)(A) of this section do not apply to an account of a counterparty that is a commercial end user.

(B) *Security-based swap legacy accounts.* The requirements of paragraph (c)(2)(ii) of this section do not apply to a security-based swap legacy account.

(C) *Bank for International Settlements, European Stability Mechanism, and Multilateral development banks.* The requirements of paragraph (c)(2)(ii)(A) of this section do not apply to an account of a counterparty that is the Bank for International Settlements or the European Stability Mechanism, or is the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, or any other multilateral development bank that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member.

(D) *Minimum transfer amount.* Notwithstanding any other provision of this rule, a major security-based swap participant is not required to collect or deliver collateral pursuant to this section with respect to a particular counterparty unless and until the total amount of collateral that is required to be collected or delivered, and has not yet been collected or delivered, with respect to the counterparty is greater than $500,000.

(3) *Deductions for collateral.* (i) The fair market value of collateral delivered by a counterparty or the security-based swap dealer must be reduced by the amount of the standardized deductions the security-based swap dealer would apply to the collateral pursuant to §240.15c3-1 or §240.18a-1, as applicable, for the purpose of paragraph (c)(1)(ii) of this section.

(ii) Notwithstanding paragraph (c)(3)(i) of this section, the fair market value of assets delivered as collateral by a counterparty or the security-based swap dealer may be reduced by the amount of the standardized deductions prescribed in 17 CFR 23.156 if the security-based swap dealer applies these standardized deductions consistently with respect to the particular counterparty.

(4) *Collateral requirements.* A security-based swap dealer or a major security-based swap participant when calculating the amounts under paragraphs (c)(1) and (2) of this section may take into account the fair market value of collateral delivered by a counterparty provided:

(i) The collateral:

(A) Has a ready market;

(B) Is readily transferable;

(C) Consists of cash, securities, money market instruments, a major foreign currency, the settlement currency of the non-cleared security-based swap, or gold;

(D) Does not consist of securities and/or money market instruments issued by the counterparty or a party related to the security-based swap dealer, the major security-based swap participant, or the counterparty; and

(E) Is subject to an agreement between the security-based swap dealer or the major security-based swap participant and the counterparty that is legally enforceable by the security-based swap dealer or the major security-based swap participant against the counterparty and any other parties to the agreement; and

(ii) The collateral is either:

(A) Subject to the physical possession or control of the security-based swap dealer or the major security-based swap participant and may be liquidated promptly by the security-based swap dealer or the major security-based swap participant without intervention by any other party; or

(B) The collateral is carried by an independent third-party custodian that is a bank as defined in section 3(a)(6) of the Act or a registered U.S. clearing organization or depository that is not affiliated with the counterparty or, if the collateral consists of foreign securities or currencies, a supervised foreign bank, clearing organization, or depository that is not affiliated with the counterparty and that customarily maintains custody of such foreign securities or currencies.

(5) *Qualified netting agreements.* A security-based swap dealer or major security-based swap participant may include the effect of a netting agreement that allows the security-based swap dealer or major security-based swap participant to net gross receivables from and

gross payables to a counterparty upon the default of the counterparty, for the purposes of the calculations required pursuant to paragraphs (c)(1)(i) and (c)(2)(i) of this section, if:

(i) The netting agreement is legally enforceable in each relevant jurisdiction, including in insolvency proceedings;

(ii) The gross receivables and gross payables that are subject to the netting agreement with a counterparty can be determined at any time; and

(iii) For internal risk management purposes, the security-based swap dealer or major security-based swap participant monitors and controls its exposure to the counterparty on a net basis.

(6) *Frequency of calculations increased.* The calculations required pursuant to paragraphs (c)(1)(i) and (c)(2)(i) of this section must be made more frequently than the close of each business day during periods of extreme volatility and for accounts with concentrated positions.

(7) *Liquidation.* A security-based swap dealer or major security-based swap participant must take prompt steps to liquidate positions in an account that does not meet the margin requirements of this section to the extent necessary to eliminate the margin deficiency.

(d) *Calculating initial margin amount.* A security-based swap dealer must calculate the initial margin amount required by paragraph (c)(1)(i)(B) of this section for non-cleared security-based swaps as follows:

(1) *Standardized approach*—(i) *Credit default swaps.* For credit default swaps, the security-based swap dealer must use the method specified in §240.18a-1(c)(1)(vi)(B)(*1*) or, if the security-based swap dealer is registered with the Commission as a broker or dealer, the method specified in §240.15c3-1(c)(2)(vi)(P)(*1*).

(ii) *All other security-based swaps.* For security-based swaps other than credit default swaps, the security-based swap dealer must use the method specified in §240.18a-1(c)(1)(vi)(B)(*2*) or, if the security-based swap dealer is registered with the Commission as a broker or dealer, the method specified in §240.15c3-1(c)(2)(vi)(P)(*2*).

(2) *Model approach.* (i) For security-based swaps other than equity security-based swaps, a security-based swap dealer may apply to the Commission for authorization to use and be responsible for a model to calculate the initial margin amount required by paragraph (c)(1)(i)(B) of this section subject to the application process in §240.15c3-1e or §240.18a-1(d), as applicable. The model must use a 99 percent, one-tailed confidence level with price changes equivalent to a ten business-day movement in rates and prices, and must use risk factors sufficient to cover all the material price risks inherent in the positions for which the initial margin amount is being calculated, including foreign exchange or interest rate risk, credit risk, equity risk, and commodity risk, as appropriate. Empirical correlations may be recognized by the model within each broad risk category, but not across broad risk categories.

(ii) Notwithstanding paragraph (d)(2)(i) of this section, a security-based swap dealer that is not registered as a broker or dealer pursuant to Section 15(b) of the Act (15 U.S.C. 78o(b)), other than as an OTC derivatives dealer, may apply to the Commission for authorization to use a model to calculate the initial margin amount required by paragraph (c)(1)(i)(B) of this section for equity security-based swaps, subject to the application process and model requirements of paragraph (d)(2)(i) of this section; provided, however, the account of the counterparty subject to the requirements of this paragraph may not hold equity security positions other than equity security-based swaps and equity swaps.

(e) *Risk monitoring and procedures.* A security-based swap dealer must monitor the risk of each account and establish, maintain, and document procedures and guidelines for monitoring the risk of accounts as part of the risk management control system required by §240.15c3-4. The security-based swap dealer must review, in accordance with written procedures, at reasonable periodic intervals, its non-cleared security-based swap activities for consistency with the risk monitoring procedures and guidelines required by this section. The security-based swap dealer also must determine whether information and data necessary to apply the risk monitoring procedures and guidelines required by this section are accessible on a timely basis and whether information systems are available to adequately capture, monitor, analyze, and report relevant data and information. The risk monitoring procedures and guidelines must include, at a minimum, procedures and guidelines for:

(1) Obtaining and reviewing account documentation and financial information necessary for assessing the amount of current and potential future exposure to a given counterparty permitted by the security-based swap dealer;

(2) Determining, approving, and periodically reviewing credit limits for each counterparty, and across all counterparties;

(3) Monitoring credit risk exposure to the security-based swap dealer from non-cleared security-based swaps, including the type, scope, and frequency of reporting to senior management;

(4) Using stress tests to monitor potential future exposure to a single counterparty and across all counterparties over a specified range of possible market movements over a specified time period;

(5) Managing the impact of credit exposure related to non-cleared security-based swaps on the security-based swap dealer's overall risk exposure;

(6) Determining the need to collect collateral from a particular counterparty, including whether that determination was based upon the creditworthiness of the counterparty and/or the risk of the specific non-cleared security-based swap contracts with the counterparty;

(7) Monitoring the credit exposure resulting from concentrated positions with a single counterparty and across all counterparties, and during periods of extreme volatility; and

(8) Maintaining sufficient equity in the account of each counterparty to protect against the largest individual potential future exposure of a non-cleared security-based swap carried in the account of the counterparty as measured by computing the largest maximum possible loss that could result from the exposure.

February 28, 2020
25.05.2020: Comments by BaFin with new column "National Measures Germany"

II. Recordkeeping and Reporting Requirements

ALLEN & OVERY

Comparability Assessment of Certain Securities and Exchange Commission and EU Requirements Applicable to Security-

Based Swap Dealers pursuant to SEC Staff Guidance on Substituted Compliance Applications

2. Category: Recordkeeping and Reporting Requirements[1]

a. Executive Summary

The recordkeeping and reporting requirements provide for records, reports and notices to facilitate the SEC's oversight of registrants, by enabling SEC access to key information in connection with the SEC's obligation to protect the integrity of the security-based swap market and to protect market participants. The recordkeeping and reporting requirements also include quarterly securities count practices intended to help guard against deficiencies in firms' internal controls.

When considering substituted compliance in connection with recordkeeping and reporting requirements, the SEC intends to consider whether "the foreign financial regulatory system's required records and reports, the timeframes for recording or reporting information, the accounting standards governing the records and reports, and the required format of the records and reports" are comparable to applicable Exchange Act provisions and underlying rules, as well as whether the foreign regulatory system "would permit the [SEC] to examine and inspect regulated firms' compliance with the applicable securities laws." Exchange Act rule 3a71-6(d)(6) [17 CFR 240.3a71-6(d)(6)].[2]

b. Subcategory: Record Creation

Registered firms must keep applicable books and records in the form and manner, and for the period, prescribed by the SEC, and keep those books and records open to inspection and examination by SEC representatives. Exchange Act section 15F(f)(1)(B), (C) [15 U.S.C. 78o-10(f)(1)(B), (C)];[3] and Exchange Act Release No. 87005 (Sep. 19, 2019) (**Books and Records Adopting Release**).[4]

The record creation requirements vary depending on whether the firm at issue has a prudential regulator.[5] For firms that have a prudential regulator, the recordkeeping requirements specifically apply to the firm's business as a dealer. Exchange Act section 15F(f)(1)(B) [15 U.S.C. 78o-10(f)(1)(B)].[6]

[1] To date, the SEC has not yet issued guidance regarding substituted compliance determinations concerning trade reporting and public dissemination. We further note that the SEC has issued limited four-year no-action relief when complying with certain CFTC reporting and dissemination requirements. The working group will monitor the situation in light of these factors, and may support a substituted compliance determination on these topics at a later time.
[2] https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf
[3] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[4] http://www.cecouncil.org/media/266640/sec-release-no-34-87005.pdf
[5] Commodity Exchange Act section 1a(39) [7 U.S.C. 1a(39)] defines "prudential regulator", and is incorporated by reference by Exchange Act section 3(a)(74) [15 U.S.C. 78c(a)(74)].
[6] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
1. What records are firms required to make with regard to their transactions and other activities?			
Recordkeeping Firms must maintain daily trading records (including records of each counterparty) of security-based swaps, and related records and recorded communications. Firms must maintain a complete audit trail for trade reconstructions. Exchange Act section 15F(g) [15 U.S.C. 78o-10(g)].[7] Records to be created include:	**Recordkeeping** Investment Firms are required to arrange for records to be kept of all services and transactions undertaken which must be sufficient to enable the relevant regulator to fulfil its supervisory tasks and to perform enforcement actions under MiFID, MiFIR, CSMAD and MAR, and in particular to ascertain that an Investment Firm has complied with all obligations with respect to clients or potential clients and the integrity of the market. Article 16(6) MiFID.	**Comparability of outcomes:** The EU transaction recordkeeping requirements provide for a comparable regulatory outcome to the SEC transaction recordkeeping requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15F(g) and MiFID are consistent in that each requires firms to record and maintain a variety of transaction and counterparty records to facilitate regulatory oversight and enforcement. *See* Article 16(6) MiFID (requiring recordkeeping to enable regulatory supervision and enforcement). While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements:**	**Article 16 (6) MiFID has been transposed int national law in Section 83 para. 1 Securities Trading Act (WpHG)**

[7] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
1. What records are firms required to make with regard to their transactions and other activities?			
		The below EU requirements are comparable to analogous SEC requirements in the following ways:	
Trade blotters: Blotters or other records of original entry containing an itemized daily record of purchases and sales of securities, receipts and deliveries of securities, and receipts and disbursements of cash and other debits and credits, as well as additional information such as account-related information and information regarding security-based swaps (e.g., type, reference security, unique transaction identifier, and counterparty identifier). **Exchange Act rule 18a-5(a)(1) [17 CFR**	**Trade blotters**: Investment Firms are required to keep detailed records in relation to every client order and decision to deal, and every client order executed or transmitted. Articles 74 and 75 MiFID Org Reg. Investment Firms are required to retain, and make accessible to regulators, precise information in relation to client orders, decisions to deal, transactions and order processing. Records cover matters such as the name and designation of the client or any person acting on the client's behalf, instrument identification, and a broad range of transaction detail (date and time, quantity, price, currency, order type etc.). These are granular information requirements which allow the regulator to reconstitute each key	**Trade blotters**: The trade information that must be recorded in accordance with Articles 74 and 75 MiFID Org Reg. and Annex IV MiFID Org Reg. is comparable to the trade information that must be recorded pursuant to Exchange Act rules 18a-5(a)(1) and 18a-5(b)(1).	**Articles 74 and 75 MiFID Del Reg. and Annex IV MiFID Del Reg. which are made reference to are directly applicable European legislations, which is why no complimantary or substantiating national provisions have been issued** **MiFIR is also directly applicable European legislation. Therefore corresponding to MiFID Del Reg. no complimentary or substantiating national provisions according to Art. 25(1) MiFIR have been issued** **Art. 16(7) MiFID has been transposed into national law**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
1. What records are firms required to make with regard to their transactions and other activities?			
240.18a-5(a)(1)][8] **(without a prudential regulator)**; and *Exchange Act rule 18a-5(b)(1) [17 CFR 240.18a-5(b)(1)]*[9] *(with a prudential regulator)*;	stage of processing a transaction. Annex IV MiFID Org Reg. Investment Firms are required to keep the relevant data relating to all transactions in financial instruments which they have carried out, whether on their own account or on behalf of a client. Article 25(1) MiFIR. Investment Firms are required to record all forms of telephone conversations and electronic communications regarding client orders (even where these do not result in the conclusion of a transaction or the provision of a service). Article 16(7) MiFID and Article 76 MiFID Org Reg.		**in Section 83 para. 3 to 8 Securities Trading Act (WpHG)**
Trade confirmations: Copies of purchase and sale confirmations for securities other than security-based swaps,	**Trade confirmations**: An Investment Firm that has carried out an order on behalf of a client (including by executing an order as principal with its client) must	**Trade confirmations**: The record retention schedules under Article 9(2) of EMIR specify how long counterparties must keep a record of any derivative contract they have concluded	**Article 16(6) MiFID has been transposed into Section 83 para. 1 Securities Trading Act (WpHG)**

[8] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[9] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
1. What records are firms required to make with regard to their transactions and other activities?			
and copies of trade acknowledgments and verifications for security-based swaps. **Exchange Act rule 18a-5(a)(6) [17 CFR 240.18a-5(a)(6)][10] (without a prudential regulator)**; and *Exchange Act rule 18a-5(b)(6) [17 CFR 240.18a-5(b)(6)][11] (with a prudential regulator)*; and	promptly provide the client, in a durable medium, with the essential information concerning the execution of that order and send a notice to the client in a durable medium confirming execution of the order. In addition, Investment Firms must supply the client, on request, with information about the status of its order. Article 25(6) MiFID and Article 59 MiFID Org Reg. The information provided forms part of the records that must be kept in order to satisfy an Investment Firm's general recordkeeping obligations. Article 16(6) MiFID. FCs and NFCs are required to confirm the terms of each uncleared OTC derivative contract in a timely manner and by electronic means where available. EMIR, Article 11(1)(a). Counterparties (including FCs and NFCs) must keep a record of any derivative contract they have	and any modification thereto. Article 25(1) MiFIR requires Investment Firms to keep the relevant data relating to all transactions in financial instruments which they have carried out, whether on their own account or on behalf of a client. Article 25(5) MiFID requires an Investment Firm to establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties. These requirements are comparable to the requirements in relation to confirmations in Exchange Act rules 18a-5(a)(6) and 18a-5(b)(6).	**Article 25(5)** has been **transposed into national law in Section 83 para. 2 Securities Trading Act (WpHG)** **Article 25(6) has been transposed into national law in Section 63 and 64 Securities Trading Act (WpHG)** **MiFIR and EMIR are directly applicable European legislations** **No complimentary national rules on Art. 9 (2) EMIR and Article 11 (1) (a) EMIR**

[10] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[11] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
1. What records are firms required to make with regard to their transactions and other activities?			
	concluded and any modification. Article 9(2) EMIR. Investment Firms are required to establish a record that includes the document or documents agreed between an Investment Firm and a client that set out the rights and obligations of the parties, and the other terms on which an Investment Firm will provide services to a client. Article 25(5) MiFID.		
Counterparty information: For each security-based swap account, a record of the counterparty's unique identification code, name and address, and of the authorization for each person with authority to transact on behalf of the counterparty. **Exchange Act rule 18a-5(a)(7) [17**	**Counterparty information**: For transactions carried out on behalf of clients, the records must contain all the information and details of the identity of the client, and the information required under the laws on the prevention of the use of the financial system for the purpose of money laundering. Article 25(1) MiFIR. Various types of counterparty information must be collected as part of a CRR Firm's customer due	**Counterparty information**: Article 25(1) MiFIR requires that the records must contain all the information and details of the identity of the client. This is comparable to the counterparty information requirements of Exchange Act rules 18a-5(a)(7) and 18a-5(b)(7).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
1. What records are firms required to make with regard to their transactions and other activities?			
CFR 240.18a-5(a)(7)][12] **(without a prudential regulator)**; and *Exchange Act rule 18a-5(b)(7) [17 CFR 240.18a-5(b)(7)]*[13] *(with a prudential regulator)*.	diligence including, for example, with regards to the customer's identity, its beneficial owner and the purpose and intended nature of the business relationship. Article 11 and Article 13 MLD4. It must be verified that any person purporting to act on behalf of the customer is duly authorised and identify and verify the identity of that person. Article 13(1) MLD4[14]. Investment Firms must collect a variety of information regarding their clients. Examples include information regarding customers in order to conduct suitability (for investment advice) and appropriateness (for product types) assessments, where relevant. This includes information regarding the client's knowledge and experience in the investment field relevant to the specific type of product or service and that person's		**1:1 implementation, see § 10 Abs. 1 Nr. 1-3 GwG**

[12] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[13] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[14] RS mit GW 5, Dr. Jacobs halten ob die Umsetzung 1:1 erfolgt ist

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
1. What records are firms required to make with regard to their transactions and other activities?			
	financial situation including his ability to bear losses. Article 25(2) MiFID. (Investment Firms are entitled to assume that these criteria are met for professional clients in relation to appropriateness and for certain types of professional clients in relation to suitability).		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
2. What records are firms required to make with regard to their positions and other potential financial liabilities?			
Records to be created: **Ledgers**: • **Ledgers or other records reflecting assets and liabilities, income and expense and capital accounts. Exchange Act rule 18a-5(a)(2) [17 CFR 240.18a-5(a)(2)]**;[15] **Securities records or ledgers**: • For securities other than security-based swaps, this includes information regarding long or short positions, location-related information and account-related information. For	An Investment Firm must arrange for records to be kept of all services and transactions undertaken by it which must be sufficient to enable the regulator to fulfil its supervisory tasks and to perform enforcement actions under MiFID, MiFIR, CSMAD, MAR, and in particular to ascertain that the Investment Firm has complied with all obligations with respect to clients or potential clients and the integrity of the market. Article 16(6) MiFID. The provisions referenced below in response to this question and in response to the question set forth in section 2.b.1 above apply to transactions in securities, security-based swaps and options positions, whether verified or not. **Ledgers**:	**Comparability of outcomes**: The EU position and liability recordkeeping requirements provide for a comparable regulatory outcome to the SEC position and liability recordkeeping requirements. In particular, both regulatory regimes require firms to record and maintain a variety of records about positions and financial liabilities to facilitate regulatory oversight and enforcement and to promote the integrity of the market. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.	**Article 16(6) MiFID has been transposed into Section 83 para. 1 Securities Trading Act (WpHG)** **EMIR is directly applicable European legislation** **CRR is directly applicable European legislation**

[15] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
2. What records are firms required to make with regard to their positions and other potential financial liabilities?			
security-based swaps, this includes information such as the reference security, transaction and counterparty identifiers, whether the position is bought or sold, and clearing-related information. For dealers with a prudential regulator, the requirement extends only to security-based swaps and securities positions related to the firm's business as a dealer**. Exchange Act rule 18a-5(a)(4) [17 CFR 240.18a-5(a)(4)][16] (without a prudential regulator)**; and *Exchange Act rule 18a-5(b)(3) [17 CFR*	• Investment Firms must assess their internal capital adequacy to ensure that they have in place sound, effective and comprehensive strategies and processes to assess and maintain, on an on-going basis, the amounts, types and distribution of internal capital that they consider adequate to cover the nature and level of the risks to which they are or might be exposed. Article 73 CRD IV. In practice, this will require the maintenance of full records of the Investment Firm's assets, liabilities, income and expense and capital accounts to be maintained on an on-going basis. • Investment Firms must: (a) ensure the segregation of client money and assets from those of the Investment Firm; (b)	**<u>Comparability of specific requirements:</u>** The EU requirements are comparable to analogous SEC requirements in that both require firms to record and maintain information on securities identifiers, positions and counterparties, etc. We note that the two regimes are different in the following way: • **Trial balances**. The US regime requires maintaining records of trial balances under Exchange Act rule 18a-5(a)(9). The EU regime does not have this specific requirement. It does, however, in practice require firms to maintain records of the inputs for their capital calculations, and therefore these	

[16] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
2. What records are firms required to make with regard to their positions and other potential financial liabilities?			
240.18a-5(b)(3)][17] *(with a prudential regulator)*; **Trial balances**: • **A record of the proof of money balances of all ledger accounts in the form of trial balances and certain records relating to the computation of aggregate indebtedness and net capital under the net capital rule. This requirement applies only to dealers without a prudential regulator. Exchange Act rule 18a-5(a)(9) [17 CFR 240.18a-5(a)(9)];**[18]	maintain detailed, up-to-date and accurate accounts and records distinguishing client money and assets from those of the Investment Firm (these accounts and records must be sufficient to establish an audit trail); and (c) conduct regular reconciliations between their accounts and records and those accounts and records of any third-parties with whom client money or assets may be held. Article 2 MiFID Delegated Directive. • An Investment Firm must keep separate records and accounts that enable it to distinguish both in accounts held with the CCP and in its own accounts its assets and positions from the assets and positions held for the	requirements are comparable in outcome.	

[17] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[18] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
2. What records are firms required to make with regard to their positions and other potential financial liabilities?			
Current exposure calculation: • **A record of daily calculations of current exposure and the initial margin amount for each account, consistent with the relevant capital rule. This provision applies only to dealers without a prudential regulator. Exchange Act rule 18a-5(a)(12) [17 CFR 240.18a-5(a)(12)]**;[19] **Non-verified security-based swaps**: • Records of each security-based swap that has not been verified, including	account of its clients at the CCP. Article 39(4) EMIR. **Securities records or ledgers**: • CRR Firms must monitor position limits for trading book positions. Articles 103 and 103(b)(ii) CRR. In practice, this will require that CRR Firms have a record of their long and short positions to enable these to be monitored. • Please also refer to the provisions referenced in response to the question set forth in section 2.b.1 above, which also enable firms to establish records of their positions. **Trial balances**:		

[19] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
2. What records are firms required to make with regard to their positions and other potential financial liabilities?			
transaction and counterparty identifiers. **Exchange Act rule 18a-5(a)(15) [17 CFR 240.18a-5(a)(15)][20] (without a prudential regulator)**; and *Exchange Act rule 18a-5(b)(11) [17 CFR 240.18a-5(b)(11)][21] (with a prudential regulator)*; and **Records of options positions**: • **A record of all options in which the firm has a direct or indirect interest or that the firm has granted or guaranteed, containing at least**	• Please refer to the response above in this section 2.b.2 in respect of Ledgers. **Current exposure calculation**: • Investment Firms must have in place clearly defined policies and procedures for the active management of trading book positions and must set and monitor position limits for trading book positions. Articles 103 and 103(b)(ii) CRR. • Investment Firms must revalue their trading book positions at least daily. Article 105(3) CRR. • Investment Firms revaluation of trading book positions must account for valuation adjustments, including close-out		

[20] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[21] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
2. What records are firms required to make with regard to their positions and other potential financial liabilities?			
the security identification and the number of units involved. This requirement applies only to dealers without a prudential regulator. Exchange Act rule 18a-5(a)(8) [17 CFR 240.18a-5(a)(8)].[22]	costs and early termination. Article 105(10) CRR. • Segregated regulatory initial margin will be treated as client money (cash collateral) or client assets (non-cash collateral) and so will be recorded in the client money and client asset records referenced above in respect of "Trial balances".		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
3. What records are firms required to make with regard to their personnel, including records regarding the background of individuals?			
Records to be created:	The following requirements entail the creation of information and	**Comparability of outcomes**: The EU personnel recordkeeping requirements provide for a	

[22] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
3. What records are firms required to make with regard to their personnel, including records regarding the background of individuals?			
A questionnaire[23] or employment application for each associated natural person who effects or is involved in effecting security-based swaps on the firm's behalf, containing identifying and background information (e.g., information regarding disciplinary actions, and arrests and indictments). The firm must also make a record that lists the offices associated with each associated person of the firm. **Exchange Act rule 18a-5(a)(10) [17 CFR 240.18a-5(a)(10)][24] (without a prudential regulator)**; and *Exchange*	records in relation to a CRR Firm's staff: CRR Firms must record information including, among other items, disclosure of criminal records, investigations, enforcement proceedings and dismissals, which may need to be provided to the regulators in order to enable them to assess the suitability of the management body. Guidelines 74-75, 172 and Annex III EBA/ESMA Guidelines on Management Suitability. The due diligence requirements for members of a CRR Firm's management body are an example of an area where member states may introduce similar or additional requirements applicable to other types of employees of the firm.	comparable regulatory outcome to the SEC personnel recordkeeping requirements. In particular, both regulatory regimes require firms to record and maintain a variety of personnel information to ensure that personnel are qualified to perform their duties. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements:**	

[23] There may be situations in which firms are prohibited by applicable non-U.S. law from receiving, creating, or maintaining records with respect to certain information that needs to be recorded pursuant to the questionnaire requirement. Therefore, the SEC has proposed additional provisions in Rule 18a-5 to address those situations. *See* Proposed Cross-Border Swap Requirements, *available at* https://www.sec.gov/rules/proposed/2019/34-85823.pdf

[24] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
3. What records are firms required to make with regard to their personnel, including records regarding the background of individuals?			
Act rule 18a-5(b)(8) [17 CFR 240.18a-5(b)(8)][25] *(with a prudential regulator)*.	Records must be maintained by CRR Firms in order to be able to comply with governance requirements imposed on their management body, such as: • Each member of the management body of a CRR Firm must be of sufficiently good repute and possess sufficient knowledge, skills and experience to perform their duties. Article 91(1) CRD IV. member state laws will, in many cases, expand the scope of these requirements to include other relevant staff of a CRR Firm. • Members of the management body must act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management where	The below EU requirements are comparable to analogous SEC requirements in the following ways: • **Associated offices**. The US regime requires records of offices associated with each associated person of the firm. The EU regime requires the identification and recording of conflicts of interest, which will include the disclosure and recording of associated offices.	

[25] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
3. What records are firms required to make with regard to their personnel, including records regarding the background of individuals?			
	necessary and to effectively oversee and monitor management decision-making. Article 9(1) MiFID and Article 91(8) CRD IV. member state laws will, in many cases, expand the scope of these requirements to include other relevant staff of a CRR Firm. • Investment Firms must employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them. Article 21(1)(a) MiFID Org Reg. • A CRR Firm's management body must define, oversee and be accountable for the implementation of the governance arrangements including, among other matters, ensuring the prevention of conflicts of interest. Article 9(1) MiFID and Article 88 CRD IV.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
3. What records are firms required to make with regard to their personnel, including records regarding the background of individuals?			
	This will include managing conflicts with associated offices. Investment Firms must maintain a record of all conflicts of interest. Article 16(3) MiFID and Article 35 MiFID Org Reg.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
4. What records are firms required to make regarding the control of customer funds and securities?			
Records to be created: **Transaction information**: • Ledger accounts or other records to itemize separately, as to each account, information such as purchases and sales, receipts and deliveries of securities and commodities, and other debits and credits, along with additional information regarding security-based swaps. **Exchange Act rule 18a-5(a)(3) [17 CFR 240.18a-5(a)(3)]**[26] **(without a prudential regulator)**; and *Exchange Act rule 18a-5(b)(2) [17 CFR*	**Transaction information and compliance records**: When holding financial instruments belonging to clients, Investment Firms must make adequate arrangements to safeguard the ownership rights of clients, especially in the event of the Investment Firm's insolvency, and to prevent the use of a client's financial instruments on own account except with the client's express consent. Article 16(8) MiFID. An Investment Firm, when holding funds belonging to clients, must make adequate arrangements to safeguard the rights of clients and, except in the case of Credit Institutions, prevent the use of client funds for its own account. Article 16(9) MiFID.	**Comparability of outcomes**: The EU control of customer funds and securities recordkeeping requirements provide for a comparable regulatory outcome to the SEC control of customer funds and securities recordkeeping requirements. In particular, both regulatory regimes require firms to record and maintain a variety of information about client funds to ensure the segregation between firm funds and client funds and protect the safety of client funds. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.	**Article 16(8) MiFID has been transposed into national law in Section 84 para. 4 Securities Trading Act (WpHG)** **Article 16(9) MiFID has been transposed into national law in Section 84 para. 1 Securities Trading Act (WpHG)** **Articles 72(1), 74 and 75 MiFID Del Reg. which are made reference to are s directly applicable European legislations, which is why no complimentary or substantiating national provisions have been issued**

[26] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

240.18a-5(b)(2)] [27] *(with a prudential regulator)*; and **Compliance records**: • Records of compliance with the possession or control requirement under the applicable segregation rule, and of the reserve computation required under the segregation rule. **Exchange Act rule 18a-5(a)(13), (14) [17 CFR 240.18a-5(a)(13), (14)]**[28] **(without a prudential regulator)**; and *Exchange Act rule 18a-5(b)(9), (10) [17 CFR 240.18a-5(b)(9), (10)]*[29] *(with a prudential regulator)*.	To this end, Investment Firms must: keep records and accounts enabling them at any time and without delay to distinguish assets held for one client from assets held for any other client and from their own assets; maintain their records and accounts in a way that ensures their accuracy, and in particular their correspondence to the financial instruments and funds held for clients and that they may be used as an audit trail; conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third-parties by whom those assets are held; take the necessary steps to ensure that any client financial instruments deposited with a third-party are identifiable separately from the financial instruments belonging to the Investment Firm and from financial instruments belonging to that third-party, by means of differently titled accounts on the books of the third-party or other equivalent measures that achieve the same level of protection; take the necessary steps to ensure that client funds deposited in a central	**<u>Comparability of specific requirements:</u>** The below EU requirements are comparable to analogous SEC requirements in the following ways: • **Transaction information**. The transaction information required under Article 2 MiFID Delegated Directive and Articles 72, 74 and 75 MiFID Org Reg. is comparable to that required by Exchange Act rules 18a-5(a)(3) and 18a-5(b)(2). • **Compliance records**. Articles 16(8) and (9) MiFID require that Investment Firms make adequate arrangements to protect client funds, including, as set out by Article 2 MiFID Delegated Directive maintaining records of client money and client assets possessed or controlled (such money and assets also being subject to a segregation requirement) which is analogous to the requirements in relation to compliance records under Exchange Act rules 18a-	

[27] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[28] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[29] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

	bank, a Credit Institution or a bank authorised in a non-EEA jurisdiction or a qualifying money market fund are held in an account or accounts identified separately from any accounts used to hold funds belonging to the Investment Firm; and introduce adequate organizational arrangements to minimise the risk of the loss or diminution of client assets, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence. Article 2 MiFID Delegated Directive. Investment Firms must keep detailed records in relation to every client order and decision to deal, and every client order executed or transmitted. Articles 74 and 75 MiFID Org Reg. Records must be retained in a medium allowing, among other things, the storage of information in a way accessible for future reference by the regulator, and in a form/manner allowing the regulator to access them readily and reconstitute each key stage of	5(a)(13), (14) and 18a-5(b)(9), (10)	

	processing each transaction. Article 72(1) MiFID Org Reg. An Investment Firm must keep separate records and accounts that enable it to distinguish both in accounts held with the CCP and in its own accounts its assets and positions from the assets and positions held for the account of its clients at the CCP. Article 39(4) EMIR.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	**EU Requirement and/or Policy Goal Summary**	**Comparability Assessment**	**National Measures Germany**
b. Subcategory: Record Creation			
5. What records are firms required to make regarding business conduct practices?			
Records to be created: **Compliance with business conduct standards***:* • Records regarding compliance with business conduct standards that address, among other respects: verification related to	An Investment Firm must arrange for records to be kept of all services, activities and transactions undertaken by it which must be sufficient to enable the regulator fulfil its supervisory tasks and to perform enforcement actions under MiFID, MiFIR, CSMAD, MAR, and in particular to ascertain that the Investment Firm has complied with all obligations with respect to clients	**Comparability of outcomes**: The EU business conduct recordkeeping requirements provide for a comparable regulatory outcome to the SEC business conduct recordkeeping requirements. In particular, both regulatory regimes require firms to record and maintain a variety of information about transactions and compliance with business conduct standards to facilitate regulatory	**Section 83 (3-8) WpHG**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
5. What records are firms required to make regarding business conduct practices?			
counterparty status; certain disclosures related to the daily mark and its calculation; disclosures regarding material incentives, conflicts of interest, material risks and characteristics of the security-based swap, and certain clearing rights; certain "know your counterparty" and suitability obligations; supervisory requirements, including written policies and procedures; certain requirements regarding interactions with special entities; provisions intended to prevent dealers from engaging in	or potential clients and the integrity of the market. Article 16(6) MiFID. **Compliance with business conduct standards**: • Investment Firms must retain all records in relation to communications with clients in respect of the reception, transmission and execution of orders. Article 16(7) MiFID and Article 76(8)(b) MiFID Org Reg. Records setting out the rights and obligations of the Investment Firm/client under the service agreement, or the terms of service, must also be retained. Article 73 MiFID Org Reg. • The minimum records Investment Firms must keep include: the information and communications provided to clients on the services provided, the Investment Firm itself, costs and charges and marketing;	supervision and enforcement, protect clients and promote the integrity of the market While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements:</u>** The below EU requirements are comparable to analogous SEC requirements in the following way: • **Compliance with business conduct standards**: The information required under Article 16(7) MiFID and Article 76(8)(b) is comparable to the information required under Exchange Act rules 18a-5(a)(16), (17), 18a-5(b)(12), (13).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
5. What records are firms required to make regarding business conduct practices?			
certain "pay to play" activities; and certain minimum requirements relating to CCOs. ***Exchange Act rules 18a-5(a)(16), (17) [17 CFR 240.18a-5(a)(16), (17)]***[30] ***(without a prudential regulator)***; and *Exchange Act rules 18a-5(b)(12), (13) [17 CFR 240.18a-5(b)(12), (13)]*[31] *(with a prudential regulator*.	client agreements; suitability and appropriateness assessments; client order and order-handling (i.e. order aggregation) records; assets and instruments held by the Investment Firm or third-parties for the client and their use by the Investment Firm; investment advice to retail clients; investment research; reports and records on business and internal organization, compliance; conflicts, inducements, risk management, internal audit, complaints-handling and personal transaction. Article 72 and Annex I MIFID Org Reg. • Investment Firms must retain records in relation to communications with clients in respect of clearing rights and, in particular, regarding the choice	We note that, while there are certain limited respects where the EU compliance obligations differ from the US ones (for example, no 'pay to play' restrictions or related recordkeeping obligations apply in the EU), the information required under Article 72 and Annex I MIFID Org Reg. (including suitability and appropriateness assessments, compliance, conflicts, inducements, risk management, internal audit, and complaints-handling) is comparable to the information regarding compliance with business conduct standards required under Exchange Act rules 18a-5(a)(16), (17), 18a-5(b)(12), (13).	

[30] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65
[31] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_65

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
5. What records are firms required to make regarding business conduct practices?			
	between omnibus client segregation and individual client segregation. Clients must be informed of the costs and level of protection associated with each option and the client must confirm its choice in writing. Article 39(5) EMIR.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
6. To what extent are firms required to make periodic securities counts or similar records to help ensure the proper care and protection of assets?			
Dealers without a prudential regulator are required to perform a securities count each quarter. The count may be performed on a certain date or on a cyclical basis, must cover the entire list of	Investment Firms must: keep records and accounts enabling them at any time and without delay to distinguish assets held for one client from assets held for any other client and from their own assets; maintain their records and accounts in a way that ensures their accuracy, and in particular their correspondence to	**Comparability of outcomes**: The EU periodic securities count requirements provide for a comparable regulatory outcome to the SEC periodic securities count requirements. In particular, both regulatory regimes require firms to make periodic securities counts, in	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
6. To what extent are firms required to make periodic securities counts or similar records to help ensure the proper care and protection of assets?			
securities, and be made or supervised by persons whose regular duties do not require them to have direct responsibility for the proper care and protection of the securities or the making or preservation[32] of the subject records. To meet this requirement, a firm generally will need to account for or verify its open security-based swap transactions, and that the method to do this could involve steps to confirm open transactions reflected in the firm's books and records with securities clearing agencies or counterparties. Exchange	the financial instruments and funds held for clients and that they may be used as an audit trail; conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third-parties by whom those assets are held; take the necessary steps to ensure that any client financial instruments deposited with a third-party are identifiable separately from the financial instruments belonging to the Investment Firm and from financial instruments belonging to that third-party, by means of differently titled accounts on the books of the third-party or other equivalent measures that achieve the same level of protection; take the necessary steps to ensure that client funds deposited in a central bank, a Credit Institution or a bank authorised in a non-EEA jurisdiction or a qualifying money market fund are held in an	order to ensure the proper care and protection of assets. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements:</u>** The specific requirements under the EU regimes are at least as stringent as those under the US regime. While the US regime only requires that securities counts be performed quarterly under Exchange Act rule 18a-9, the EU regime requires that firms make similar information available and accessible at any time	

[32] In adopting this requirement the SEC acknowledged that security-based swaps are not held in depositories or at other types of custodians.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
6. To what extent are firms required to make periodic securities counts or similar records to help ensure the proper care and protection of assets?			
Act rule 18a-9 [17 CFR 240.18a-9].[33]	account or accounts identified separately from any accounts used to hold funds belonging to the Investment Firm; and introduce adequate organizational arrangements to minimise the risk of the loss or diminution of client assets, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence. Article 2 MiFID Delegated Directive. An external auditor must report at least annually to an Investment Firm's regulator on the adequacy of an Investment Firm's client money and client asset arrangements. Article 8 MiFID Delegated Directive. Investment Firms must keep detailed records in relation to every client order and decision to deal, and every client order executed or	under Article 2 MiFID Delegated Directive.	

[33] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_69

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
6. To what extent are firms required to make periodic securities counts or similar records to help ensure the proper care and protection of assets?			
	transmitted. Articles 74 and 75 MiFID Org Reg. With regards to the verification of open transactions, timely confirmations and portfolio reconciliation requirements apply: (i) FCs and NFCs to an OTC derivative contract not cleared by a CCP are required to establish formalised processes which are robust, resilient and auditable in order to reconcile portfolios. EMIR, Article 11(1)(b); and (ii) to comply with the timely confirmation obligation, counterparties must reach a legally binding agreement as to all the terms of an OTC derivative contract. ESMA Q&A on EMIR, OTC Answer 4(a).		

b. Subcategory: Record Creation			
7. (Part A) Are there potential restrictions or prohibitions on the ability of firms to receive, create or maintain certain types of information, such as information regarding counterparties and associated persons?			**National Measures Germany**
There may be situations in which firms are prohibited by applicable non-U.S. law from receiving, creating, or maintaining records with respect to information regarding associated natural persons that needs to be recorded pursuant to the questionnaire requirement. The SEC has proposed additional provisions in Rule 18a-5 to address those situations. *See* Exchange Act Release No. 85823 (May 10, 2019), 84 FR 24206, 24242-44, 24294 (May 24, 2019) (**Proposed Cross-Border Swap Requirements**).[34]	Recordkeeping and creation requirements must be followed in a manner that is consistent with privacy laws (including the GDPR) that Investment Firms are subject to in respect of personal data (i.e. relating to identified or identifiable natural persons). Among the records listed by the SEC Guidance, some could contain personal data. Although record creation and compliance with GDPR should be considered on a case-by-case basis, having regard to the relevant personal data and the purpose for which that data will be processed, it is generally possible for Credit Institutions and Investment Firms to collect and process the type of personal data that the records listed may entail in a manner that is compliant with GDPR. For instance, data collected in establishing a client relationship could be processed	**Comparability of outcomes**: The EU restrictions on firm record creation provide for a comparable regulatory outcome to the SEC restrictions on firm record creation. In particular, while the EU GDPR could result in situations where personal data cannot be collected or processed, these situations are narrow, and should not broadly alter the ability of Investment Firms to retain the records at issue here.	**ZR 3:** **BaFin is not supervisory authority of the entities regarding GDPR issues anddoes not confirm GDPR assessments in this document.**

[34] https://www.sec.gov/rules/proposed/2019/34-85823.pdf

b. Subcategory: Record Creation			
7. (Part A) Are there potential restrictions or prohibitions on the ability of firms to receive, create or maintain certain types of information, such as information regarding counterparties and associated persons?			**National Measures Germany**
	further within the Credit Institution or the Investment Firm if the "controller" has a legitimate interest that is not overridden by the rights or freedoms of the affected data subjects. Accordingly, it is reasonable to assume that creation and maintenance of records for the purpose of complying with its obligations as a swap dealer would be capable of being accommodated under GDPR. Moreover, much of the information that is required to be recorded by Credit Institutions and Investment Firms pursuant to the provisions of EU law referenced in the responses to the questions set forth in sections 2.b.1-2.b.6 above may not fall within the definition of personal data (to the extent that it is information that does not relate to an identified or identifiable natural person).		

b. Subcategory: Record Creation			
7. (Part A) Are there potential restrictions or prohibitions on the ability of firms to receive, create or maintain certain types of information, such as information regarding counterparties and associated persons?			**National Measures Germany**
	This answer does not address the sharing of such information outside of the Credit Institution or the Investment Firm, for which please see the response in Part B to the question set forth in section 2.b.7 below.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	**EU Requirement and/or Policy Goal Summary**	**Comparability Assessment**	**National Measures Germany**
b. Subcategory: Record Creation			
7. (Part B) Are there potentially any restrictions on the ability of the SEC to access particular types of records?			
In general, Credit Institutions and Investment Firms are able to share their own data directly with the SEC (subject to considerations regarding privacy and client confidentiality) without restrictions. Exceptions to this are reports from, and correspondence with, a Credit Institution's or Investment Firm's regulator, which the regulator often requires the firm to keep confidential (though this would vary on a case-by-case basis with different regulators). Beyond this, the working group recognizes that substituted compliance on recordkeeping not only requires a comparability finding, but also a framework that would permit the SEC to examine and inspect regulated firms' compliance with the applicable securities laws. However, the working group further understands that there are multiple variations of the question of access to data protected by, e.g., GDPR, including as a request to obtain assurances on records access, a registration opinion required from non-US entity registrants, and in the context of negotiations of memoranda of understanding between EU member state authorities and the SEC each of which, in itself, should give			**A MoU between BaFin and SEC solely cannot assure that data transfers compliant to data protection regulations. According to GDPR it needs e.g. an Administrative Arrangement. Under IOSCO SEC and BaFin have agreed to such an Arrangement which has been accepted by the German national data protection authority (BfDI).**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Record Creation			
7. (Part B) Are there potentially any restrictions on the ability of the SEC to access particular types of records?			
the SEC the assurance that, even accounting for privacy laws and client confidentiality, records access can be obtained either directly or through supervisory channels. The working group does not propose to add another variation of the discussion, in addition to the three aforementioned venues.			

c. Subcategory: Record Preservation

The preservation of records requirements – regarding firms' financial status, positions, activities and compliance with applicable requirements – promote effective SEC oversight.

Registered firms must keep applicable books and records in the form and manner, and for the period, prescribed by the SEC, and keep those books and records open to inspection and examination by SEC representatives. Exchange Act sections 15F(f)(1)(B), (C) [15 U.S.C. 78o-10(f)(1)(B), (C)].[35] For firms that have a prudential regulator, the recordkeeping requirements specifically apply to the firm's business as a dealer. 15F(f)(1)(B) [15 U.S.C. 78o-10(f)(1)(B)].[36]

Firms must maintain daily trading records (including records of each counterparty) of security-based swaps, and related records and recorded communications, for the period prescribed by the SEC. Firms must maintain a complete audit trail for trade reconstructions. Exchange Act section 15F(g) [15 U.S.C. 78o-10(g)].[37]

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
1. What are the general provisions regarding the preservation period and accessibility?			
SEC rules incorporate a number of elements regarding how long particular records must be preserved, accessibility of records, and related matters. *See* below for details.	MiFID contains extensive recordkeeping requirements, including with respect to how long particular records must be preserved, accessibility of records, and related matters. *See* below for details.	**<u>Comparability of outcomes</u>**: The EU record preservation and accessibility requirements provide for a comparable regulatory outcome to the SEC record preservation and accessibility requirements. In particular, both regulatory regimes contain detailed, comprehensive requirements on record	

[35] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[36] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[37] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
1. What are the general provisions regarding the preservation period and accessibility?			
		preservation to promote information accessibility for market participants and facilitate regulatory supervision.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
Firms are required to maintain a variety of records:	**General recordkeeping requirement:** An Investment Firm must arrange for records to be kept of all services and transactions undertaken by it which must be sufficient to enable the regulator to fulfil its supervisory tasks and to perform enforcement actions under MiFID, MiFIR,	**Comparability of outcomes**: The EU record preservation requirements provide for a comparable regulatory outcome to the SEC record preservation requirements. In particular, both regulatory regimes contain detailed requirements for different types of information about firms and transactions, in order to promote information accessibility for market participants and facilitate regulatory supervision and enforcement. *See* Article 16(6) MiFID and Article 72(1) MiFID Org Reg.	**Article 16(6) MiFID has been transposed into national law in Section 83 para. 1 Securities Trading Act (WpHG** **Art. 72 MiFID Del Reg. is subject to directly applicable European legislation, which is why no complimentary or substantiating national provisions have been issued**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	CSMAD and MAR. Article 16(6) MiFID. Records must be retained in a medium allowing the storage of information in a way accessible for future reference by the regulator, and in a form/manner allowing (i) the regulator to access them readily and reconstitute each key stage of processing each transaction; (ii) corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained; (iii) it must not be possible for the records otherwise to be manipulated or altered; and (iv) IT or any other sufficient	While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements:** The below EU requirements are comparable to analogous SEC requirements in the following ways:	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	exploitation when the analysis of the data cannot easily be carried out due to the volume and nature of the data. Article 72(1) MiFID Org Reg.		
Ledgers and transaction information: Records related to trade blotters, ledgers, ledger accounts and security records/ledgers for at least six years, the first two years in an easily accessible place. **Exchange Act rule 18a-6(a)(1) [17 CFR 240.18a-6(a)(1)]**[38] **(without a prudential regulator)**; and *Exchange Act rule 18a-6(a)(2) [17 CFR 240.18a-6(a)(2)]*[39] *(with a prudential regulator*);	**Ledgers and transaction information**: Please refer to the responses to question set forth in sections 2.b.1 at "Trade blotters", 2.b.2 at "Ledgers" and "Securities records or ledgers", and 2.b.4 at "Ledger accounts and compliance records" regarding the records that must be preserved, as well as the "General recordkeeping	**Ledgers and transaction information**: Requirements on transaction records under Articles 16(6), 16(7) and 69(2) MiFID, Articles 74-76 and Annex IV MiFID Org Reg. and Article 25(1) MiFIR are comparable to those under Exchange Act rules 18a-6(a)(1), (2) and 18a-6(b)(1), (2).	**Corresponding national legislation see above**

[38] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[39] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
Information required to be made pursuant to rule 18a-5, including records related to the above information regarding brokerage orders/instructions, security-based swap transactions for the firm account, confirmations and trade acknowledgments/verifications, security-based swap counterparty information, options positions, trial balances, current exposure calculations, segregation, non-verified security-based swaps, and business conduct compliance for at least three years, the first two years in an easily accessible place. This portion of the record preservation requirement does not address the record-making requirement related to associated persons. **Exchange**	requirement" noted above in this response. Additionally, Investment Firms must keep at the disposal of the regulator, for five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on their own account or on behalf of a client. For transactions carried out on behalf of clients, the records must contain all the information and details of the identity of the client, and the information required under the laws on the prevention of the use of the financial system for the purpose of money		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
Act rule 18a-6(b)(1)(i) [17 CFR 240.18a-6(b)(1)(i)][40] **(without a prudential regulator)**; and *Exchange Act rule 18a-6(b)(2)(i) [17 CFR 240.18a-6(b)(2)(i)]*[41] *(with a prudential regulator)*;	laundering. Article 25(1) MiFIR. Counterparties must keep a record of any derivative contract they have concluded and any modification for at least five years following the termination of the contract. Article 9(2) EMIR.		
Trade instructions, confirmations and positions: Originals of communications received and copies of communications sent (and approvals of communications sent), including inter-office memoranda and communications, as well as sales scripts and recordings of telephone calls required to be	**Trade instructions, confirmations and positions**: Please refer to the responses to the questions set forth in sections 2.b.1 at "Trade confirmations" and "Counterparty information", 2.b.2 at "Ledgers" and	**Trade instructions, confirmations and positions**: Requirements on client communication records under Articles 25(5) and 25(6) MiFID, Article 59 MiFID Org Reg., and Articles 9(2) and 11(1)(a) EMIR are comparable to those set forth in Exchange Act rules 18a-6(b)(1)(iv) and 18a-6(b)(2)(ii).	**Corresponding national legislation see above**

[40] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[41] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
maintained pursuant to Exchange Act section 15F(g)(1) (related to daily trading records) for at least three years, the first two years in an easily accessible place. **Exchange Act rule 18a-6(b)(1)(iv) [17 CFR 240.18a-6(b)(1)(iv)][42] (without a prudential regulator)**; and *Exchange Act rule 18a-6(b)(2)(ii) [17 CFR 240.18a-6(b)(2)(ii)][43] (with a prudential regulator)*;	"Securities records or ledgers", and 2.b.5 at "Compliance with business conduct standards" regarding the records that must be preserved as well as the "General recordkeeping requirement" noted above in this response regarding the preservation of such records.		
Cash-related records: **Certain cash-related records and bills, including (i) check books, bank statements, cancelled checks and cash reconciliations; and (ii) information regarding bills receivable and payable,**	**Cash-related records**: Please refer to the responses to the question set forth in section 2.b.2 at "Ledgers" as well as the "General recordkeeping requirement" noted	**Cash-related records**: Requirements under Article 73 CRD IV, Article 2 MiFID Delegated Directive, and Article 16(6) MiFID are comparable to those under Exchange Act rules 18a-6(b)(1)(ii), (iii).	**Corresponding national legislation see above**

[42] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[43] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
related to the business of the firm as such for at least three years, the first two years in an easily accessible place. These requirements apply only to firms without a prudential regulator. *See* Exchange Act rules 18a-6(b)(1)(ii), (iii) [17 CFR 240.18a-6(b)(1)(ii), (iii)];[44]	above in this response regarding the records that must be preserved and the preservation of such records.		
Communication records: Originals of communications received and copies of communications sent (and approvals of communications sent), including inter-office memoranda and communications, as well as sales scripts and recordings of telephone calls required to be maintained pursuant to Exchange Act section 15F(g)(1) (related to daily trading records) for at least three	**Communication records**: Investment Firms must retain records in relation to communications with clients in respect of the reception, transmission and execution of orders for five years or, where requested by its regulator, up to seven years. Article 16(7) MiFID and Article 76(8)(b) MiFID Org Reg.	**Communication records**: Requirements under Article 16(7) MiFID and Article 76(8)(b) MiFID Org Reg. are comparable to those under Exchange Act rules 18a-6(b)(1)(iv) and 18a-6(b)(2)(ii).	**Article 16(7) MiFID has been transposed into national law in Section 83 para. 3 to 8 Securities Trading Act (WpHG** **Art. 76 MiFID Del Reg. is subject to directly applicable European legislations, which is why no complimantary or substantiating national provisions have been issued**

[44] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
years, the first two years in an easily accessible place. **Exchange Act rule 18a-6(b)(1)(iv) [17 CFR 240.18a-6(b)(1)(iv)]**[45] **(without a prudential regulator)**; and *Exchange Act rule 18a-6(b)(2)(ii) [17 CFR 240.18a-6(b)(2)(ii)]*[46] *(with a prudential regulator)*;	Investment Firms must record all forms of telephone conversations and electronic communications regarding client orders (even where these do not result in the conclusion of a transaction or the provision of a service). Article 16(7) MiFID and Article 76 MiFID Org Reg. Please refer to the "General recordkeeping requirement" noted above in this response regarding the preservation of such records.		
Capital information: **Net capital-related information, including trial**	**Capital information**: CRR requires the financial/capital reports	**Capital information**: Requirements under the Articles 99, 394 and 430 and Part Six: Title II & Title III CRR	

[45] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[46] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
balances, computations of net capital and tangible net worth (and related working papers), financial statements, branch office reconciliations, and internal audit working papers relating to the business of the firm as such for at least three years, the first two years in an easily accessible place. This requirement applies only to firms without a prudential regulator. Exchange Act rule 18a-6(b)(1)(v) [17 CFR 240.18a-6(b)(1)(v)];[47]	to be submitted by CRR Firms on the following matters (among others): capital/own funds (Article 99 CRR and Annexes I and II CRR Reporting ITS), accounting information (Article 99 CRR and Annexes III, IV and V CRR Reporting ITS), counterparty credit risk (Article 99 CRR), large exposures (Article 394 CRR and Annexes VIII and IX CRR Reporting ITS), liquidity coverage and stable funding (Part Six: Title II & Title III CRR and Annexes XII and XIII CRR Reporting ITS), and leverage ratios (Article 430 CRR and Annexes X	and the CRR Reporting ITS are comparable to those under Exchange Act rule 18a-6(b)(1)(v).	

[47] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	and XI CRR Reporting ITS). Information on capital and large exposures must be reported semi-annually, liquidity coverage must be reported monthly, and stable funding and leverage must be reported quarterly. Articles 99, 294 and 415 CRR and Article 14 CRR Reporting ITS. Regulators also have the power to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions. Article 104(1)(j) CRR.		
Account documents:	**Account documents**:	**Account documents**:	**Article 16(6) MiFID has been transposed into national law in**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
Account documents, including guarantees of accounts and powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account, as well as copies of resolutions empowering an agent to act on behalf of a corporation for at least three years, the first two years in an easily accessible place. **Exchange Act rule 18a-6(b)(1)(vi) [17 CFR 240.18a-6(b)(1)(vi)]**[48] **(without a prudential regulator)**; and *Exchange Act rule 18a-6(b)(2)(iii) [17 CFR 240.18a-6(b)(2)(iii)]*[49] *(with a prudential regulator)*;	An Investment Firm must establish a record that includes the documents agreed between the Investment Firm and the client that set out the rights and obligations of the parties, and the other terms on which the Investment Firm will provide services to the client. Article 25(5) MiFID. Records setting out the rights and obligations of the firm/client under the service agreement, or the terms of service, must be retained for at least the duration of the	Requirements under the Articles 16(6) and 25(5) MiFID and Article 73 MiFID Org Reg. are comparable to those under Exchange Act rules 18a-6(b)(1)(vi) and 18a-6(b)(2)(iii).	**Section 83 para. 1 Securities Trading Act (WpHG)** **Article 25(5) MiFID has been transposed into national law in Section 83 para. 2 Securities Trading Act (WpHG)** **Art. 73 MiFID Del Reg. is subject to directly applicable European legislation, which is why no complimentary or substantiating national provisions have been issued**

[48] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[49] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	client relationship. Article 73 MiFID Org Reg. Please also refer to the "General recordkeeping requirement" noted above in this response regarding the records that must be preserved and the preservation of such records.		
Written agreements: Written agreements (or copies) relating to the firm's business as such, including agreements with respect to any account. Written agreements with respect to a security-based swap customer or noncustomer – including governing documents or any document establishing the terms and conditions of the security-based swaps – must be maintained with the account records of the customer or non-	**Written agreements**: Please refer to the section on "2(e) Account documents" noted above in this response regarding the records that must be preserved and the preservation of such records. Please also refer to the response to the question set forth in section 2.b.1 at "Trade confirmations" regarding the records	**Written agreements**: Requirements on maintaining records of written agreements with clients under Articles 16(6) and 25(5), 25(6) MiFID, Articles 59 and 73 MiFID Org Reg. and Articles 9(2) and 11(1)(a) EMIR are comparable to those under Exchange Act rules 18a-6(b)(1)(vii) and 18a-6(b)(2)(iv).	**Corresponding national legislation see above**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
customer for at least three years, the first two years in an easily accessible place. **Exchange Act rule 18a-6(b)(1)(vii) [17 CFR 240.18a-6(b)(1)(vii)][50] (without a prudential regulator)**; and *Exchange Act rule 18a-6(b)(2)(iv) [17 CFR 240.18a-6(b)(2)(iv)][51] (with a prudential regulator)*;	that must be preserved as well as the "General recordkeeping requirement" noted above in this response regarding the preservation of such records.		
Financial statements: Information supporting financial statements including information supporting amounts included in FOCUS reports and in required financial statements, including money balances, positions in securities, futures, commodities and options, and records relating to margin and	**Financial statements:** Please refer to the section on "2(d) Capital information" noted above in this response regarding the records that must be preserved and the preservation of such records.	**Financial statements**: Requirements under Articles 99, 394 and 430 and Part Six: Title II & Title III CRR and the CRR Reporting ITS are comparable to those under Exchange Act rules 18a-6(b)(1)(viii) and 18a-6(b)(2)(v).	

[50] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[51] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
segregation for at least three years, the first two years in an easily accessible place. This requirement applies only to firms without a prudential regulator, except for the segregation-related possession or control information. **Exchange Act rule 18a-6(b)(1)(viii) [17 CFR 240.18a-6(b)(1)(viii)][52] (without a prudential regulator)**; and *Exchange Act rule 18a-6(b)(2)(v) [17 CFR 240.18a-6(b)(2)(v)][53] (with a prudential regulator)*;			
Risk management: **Risk management records, including records and results of periodic reviews associated with risk management requirements for at least three**	**Risk management:** Investment Firms must have sound administrative and accounting procedures, internal control	**Risk management**: Requirements under CRR, CRD IV, MiFID, the MiFID Org Reg. and EMIR are comparable to those under Exchange Act rule 18a-6(b)(1)(ix).	**Article 16(5) MiFID has been transposed into national law in Section 80 para. 6 Securities Trading Act (WpHG)**

[52] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[53] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
years, the first two years in an easily accessible place. This requirement applies only to firms without a prudential regulator. Exchange Act rule 18a-6(b)(1)(ix) [17 CFR 240.18a-6(b)(1)(ix)];[54]	mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems. Article 16(5) MiFID. Investment Firms must establish, implement and maintain adequate risk management policies and procedures that identify the risks relating to the Investment Firm's activities, processes and systems and, where appropriate, set the level of risk tolerated by the Investment Firm. Article 23 MiFID Org Reg. The requirement encompasses the		

[54] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	monitoring of the effectiveness and adequacy of the Investment Firm's risk management policies and procedures, together with the level of compliance by the Investment Firm and its personnel with the arrangements, processes and mechanisms adopted and the adequacy and effectiveness of measures taken to address deficiencies in them. MiFID requires the maintenance of a range of risk management records, including: compliance reports (Article 16(2) MiFID and Article 22(3)(c) MiFID Org Reg.), conflict of		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	interest records (Article 16(3) MiFID and Article 35 MiFID Org Reg.), inducements (Article 24(9) MiFID and Article 11 Delegated Regulation 2017/593), risk management reports (Article 16(5) MiFID and Articles 23(1)(b) and 25(2) MiFID Org Reg.), internal audit (Article 16(5) MiFID and Articles 24 and 25(2) MiFID Org Reg.), complaints-handling records (Article 16(2) MiFID and Article 26 MiFID Org Reg.), and personal transaction records (Article 16(2) MiFID and Articles 29(2)(c) MiFID Org Reg.). CRR Firms are subject to enhanced risk management requirements, especially,		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	for CRR Firms using internal models, in relation to CCR exposures arising from derivatives trading activities. In particular, a CRR Firm is required to establish and maintain a CCR management framework. Article 286 CRR. Daily reports on a CRR Firm's exposures to CCR must be prepared and then reviewed by a level of management with sufficient seniority and authority to enforce both reductions of positions taken by individual credit managers or traders and reductions in the entity's overall CCR exposure. Article 293(1)(d) CRR. The management body of a CRR Firm must		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	approve and periodically review the strategies and policies for taking up, managing, monitoring and mitigating the risks the entity is or might be exposed to, including those posed by the macroeconomic environment in which it operates in relation to the status of the business cycle. Article 76(1) CRD IV. The risk management arrangements, policies and procedures required to be implemented under this broad CRD IV framework cover: internal capital; remuneration of staff; treatment of risks; use of, and supervisory approaches to, capital		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	models; credit and counterparty risk; residual risk; concentration risk; securitisation risk; market risk; interest rate risk; operational risk; liquidity risk; and risk of excessive leverage. Articles 73, 75-87 CRD IV. A CRR Firm is required to establish and maintain a CCR management framework, consisting of: policies, processes and systems to ensure the identification, measurement, management, approval and internal reporting of CCR; and procedures for ensuring that those policies, processes and		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	systems are complied with. Article 286 CRR. FCs and NFCs are generally required to comply with risk mitigation obligations, which include having formalised processes which are robust, resilient and auditable to measure, monitor and mitigate operational risk and counterparty credit risk, including but not limited to: 1. timely confirmation of OTC derivative contracts; 2. portfolio reconciliation (agreement to be reached before the counterparties enter		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	into the derivative contract); 3. portfolio compression; and 4. identifying and resolving disputes. Article 11 EMIR and RTS 149/2013.		
Credit assessments: **Records regarding the basis for the firm's internal credit assessments of counterparties for purposes of the credit risk charges it must take as part of its net capital computation for at least three years, the first two years in an easily accessible place. This provision applies only to firms without a prudential regulator. Exchange**	**Credit assessments**: Investment Firms must assess their internal capital adequacy to ensure that they have in place sound, effective and comprehensive strategies and processes to assess and maintain, on an on-going basis, the amounts, types and distribution of internal capital that they consider adequate to cover the nature and	**Credit assessments**: Requirements under Article 73 CRD IV and Article 16(6) MiFID are comparable to those under Exchange Act rule 18a-6(b)(1)(x).	**Article 16(6) MiFID has been transposed into national law in Section 83 para. 1 Securities Trading Act (WpHG)**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
Act rule 18a-6(b)(1)(x) [17 CFR 240.18a-6(b)(1)(x)];[55]	level of the risks to which they are or might be exposed. Article 73 CRD IV. In practice, this will require the maintenance of full records of the Investment Firm's assets, liabilities, income and expense and capital accounts to be maintained on an on-going basis. Please also refer to the "General recordkeeping requirement" noted above in this response regarding the records that must be preserved and the preservation of such records.		
Submission of information to a repository:	**Submission of information to a repository**:	**Submission of information to a repository**:	

[55] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
Information the firm is required to submit to a repository pursuant to Regulation SBSR. For firms without a prudential regulator, this information includes documentation of internal risk management systems, periodic reviews of such systems conducted by internal audit staff and annual reviews of such systems conducted by independent certified public accountants for at least three years, the first two years in an easily accessible place. For firms with prudential regulators, this information includes counterparty and transaction information, secondary trade information, life cycle events, and the identity of parent and affiliated entities. **Exchange Act rule 18a-6(b)(1)(xi) [17 CFR 240.18a-6(b)(1)(xi)][56] (without**	Counterparties must ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository. Article 9(1) EMIR. Counterparties must keep a record of any derivative contract they have concluded and any modification for at least five years following the termination of that contract. Article 9(2) EMIR.	Article 9(1) requires counterparties to ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository. Article 9(2) of EMIR requires counterparties to keep a record of any derivative contract they have concluded and any modification for at least five years following the termination of that contract. Exchange Act rules 18a-6(b)(1)(xi) and 6(b)(2)(vi).	

[56] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
a prudential regulator); and *Exchange Act rule 18a-6(b)(2)(vi) [17 CFR 240.18a-6(b)(2)(vi)]*[57] *(with a prudential regulator)*; and			
Due diligence information: Documents related to applicable business conduct standards, and documents used to make certain determinations with respect to special entities, including information relating to financial status, tax status and the investment or financing objectives of the special entity for at least three years, the first two years in an easily accessible place. **Exchange Act rule 18a-6(b)(1)(xii), (xiii) [17 CFR 240.18a-6(b)(1)(xii), (xiii)]**[58] **(without a prudential regulator)**; and *Exchange Act*	**Due diligence information:** Various types of counterparty information must be collected as part of customer due diligence including, for example, with regards to the customer's identity, its beneficial owner and the purpose and intended nature of the business relationship. Articles 11 and 13 MLD4.	**Due diligence information**: Requirements under Articles 11 and 13 MLD4 are comparable to those under Exchange Act rules 18a-6(b)(1)(xii), (xiii) and 18a-6(b)(2)(vii), (viii).	

[57] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[58] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
rule 18a-6(b)(2)(vii), (viii) [17 CFR 240.18a-6(b)(2)(vii), (viii)][59] *(with a prudential regulator)*;	Please also refer to the "General recordkeeping requirement" noted above in this response regarding the records that must be preserved and the preservation of such records.		
Registration documents: Records such as partnership articles, articles of incorporation, minute books and stock certificate books (depending on the form of the legal entity); and copies of the applicable firm registration forms (forms SBSE, SBSE-A, SBSE-C or SBSE-W), as well as amendments to those forms and other documentation showing the firm's registration with securities regulatory authorities or the CFTC for the life of the enterprise and any	**Registration documents:** The forms and supporting documents required for an Investment Firm to become authorized in an EU member state in order to be able to provide investment services are set out in individual member state rules and regulations. In practice, any such application for authorization to a regulator broadly	**Registration documents**: Investment Firms must preserve relevant types of records on an ongoing basis that are relevant to their regulatory status and their general recordkeeping obligations. This is comparable to the requirements of Exchange Act rule 18a-6(c).	

[59] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
successor enterprise. Exchange Act rule 18a-6(c) [17 CFR 240.18a-6(c)];[60]	requires the submission by the Investment Firm of documentation including: articles of association and related constitutional documentation, supporting documentation regarding its senior management (including their skills and expertise, criminal background, etc.), accounting documents and related financial and operational information and certain policies and procedures. The information requirements are member state-specific and may vary from jurisdiction to jurisdiction. Once authorized, Investment		

[60] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
	Firms will have general record-keeping obligations which, in practice, means that they would need to have a record of many of the items mentioned above.		
Associated persons: Information regarding associated persons in an easily accessible place. Exchange Act rule 18a-6(d)(1) [17 CFR 240.18a-6(d)(1)];[61]	**Associated persons:** Please refer to the response to the question set forth in 2.b.3 regarding the records that must be preserved as well as the "General recordkeeping requirement" noted above in this response regarding the preservation of such records.	**Associated persons**: Requirements under Guidelines 74-75, 172 and Annex III EBA/ESMA Guidelines on Management Suitability are comparable to those under Exchange Act rule 18a-6(d)(1).	
Settlement: Records related to orders or settlement, including reports	**Settlement:** Regulators are able to require Investment	**Settlement**:	**Art. 72 MiFID Del Reg. is subject to directly applicable European legislations, which is why no**

[61] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
that a securities regulatory authority or the CFTC (or a prudential regulator, if applicable) has required the firm to make and furnish pursuant to an order or settlement, and related examinations reports until three years after the date of the report in an easily accessible place. **Exchange Act rule 18a-6(d)(2)(i) [17 CFR 240.18a-6(d)(2)(i)]**[62] **(without a prudential regulator)**; and *Exchange Act rule 18a-6(d)(2)(ii) [17 CFR 240.18a-6(d)(2)(ii)]*[63] *(with a prudential regulator)*;	Firms to hold any additional records beyond those required to be retained under normal circumstances. Article 72(3) MiFID Org Reg.	Requirements under Article 72(3) MiFID Org Reg. are analogous to those under Exchange Act rules 18a-6(d)(2)(i), (ii).	**complimentary or substantiating national provisions have been issue**
Compliance manuals: Compliance, supervisory and procedures manuals related to compliance with applicable	**Compliance manuals:** MiFID requires the maintenance of a range of compliance policies	**Compliance manuals**: Requirements under Articles 16(2), 16(6) and 16(7) MiFID, Articles 72, 73 and 76(8)(b) and Annex I MiFID Org Reg. are	**Corresponding national legislation see above**

[62] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[63] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
requirements and the supervision of associated natural persons, until three years after termination of the use of the manual in an easily accessible place. For firms with a prudential regulator, this requirement relates to compliance with laws and rules relating to security-based swap activities. **Exchange Act rule 18a-6(d)(3)(i) [17 CFR 240.18a-6(d)(3)(i)][64] (without a prudential regulator)**; and *Exchange Act rule 18a-6(d)(3)(ii) [17 CFR 240.18a-6(d)(3)(ii)][65] (with a prudential regulator)*; and	and procedures in respect of the Investment Firm's, and its managers, employees and tied agents, compliance with MiFID obligations. Article 16(2) MiFID. Please also refer to the response to the question set forth in section 2.b.5 at "Compliance with business conduct standards" regarding the records that must be preserved as well as the "General recordkeeping requirement" noted above in this response regarding the preservation of such records.	comparable to those under Exchange Act rules 18a-6(d)(3)(i), (ii).	

[64] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66
[65] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (e.g., bank records, bills, communications, account documents, written agreements and risk management records)?			
Post-relationship documentation: Written policies and procedures required under the risk mitigation requirements until three years after their termination, written portfolio reconciliation agreements until three years after the termination of the agreement and related transactions, trading relationship documentation until three years after the termination of the documentation and related transactions, and audit results related to trading relationship documentation until three years after the conclusion of the audit in an easily accessible place. Exchange Act rule 18a-6(d) [17 CFR 240.18a-6(d)].[66]	**Post-relationship documentation:** Please refer to the section on "2(e) Account documents" noted above in this response regarding the records that must be preserved and the preservation of such records. MiFID requires the maintenance of a range of risk management records, including internal audit reports which must be submitted to the Investment Firm's management body at least annually. Article 16(5) MiFID and Articles 24 and 25(2) MiFID Org Reg.	**Post-relationship documentation**: Requirements under the Articles 16(2), 16(5), 16(6) and 25(5) MiFID and Articles 24, 25(2) and 73 MiFID Org Reg. are comparable to those under Exchange Act rule 18a-6(d).	**Article 16(5) MiFID has been transposed into national law in Section 80 para. 6 Securities Trading Act (WpHG)** **Article 16(6) MiFID has been transposed into national law in Section 83 para. 1 Securities Trading Act (WpHG)** **Article 24 and 25(2) MiFID Del Reg. are subject to directly applicable European legislation, which is why no complimentary or substantiating national provisions have been issued**

[66] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
3. To what extent are firms required to preserve specific information regarding associated persons?			
This provision requires preservation of the above information related to associated persons, in an easily accessible place until at least three years after the termination of the associated person's employment or other connection with the firm. Exchange Act rule 18a-6(d)(1) [17 CFR 240.18a-6(d)(1)].[67]	A CRR Firm must prepare and retain the records related to the requirements applicable to a CRR Firm's staff, as set out in response to the question set forth in section 2.b.3 above. These requirements apply at all times. Article 91(1) CRD IV. In addition, CRR Firms should keep records of all external professional and political positions held by the members of the management body. Such records must be updated whenever a member notifies the CRR Firm of a change and when such changes come otherwise to the attention of the CRR Firm. Guideline 48 EBA/ESMA Guidelines on Management Suitability. An Investment Firm must retain records in relation to all its services, activities and	**Comparability of outcomes**: The EU relevant employees/personnel record preservation requirements provide for a comparable regulatory outcome to the SEC associated person record preservation requirements. In particular, both regulatory regimes contain detailed requirements on preservation of information about associated persons, in order to ensure the associated persons' qualification, promote information accessibility for market participants and facilitate regulatory supervision and enforcement.	**Article 72(1) MiFID Del Reg. is subject to directly applicable European legislation, which is why no complimentary or substantiating national provisions have been issued**

[67] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
3. To what extent are firms required to preserve specific information regarding associated persons?			
	transactions in a medium allowing the storage of information in a way accessible for future reference by the regulator, and in a form/manner allowing the regulator to access them readily. Article 72(1) MiFID Org Reg.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
4. What requirements address firms' use of electronic storage systems and third-party contractors in connection with record preservation?			
Comparability of outcomes: The EU electronic storage and third-party record preservation requirements provide for a comparable regulatory outcome to the SEC electronic storage and third-party record preservation requirements. In particular, both regulatory regimes stipulate requirements on electronic storage and third-party contractors as record keepers, in order to promote easier access to information and ensure information safety.			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
4. What requirements address firms' use of electronic storage systems and third-party contractors in connection with record preservation?			
While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements:</u>** The below EU requirements are comparable to analogous SEC requirements in the following ways:			
Electronic storage: The records required to be maintained and preserved may be produced by means of an electronic storage system, subject to a number of conditions including the capacity to readily download into the readable format the indexes and records preserved in the system, the use of duplicate records stored separately, an audit system, and undertakings by senior officers. *See* Exchange Act	**Electronic storage**: An Investment Firm can make use of electronic storage systems as long as it complies with the following requirements: • an Investment Firm must retain records in relation to all its services, activities and transactions in a medium allowing the storage of information in a way accessible for future reference by the regulator, and in a form/manner allowing (i) the regulator to access them readily and reconstitute each key stage of processing each transaction; (ii) corrections or other amendments, and the contents of the records prior to such corrections or amendments,	**Electronic storage**: Requirements on the accessibility of storage systems under Article 72(1) MiFID Org Reg. are comparable to those under Exchange Act rule 18a-6(e).	**Article 16(5) MiFID has been transposed into national law in Section 80 para. 6 Securities Trading Act (WpHG)** **Article 16(6) MiFID has been transposed into national law in Section 83 para. 1 Securities Trading Act (WpHG)** **Article 25(5) MiFID has been transposed into national law in Section 83 para. 2 Securities Trading Act (WpHG)** **MiFID Del Reg. is subject to directly applicable European legislation, which is why no**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
4. What requirements address firms' use of electronic storage systems and third-party contractors in connection with record preservation?			
rule 18a-6(e) [17 CFR 240.18a-6(e)].[68]	to be easily ascertained; (iii) it must not be possible for the records otherwise to be manipulated or altered; and (iv) IT or any other sufficient exploitation when the analysis of the data cannot easily be carried out due to the volume and nature of the data. Article 72(1) MiFID Org Reg. Investment Firms are required to arrange for records to be kept of all services and transactions undertaken which must be sufficient to enable the relevant regulator to fulfil its supervisory tasks and to perform enforcement actions under MiFID, MiFIR, CSMAD and MAR, and in particular to ascertain that an Investment Firm has complied with all obligations with respect to clients or potential clients and the integrity of the market. Article 16(6) MiFID. • an Investment Firm must retain records of any policies and procedures required to be		**complimentary or substantiating national provisions have been issued**

[68] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
4. What requirements address firms' use of electronic storage systems and third-party contractors in connection with record preservation?			
	maintained under MiFID, MiFIR, CSMAD and MAR must be maintained in writing. Article 72(3) MiFID Org Reg. • an Investment Firm must establish in writing and on paper or another durable medium a record that includes the document or documents agreed between the Investment Firm and the client that set out the rights and obligations of the parties, and the other terms on which the Investment Firm will provide services to the client. Article 25(5) MiFID and Article 58 MiFID Org Reg. • Investment Firms must have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems, and to have sound security mechanisms in place to guarantee the security and authentication of		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
4. What requirements address firms' use of electronic storage systems and third-party contractors in connection with record preservation?			
	the means of transfer of information, minimize the risk of data corruption and unauthorized access and to prevent information leakage maintaining the confidentiality of the data at all times. Article 16(5) MiFID. • Investment Firms must establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question. Article 21(2) MiFID Org Reg.		
Third-party contractors: If a firm uses a third-party to prepare or maintain records, the rule requires the third-party to file an undertaking with the SEC stating, among other things, that the records are the property of the firm and will be promptly	**Third-party contractors**: MiFID treats third-party contractors brought into the firm to work alongside other staff in the same way as an Investment Firm's employees (both are captured within policies and procedures relating to "staff"). Accordingly, the provisions noted above will apply.	**Third-party contractors**: Requirements under Article 16(5) MiFID on qualifications of third-party contractors as record keepers are comparable to those under Exchange Act rule 18a-6(f).	**Corresponding national provision see above**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
4. What requirements address firms' use of electronic storage systems and third-party contractors in connection with record preservation?			
furnished to the SEC or its designee. *See* Exchange Act rule 18a-6(f) [17 CFR 240.18a-6(f)].[69]	Where an Investment Firm uses an external third-party contractor, outsourcing requirements may be applicable. Where an Investment Firm outsources critical or important operational functions, it will remain fully responsible for discharging all of its MiFID obligations. Article 31(1) MiFID Org Reg. An Investment Firm must ensure, when relying on an outsourced service provider for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the regulator to monitor the Investment		

[69] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
4. What requirements address firms' use of electronic storage systems and third-party contractors in connection with record preservation?			
	Firm's compliance with all obligations. Article 16(5) MiFID. CRR Firms are required to ensure that its regulators have access to the information held by, and premises of, and rights to audit critical or important outsourced functions. Section 13.3 EBA Guidelines on Outsourcing.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
5. (Part A) Are there potentially any restrictions or prohibitions on the ability of firms to maintain certain of those types of information?			
The SEC Guidance recognizes that there may be situations in which firms are prohibited by applicable non-U.S. law from receiving, creating, or maintaining records with respect to	All recordkeeping and creation requirements are subject to data privacy and confidentiality laws, where applicable, as further described in response to the question set forth in section 2.b.7 above.	**Comparability of outcomes**: The EU restrictions on preservation of certain records provide for a comparable regulatory outcome to the SEC restrictions on preservation of certain records. In particular,	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
5. (Part A) Are there potentially any restrictions or prohibitions on the ability of firms to maintain certain of those types of information?			
information regarding associated natural persons that needs to be recorded pursuant to the questionnaire requirement. The SEC has adopted Rule 18a-5(b)(8)(iii) to address those situations. Specifically, as exceptions to the general rule to make and keep current the AP questionnaires: (1) an SBS Entity would not need to make or keep current such questionnaires or employment applications if the entity is excluded from the statutory disqualification prohibition in Exchange Act 15F(b)(6) with respect		both regulatory regimes contemplate situations where firms are not allowed to maintain certain information. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements:</u>** The specific requirements under the EU regime are more detailed than the US regime. The EU regime stipulates specific situations where firms are subject to additional confidentiality requirements and are prevented from collecting certain information (e.g., under the GDPR). In	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
5. (Part A) Are there potentially any restrictions or prohibitions on the ability of firms to maintain certain of those types of information?			
to the associated person; and, (2) A questionnaire or application for employment executed by an associated person who is not a U.S. resident need not include the information described in paragraphs (b)(8)(i)(A) through (H) of Rule 18a-5, unless the SBS Entity (a) is required to obtain such information under local law in the jurisdiction in which the associated person is employed or located, or (b) obtains such information in conducting a background check that is customary for such firms in that jurisdiction, and the creation or maintenance of records reflecting that information would not		contrast, the US regime only broadly contemplates that firms may be subject to non-US law and therefore restricted in information collection.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
5. (Part A) Are there potentially any restrictions or prohibitions on the ability of firms to maintain certain of those types of information?			
result in a violation of applicable law in the jurisdiction in which the associated person is employed or located.			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
5. (Part B) Are there potentially any restrictions on the ability of the SEC to access particular types of records?			
In general, Credit Institutions and Investment Firms are able to share their own data directly with the SEC (subject to considerations regarding privacy and client confidentiality) without restrictions. Exceptions to this are reports from, and correspondence with, a Credit Institution's or Investment Firm's regulator, which the regulator often requires the firm to keep confidential (though this would vary on a case-by-case basis with different regulators). Beyond this, the working group recognizes that substituted compliance on recordkeeping not only requires a comparability finding, but also a framework that would permit the SEC to examine and inspect regulated firms' compliance with the applicable securities laws. However, the working group further understands that there are multiple variations of the question of access to data protected by, e.g., GDPR, including as a request to obtain assurances on records access, a registration opinion required from non-US entity registrants, and in the context of negotiations of memoranda of understanding between EU			

member state authorities and the SEC each of which, in itself, should give the SEC the assurance that even accounting for privacy laws and client confidentiality, records access can be obtained either directly or through supervisory channels. The working group does not propose to add another variation of the discussion, in addition to the three aforementioned venues	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
6. Are firms required to furnish records promptly to regulators upon request?			
Upon request, firms must furnish promptly to a representative of the SEC legible, true, complete, and current copies of records that the firm is required to make or preserve. *See* Exchange Act rule 18a-6(g) [17 CFR 240.18a-6(g)].[70]	Regulators are given very broad information-access powers under MiFID, including with regards to access to information upon request. Article 69(2) MiFID. Regulators have powers to: have access to any document or other data in any form which the regulator considers could be relevant for the performance of its duties and receive or take a copy of it; to require or demand the provision of information from any person and if necessary to summon and question a person with a view to obtaining information; to carry out on-site inspections or investigations; and to require existing recordings of	**Comparability of outcomes**: The EU requirements to furnish records to EU regulators provide for a comparable regulatory outcome to the SEC requirements to furnish records to the SEC. In particular, both regulatory regimes allow the SEC/EU regulators (as applicable) to have prompt access to information upon request.	**Article 69(2) MiFID essentially transposed in national law in Sections 6, 7 Securities Trading Act (WpHG)**

[70] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_66

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Record Preservation			
6. Are firms required to furnish records promptly to regulators upon request?			
	telephone conversations or electronic communications or other data traffic records held by an Investment Firm, a Credit Institution, or any other entity regulated by MiFID or MiFIR. Article 69(2) MiFID.		

d. Subcategory: Reports and Notifications

The reports and notices that firms must provide regarding their financial condition and regarding operational issues and deficiencies are necessary to provide for effective SEC oversight of registered entities.

Registered firms must make reports that the SEC requires regarding transactions, positions and financial condition. Exchange Act section 15F(f)(1)(A) [15 U.S.C. 78o-10(f)(1)(A)].[71]

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with the required reports similar to, or different from, the information presented in FOCUS reports, and in annual reports required under the Exchange Act?			**2.**
<u>Comparability of outcomes</u>: The EU requirements to make reports provide for a comparable regulatory outcome to the SEC requirements to make reports. In particular, both regulatory regimes require that firms provide periodic, detailed information on their financials, operations, trading, and communication with clients, in order to improve information availability to market participants and facilitate regulatory oversight and enforcement. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements:</u>** The below EU requirements are comparable to analogous SEC requirements in the following ways:			

[71] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with the required reports similar to, or different from, the information presented in FOCUS reports, and in annual reports required under the Exchange Act?			**2.**
Firms are required to make a number of reports: **Financial/capital reports**: Firms must file FOCUS reports to provide the SEC with, *inter alia*, unaudited reports about their financial and operational condition. **Exchange Act rule 18a-7(a)(1) [17 CFR 240.18a-7(a)(1)][72] (without a prudential regulator)**; and *Exchange Act rule 18a-7(a)(2) [17 CFR 240.18a-7(a)(2)][73] (with a prudential regulator)*;	Firms are required to make a number of reports, and in addition to the following, regulators have the power to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions. Article 104(1)(j) CRR. **Financial/capital reports**: Reports must be submitted by CRR Firms on the following matters (among others): capital/own funds (Article 99 CRR and Annexes I and II CRR Reporting ITS), accounting information (Article 99 CRR and Annexes III, IV and V CRR Reporting ITS), counterparty credit risk (Article 99 CRR), large exposures (Article 394 CRR and Annexes VIII and IX CRR Reporting ITS), liquidity coverage and stable funding (Part Six: Title II & Title III CRR and Annexes XII	Firms are required to make a number of reports: **Financial/capital reports**: Financial and capital information required under CRR and CRR Reporting ITS is comparable to that required under Exchange Act rules 18a-7(a)(1) and 18a-7(a)(2).	

[72] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67
[73] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with the required reports similar to, or different from, the information presented in FOCUS reports, and in annual reports required under the Exchange Act?			**2.**
	and XIII CRR Reporting ITS), and leverage ratios (Article 430 CRR and Annexes X and XI CRR Reporting ITS).		
Internal models: **Dealers that have been authorized to use internal models to calculate net capital are required to file additional reports on a monthly or quarterly basis. Exchange Act rule 18a-7(a)(3) [17 CFR 240.18a-7(a)(3)];**[74]	**Internal models**: CRR Firms are required to report on their use of internal models, as further described in response to the question set forth in section 2.d.3 below.	**Internal models**: The EU requirements are comparable to the requirements under Exchange Act rule 18a-7(a)(3) in that firms that use internal models must submit additional reports to regulators. Although the EU regime does not specify the monthly or quarterly frequency, it imposes more detailed requirements on what information to report. Please see section 2.d.2 below for more details.	
Financial statements:	**Financial statements**:	**Financial statements**:	

[74] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with the required reports similar to, or different from, the information presented in FOCUS reports, and in annual reports required under the Exchange Act?			**2.**
Firms without a prudential regulator are required to disclose on their websites an audited statement of financial condition, and more recent unaudited statements. Exchange Act rules 18a-7(b)(1)(i), (2) [17 CFR 240.18a-7(b)(1)(i), (2)].[75] Dealers for which there is no prudential regulator also must disclose information regarding net capital, and if applicable, regarding material weaknesses identified by an accountant. Exchange Act rules 18a-7(b)(1)(ii),	Please see the response to question set forth in section 2.d.3 below for details	Financial and operational information required under CRR and Article 26 MiFIR is comparable to that required under Exchange Act rules 18a-7(b)(1)(i), (ii), (iii), 18a-7(b)(2), 18a-7(c)(1)(i)(A) and 18a-7(c)(2).	

[75] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with the required reports similar to, or different from, the information presented in FOCUS reports, and in annual reports required under the Exchange Act?			**2.**
(iii) [17 CFR 240.18a-7(b)(1)(ii), (iii)];[76]			
Annual reports: **Firms without a prudential regulator annually must file a financial report with the SEC. Exchange Act rule 18a-7(c)(1)(i)(A) [17 CFR 240.18a-7(c)(1)(i)(A)];[77] *see* also Exchange Act rule 18a-7(c)(2) [17 CFR 240.18a-7(c)(2)][78] (addressing required contents of the financial report)**;	**Annual reports**: CRR Firms must publish their financial statements and management report annually. Article 30 Accounting Directive.	**Annual reports**: Financial and operational information required under CRR and Article 26 MiFIR is comparable to that required under Exchange Act rules 18a-7(b)(1)(i), (ii), (iii), 18a-7(b)(2), 18a-7(c)(1)(i)(A) and 18a-7(c)(2).	
Segregation reports:	**Segregation reports**:	**Segregation reports**:	

[76] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67
[77] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67
[78] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with the required reports similar to, or different from, the information presented in FOCUS reports, and in annual reports required under the Exchange Act?			**2.**
Dealers are required to file, as applicable, a report addressing the firm's compliance with or exemption from segregation requirements. Exchange Act rule 18a-7(c)(1)(i)(B) [17 CFR 240.18a-7(c)(1)(i)(B)];[79] *see* also Exchange Act rules 18a-7(c)(3), (4) [17 CFR 240.18a-7(c)(3), (4)][80] (addressing required contents of compliance and exemption reports); and	Investment Firms must: (a) ensure the segregation of client money and assets from those of the Investment Firm, (b) maintain detailed, up to date and accurate accounts and records distinguishing client money and assets from those of the Investment Firm (these accounts and records must be sufficient to establish an audit trail), and (c) conduct regular reconciliations between their accounts and records and those accounts and records of any third-parties with whom client money or assets may be held. Article 2 MiFID Delegated Directive. An external auditor must report at least annually to an Investment Firm's regulator on the adequacy of an Investment Firm's client money and	Although the EU regime does not require standalone reports on funds segregation, information about trading details required under Article 2 MiFID Delegated Directive is comparable to information required under Exchange Act rules 18a-7(c)(1)(i)(B) and 18a-7(c)(3), (4) in order to ensure funds segregation.	

[79] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67
[80] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with the required reports similar to, or different from, the information presented in FOCUS reports, and in annual reports required under the Exchange Act?			**2.**
	client asset arrangements. Article 8 MiFID Delegated Directive.		
Accountant reports: **Firms are required to file reports of an independent public accountant addressing the financial report and the segregation-related report. Exchange Act rule 18a-7(c)(1)(i)(C) [17 CFR 240.18a-7(c)(1)(i)(C)].[81] The rule contains additional provisions regarding, *inter alia*, the nature and form of reports, accountant qualifications and engagement, and notifications of non-compliance or material**	**Accountant Reports**: Please see the response to the question set forth in section 2.d.5 below for details.	**Accountant Reports**: Both regulatory regimes require firms to submit reports by independent auditors addressing the firms' financial and operational information. Please see section 2.d.5 below for details However, the US regime requires unaudited reports of financial and operational information (to be submitted in FOCUS reports under Exchange Act rules 18a-7(a)(1), (2)), which the EU regime does not.	

[81] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with the required reports similar to, or different from, the information presented in FOCUS reports, and in annual reports required under the Exchange Act?			**2.**
weakness. Exchange Act rules 18a-7(d)-(g) [17 CFR 240.18a-7(d)-(g)].[82]			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
3. To what extent does your jurisdiction require reports that address the use of internal models for purposes of calculating net capital?			
Dealers that have been authorized to use internal models to calculate net capital are required to file additional reports on a monthly or quarterly basis. Exchange Act rule 18a-7(a)(3) [17 CFR 240.18a-7(a)(3)].[83]	CRR Firms must submit financial/capital reports that expressly include a range of data in relation to their use of models. More broadly, CRR Firms must submit reports on the following matters (among others) which can be directly or indirectly affected by the use of capital models: own funds (Article 99	**<u>Comparability of outcomes</u>**: The EU requirements that the use of internal models to calculate net capital be addressed in reports provide for a comparable regulatory outcome to the SEC requirements that the use of internal models to calculate net	

[82] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67
[83] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
3. To what extent does your jurisdiction require reports that address the use of internal models for purposes of calculating net capital?			
	CRR and Annexes I and II CRR Reporting ITS), counterparty credit risk (Article 99 CRR), and large exposures (Article 394 CRR and Annexes VIII and IX CRR Reporting ITS). Regulators also have the power to impose additional or more frequent reporting requirements, including reporting on capital positions. Article 104(1)(j) CRR. CRR Firms are also required to make 'Pillar III' public disclosures at least annually in conjunction with the publication of their financial statements. Articles 431 and 433 CRR. These disclosures include information on the use of capital models. Articles 452, 454 and 455 CRR. This information includes matters such as, for credit risk, the exposure values by class of exposures subject to evaluation using models and internal controls on the development and use of models. CRR Firms have discretion to determine where and how this information is made public. Article 434 CRR. CRR Firms are not required to	capital be addressed in reports. In particular, both regulatory regimes impose additional reporting obligations if firms use internal models of net capital calculation. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements:</u>** The EU requirements are comparable to the US requirements under Exchange Act rule 18a-7(a)(3) in that firms that use internal models must submit additional reports to regulators. Although the EU regime does not	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
3. To what extent does your jurisdiction require reports that address the use of internal models for purposes of calculating net capital?			
	disclose information which is immaterial, proprietary or confidential. Articles 432 CRR.	specify the monthly or quarterly frequency, it imposes more detailed requirements on what information to report.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
4. Does your jurisdiction require firms to make financial and capital information publicly available online? If so, what are the contents of the required disclosures?			
Firms without a prudential regulator are required to disclose on their websites an audited statement of financial condition, and more recent unaudited statements. Exchange Act rules 18a-7(b)(1)(i), (2) [17 CFR 240.18a-7(b)(1)(i), (2)].[84] Dealers for which there is no	CRR Firms are required to make 'Pillar III' public disclosures at least annually in conjunction with the publication of their audited corporate financial statements. Articles 431 to 455 CRR. These disclosures cover (among other matters): capital resources and	**<u>Comparability of outcomes</u>**: The EU public disclosure requirements provide for a comparable regulatory outcome to the SEC public disclosure requirements. In particular, both regulatory regimes require firms to disclose financial and capital information in order to promote easier access to information and to protect market participants.	

[84] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
4. Does your jurisdiction require firms to make financial and capital information publicly available online? If so, what are the contents of the required disclosures?			
prudential regulator also must disclose information regarding net capital, and if applicable, regarding material weaknesses identified by an accountant. Exchange Act rules 18a-7(b)(1)(ii), (iii) [17 CFR 240.18a-7(b)(1)(ii), (iii)].[85]	capital requirements, exposure to CCR, capital buffers (amounts required to be held above minimum capital, such as the countercyclical capital buffer); credit risk adjustments; unencumbered assets; use of rating agencies; exposure to market risk; operational risk; non-trading book equity and interest rate exposures; exposures to securitization positions; remuneration policy; the leverage ratio; use of capital models; and use of credit risk mitigation. Articles 437 to 440, 442, 443, 445 to 449 and 451 to 455 CRR.	While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements:</u>** The EU requirements are comparable to analogous SEC requirements. The requirements on disclosure of financial and capital information under Articles 431 to 455 CRR are comparable to those under Exchange Act rules 18a-7(b)(1)(i), (ii) and (iii) and 18a-7(b) (2). Although the EU regime does not specifically require that firms disclose the information on their websites, firms must make the information public and, in practice, websites are widely used.	

[85] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
4. Does your jurisdiction require firms to make financial and capital information publicly available online? If so, what are the contents of the required disclosures?			
	CRR Firms have discretion to determine where and how this information is made public. Article 434 CRR. In practice, websites are used. Credit Institutions and certain Investment Firms (depending on their size)[86] must have their financial statements audited. Article 34 Accounting Directive. CRR Firms must publish their financial statements and management report annually. Article 30 Accounting Directive.		

[86] This requirement applies to Investment Firms that meet two of the following three criteria: balance sheet total of at least €4m; net turnover of at least €8m; or at least fifty average number of employees during the financial year.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
5. What notices are firms required to make regarding matters such as capital adequacy and deficiencies, failures to comply with books and records requirements, failures to comply with segregation requirements, and material weaknesses?			
Firms must provide notices regarding: 1. **Capital deficiencies: Dealers without a prudential regulator must notify the SEC if the dealer's net capital falls below the minimum amount required. Exchange Act rule 18a-8(a)(1) [17 CFR 240.18a-8(a)(1)].[87] Notice must be provided promptly, but within twenty-four hours, based on a number of triggering events. Exchange Act rule**	Breach reporting requirements apply to CRR Firms. The detail of breach reporting requirements is reserved to the local law of each EU member state. Regulators must establish effective and reliable mechanisms to encourage reporting to regulators of potential or actual breaches of CRR and MiFIR and national provisions transposing CRD IV and MiFID. Article 73 MiFID and Article 71 CRD IV.	**Comparability of outcomes**: The EU notice requirements provide for a comparable regulatory outcome to the SEC notice requirements. In particular, both regulatory regimes aim to establish reporting mechanisms so that the regulators will be promptly notified of these events, in order to facilitate regulatory oversight and enforcement and protect market participants. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements:** The specific EU requirements are different from the specific US requirements. The US regime specifies	**According to Section 24 para. 1 KWG an institution shall report to the banking supervisors without delay, inter alia, a loss amounting to 25% of eligible capital pursuant to Article 4(1) number 71 CRR, a fall in the initial capital below the minimum requirements and the discontinuation of appropriate insurance cover.** **The requirement to establish mechanisms to encourage breach reporting to regulators according to Article 71 CRD IV is transposed into German law by Section 4d FinDAG.**

[87] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_68

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
5. What notices are firms required to make regarding matters such as capital adequacy and deficiencies, failures to comply with books and records requirements, failures to comply with segregation requirements, and material weaknesses?			
18a-8(b) [17 CFR 240.18a-8(b)];[88] 2. *Bank dealers' capital category adjustments: Dealers with a prudential regulator are required to give notice to the SEC when they file an adjustment of reported capital category with a prudential regulator. Exchange Act rule 18a-8(c) [17 CFR 240.18a-8(c)]*;[89] 3. Failures regarding books and records: Firms that fail to make and keep current the required		how firms must notify the regulators of these events (including timing, content, etc.). By contrast, these detailed reporting requirements are reserved to the local law of each EU member state, not at the EU level. The EU regime specifies requirements of how member states must establish the reporting mechanism.	

[88] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_68
[89] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_68

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
5. What notices are firms required to make regarding matters such as capital adequacy and deficiencies, failures to comply with books and records requirements, failures to comply with segregation requirements, and material weaknesses?			
books and records must notify the SEC on the day that the failure arises, and, within forty-eight hours of the original notice, provide a report stating what the firm has done or is doing to correct the situation. Exchange Act rule 18a-8(d) [17 CFR 240.18a-8(d)];[90] 4. **Material weaknesses: Firms without prudential regulators that discover a material weakness, or are notified by an independent public accountant of a material weakness, must notify the SEC**			

[90] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_68

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
5. What notices are firms required to make regarding matters such as capital adequacy and deficiencies, failures to comply with books and records requirements, failures to comply with segregation requirements, and material weaknesses?			
within twenty-four hours, and transmit a report within forty-eight hours of the notice stating what they have done or are doing to correct the situation. Exchange Act rule 18a-8(e) [17 CFR 240.18a-8(e)];[91] and 5. Failures to make required reserve account deposits: Dealers must give notice to the SEC if they fail to make a deposit into their customer reserve account, as required by the segregation rule. Exchange Act			

[91] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_68

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
5. What notices are firms required to make regarding matters such as capital adequacy and deficiencies, failures to comply with books and records requirements, failures to comply with segregation requirements, and material weaknesses?			
rule 18a-8(g) [17 CFR 240.18a-8(g)].[92]			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
6. To what extent does your jurisdiction require financial reports or other information to be reviewed by an independent accountant?			
As described above, firms without a prudential regulator annually must file a financial report with the SEC, and dealers are further required to file, as applicable, a report addressing the firm's compliance with or exemption from segregation	**Accountant reports**: Certain Investment Firms (depending on their size)[95] must have their financial statements audited. Article 34 Accounting Directive. Investment Firms must ensure that their external auditors report at least annually to the regulators on	**<u>Comparability of outcomes</u>**: The EU report review requirements provide for a comparable regulatory outcome to the SEC report review requirements. In particular, both regulatory regimes require firms to submit reports by independent auditors on the firms' financial and operational information, in order to ensure accuracy	

[92] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_68

[95] This requirement applies to Investment Firms that meet two of the following three criteria: balance sheet total of at least €4m; net turnover of at least €8m; or at least fifty average number of employees during the financial year.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
6. To what extent does your jurisdiction require financial reports or other information to be reviewed by an independent accountant?			
requirements. Firms are required to file reports of an independent public accountant addressing the financial report and the segregation-related report, as applicable. Exchange Act rule 18a-7(c)(1)(i)(C) [17 CFR 240.18a-7(c)(1)(i)(C)].[93] **The rule contains additional provisions regarding, *inter alia*, the nature and form of reports, accountant qualifications and engagement, and notifications of non-compliance or material weakness. Exchange Act rule 18a-7(d)-(g) [17 CFR 240.18a-7(d)-(g)].**[94]	the adequacy of the Investment Firms' arrangements regarding client money and client assets under Article 16(8)-(10) MiFID. Article 8 MiFID Delegated Directive. An Investment Firm may include interim or year-end profits in Common Equity Tier 1 capital before the Investment Firm has taken a formal decision confirming the final profit or loss of the Investment Firm for the year only with the prior permission of the regulator, which must require that those profits have been verified by persons independent of the Investment Firm that are responsible for the auditing of the accounts of that Investment Firm. Article 26(2) CRR.	of information and protect market participants. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements:</u>** The below EU requirements are comparable to analogous SEC requirements in the following ways: • **Information to be audited**. Information to be audited under Articles 132(5) and 154 CRR and Article 89 CRD IV is comparable to that under Exchange Act rules 18a-7(c)(1)(i)(C) and 18a-7(d)-(g).	

[93] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67
[94] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=544aa6f87075e70ff4681c3c80a5e91c&mc=true&r=SECTION&n=se17.4.240_118a_67

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
6. To what extent does your jurisdiction require financial reports or other information to be reviewed by an independent accountant?			
	Investment Firms must engage an external auditor to confirm the accuracy of their calculation regarding an average risk weight for its exposures in the form of a unit or share in a collective investment undertaking (i.e. a fund), where the Investment Firm is not aware of the underlying exposures of the fund. Article 132(5) and 154 CRR. Where an Investment Firm uses internal models to calculate its credit risk requirement, the Investment Firm's internal audit department, or another comparable independent auditing unit must review, at least annually, the Investment Firm's rating systems and its operations, including the operations of the credit function and the estimation of probability of default, loss given default, expected losses and	• **Independence of auditors**. The EU regime requires independent auditing teams from both inside and outside the firm, which is comparable to the requirements under Exchange Act rule 18a-7(c)(1)(i)(C).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
6. To what extent does your jurisdiction require financial reports or other information to be reviewed by an independent accountant?			
	conversion factors. Article 191 CRR. An Investment Firm which uses internal models must calculate its operational risk capital requirement to subject its operational risk management processes and measurement systems to regular reviews performed by internal or external auditors. Article 321 CRR. An Investment Firm that uses an internal risk-measurement model for market risk purposes must conduct an independent review of this (these) model(s), either as part of its regular internal auditing process, or by mandating a third-party undertaking that provides auditing or consulting services and that has staff who have sufficient skills in the area of market risk in trading activities to conduct that review, which must be conducted to the satisfaction of the		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
6. To what extent does your jurisdiction require financial reports or other information to be reviewed by an independent accountant?			
	Investment Firm's regulators. Article 325bi CRR. An Investment Firm which relies on a depository or management company of a collective investment undertaking must calculate and report own funds requirements for position risk for positions in, or foreign exchange positions in, collective investment undertakings and must confirm the accuracy of these calculations with an external auditor. Articles 350 and 353 CRR. An Investment Firm which uses the internal models approach to calculate its market risk capital requirement must conduct, as part of its regular internal auditing process, an independent review of its internal models. Article 368 CRR. An Investment Firm which relies on a depository or management		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
6. To what extent does your jurisdiction require financial reports or other information to be reviewed by an independent accountant?			
	company of a collective investment undertaking must calculate and report own funds requirements for the market value and haircuts for shares or units in collective investment undertakings and must confirm the accuracy of these calculations with an external auditor. Article 418 CRR. Investment Firms must have certain information audited in accordance with EU law on statutory audits of accounts. Such information includes: (a) name(s), nature of activities and geographical location; (b) turnover; (c) number of employees on a full time equivalent basis; (d) profit or loss before tax; (e) tax on profit or loss; and (f) public subsidies received. Article 89 CRD IV.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Reports and Notifications			
6. Are there potentially any restrictions or prohibitions on the ability of the SEC to access reports or notices made pursuant to the requirements of your jurisdiction?			
In general, Credit Institutions and Investment Firms are able to share their own data directly with the SEC (subject to considerations regarding privacy and client confidentiality) without restrictions. Exceptions to this are reports from, and correspondence with, a Credit Institution's or Investment Firm's regulator, which the regulator often requires the firm to keep confidential (though this would vary on a case-by-case basis with different regulators). Beyond this, the working group recognizes that substituted compliance on recordkeeping not only requires a comparability finding, but also a framework that would permit the SEC to examine and inspect regulated firms' compliance with the applicable securities laws. However, the working group further understands that there are multiple variations of the question of access to data protected by, e.g., GDPR, including as a request to obtain assurances on records access, a registration opinion required from non-US entity registrants, and in the context of negotiations of memoranda of understanding between EU member state authorities and the SEC each of which, in itself, should give the SEC the assurance that even accounting for privacy laws and client confidentiality, records access can be obtained either directly or through supervisory channels. The working group does not propose to add another variation of the discussion, in addition to the three aforementioned venues.			

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March 4, 2020

19.05.2020: Comments by BaFin with new column "National Measures Germany"

III. Internal Supervision and Compliance

ALLEN & OVERY

Comparability Assessment of Certain Securities and Exchange Commission and EU Requirements Applicable to Security-Based Swap Dealers pursuant to SEC Staff Guidance on Substituted Compliance Applications

3. Category: Supervision and Chief Compliance Officer Requirements

a. Executive Summary

The supervision and CCO requirements promote registered entities' use of structures, processes and responsible personnel reasonably designed to promote compliance with applicable law and to identify and cure instances of non-compliance, in part through the designation of an individual with responsibility and authority over compliance matters.

b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors

Firms are required to have internal supervision systems with qualified supervisory personnel. When making a substituted compliance determination with regard to supervision requirements, the SEC will consider whether "the mandates for supervisory systems under the requirements of the foreign financial regulatory system, and the duties imposed by the foreign financial regulatory system" are comparable to those associated with the applicable Exchange Act provisions and underlying rules. Exchange Act rule 3a71-6(d)(1) [17 CFR 240.3a71-6(d)(1)].[1]

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	**EU Requirement and/or Policy Goal Summary**	**Comparability Assessment**	**National Measures Germany**
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
1. **To what extent are firms required to have systems for the internal supervision of their security-based swap business and personnel? How are those systems required to be reasonably designed to prevent violations of the applicable laws? How is the effectiveness of those systems assessed?**			
<u>Comparability of outcomes</u>: The EU requirements to establish internal supervisory systems provide a comparable regulatory outcome to the SEC internal supervisory system requirements. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(1) and MiFID and CRD IV are consistent in that each requires firms to establish internal supervisory systems designed to ensure compliance with applicable laws, and each provide for mechanisms to assess the effectiveness of those systems.			

[1] https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf

While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Supervisory systems to prevent violations Firms are required to conform with rules that the SEC prescribes with regard to diligent supervision of the firm's business. Exchange Act section 15F(h)(1)(B) [15 U.S.C. 78o-10(h)(1)(B)].[2] Under SEC rules, each firm is required to "establish and maintain a system to supervise, and shall diligently supervise," its business and the activities of its associated persons relating to security-based swaps. The system must "be	**Supervisory systems to prevent violations** An Investment Firm must establish adequate policies and procedures sufficient to ensure compliance of the Investment Firm including its managers, employees and tied agents with its obligations under MiFID. Article 16(2) MiFID. MiFID also contains extensive requirements regarding the supervisory measures that must be taken by Investment Firms in order to supervise their business and their staff, and to prevent violations of applicable rules and regulations. Examples include: • Investment Firms must ensure that their relevant persons are aware of the procedures	**Supervisory systems to prevent violations** Article 21 MiFID Org Reg. requires Investment Firms to ensure that their relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities and maintain internal compliance and reporting mechanisms. Article 25 MiFID Org Reg. requires Investment Firms to ensure that senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the Investment Firm complies with its obligations under MiFID. Article 16(2) MiFID requires an Investment Firm to establish adequate policies and procedures sufficient to ensure compliance of the Investment Firm including its managers, employees and tied agents with its obligations under MiFID. Articles 27,	Section 80 (1) sentences 1, 3 of the German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) in conjunction with Articles 21 – 26 MiFID Org Reg.

[2] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

reasonably designed to prevent violations of the provisions of applicable federal securities laws and the rules and regulations thereunder" relating to the firm's business. Exchange Act rule 15Fh-3(h)(1) [17 CFR 240.15Fh-3(h)(1)].[3]	which must be followed for the proper discharge of their responsibilities; establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the Investment Firm; and establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the Investment Firm. Article 21 MiFID Org Reg. • Investment Firms must ensure that their senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the Investment Firm complies with its obligations under MiFID. Article 25 MiFID Org Reg. MiFID imposes a range of requirements, including in relation to remuneration and personal transactions, to ensure that an Investment Firm's staff comply	28 and 29 MiFID Org Reg. provide various requirements to ensure that an Investment Firm's staff complies with their regulatory obligations regarding remuneration and personal transactions matters. Article 88 CRD IV and Article 9(1) MiFID require the management body to ensure the integrity of the accounting and financial reporting systems, including financial and operational controls, and compliance with the law and relevant standards. These requirements are comparable to the supervisory system requirements prescribed by Exchange Act rule 15Fh-3(h).	

[3] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

	with their obligations. Articles 27, 28 and 29 MiFID Org Reg.		
System assessments Firms are required to conform to rules that the SEC prescribes with regard to diligent supervision of the firm's business. Exchange Act section 15F(h)(1)(B) [15 U.S.C. 78o-10(h)(1)(B)].[4] Under SEC rules, each firm is required to "establish and maintain a system to supervise, and shall diligently supervise," its business and the activities of its associated persons relating to security-based swaps. The system must "be reasonably designed to prevent violations of the provisions of applicable federal securities laws and the rules and regulations thereunder" relating to	**System assessments** Investment Firms must establish and maintain a permanent and effective compliance function which operates independently and has responsibilities including: monitoring and assessing the adequacy and effectiveness of measures, policies and procedures to detect a failure in the Investment Firm's obligations under MiFID; advising and assisting relevant persons responsible for carrying out investment services and activities to comply with the Investment Firm's obligations under MiFID; reporting to the management body on the implementation and effectiveness of the overall control environment, identified risks and remedial actions; and monitoring the complaints-handling process. Article 22 of MiFID Org Reg. The management body must define, oversee and be accountable for matters including the implementation of the	**System assessments** Article 22 MiFID Org Reg. requires firms to maintain an independent compliance function that assesses the adequacy and effectiveness of procedures and systems in place to ensure compliance with MiFID. The management body must ensure the integrity of the accounting and financial reporting systems, including financial and operational controls and compliance with the law and relevant standards. These requirements are analogous to the system assessment requirement set forth in Exchange Act rule 15Fh-3(h).	

[4] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

the firm's business. Exchange Act rule 15Fh-3(h)(1) [17 CFR 240.15Fh-3(h)(1)].[5]	governance arrangements that ensure effective and prudent management. Among other requirements, the management body must ensure the integrity of the accounting and financial reporting systems, including financial and operational controls and compliance with the law and relevant standards Article 9(1) MiFID and Article 88 CRD IV.		

SEC Requirement/or Policy Goal Summary per SEC (with link to the US rule)	**EU Requirement and/or Policy Goal Summary**	**Comparability Assessment**	**National Measures Germany**
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
2. **What requirements govern firms' designation of supervisory personnel, and the authority, responsibility and capacity of those personnel?**			
<u>Comparability of outcomes</u>: The EU requirements regarding the designation, responsibility and capacity of supervisory personnel provide a comparable regulatory outcome to the SEC requirements regarding the designation, responsibility and capacity of supervisory personnel. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2) and MiFID are consistent in that each requires firms to designate qualified supervisory personnel responsible for ensuring compliance with applicable laws. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.			

[5] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
2. **What requirements govern firms' designation of supervisory personnel, and the authority, responsibility and capacity of those personnel?**			
<u>Comparability of specific requirements</u>: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Authority and responsibility Firms must designate at least one qualified person with authority to carry out supervisory responsibilities. The designation requirement applies to each type of business for which registration is required. Exchange Act rule 15Fh-3(h)(2)(i) [17 CFR 240.15Fh-3(h)(2)(i)].[6]	**Authority and responsibility** An Investment Firm must establish adequate policies and procedures sufficient to ensure compliance of the Investment Firm including its managers, employees and tied agents with its obligations under MiFID. Article 16(2) MiFID. An Investment Firm must ensure that senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the Investment Firm complies with its obligations under MiFID. Article 25 MiFID Org Reg.	**Authority and responsibility** Article 22(3) MiFID requires Investment Firms to appoint a compliance officer responsible for the compliance function and for any reporting as to compliance required by MiFID. Additionally, Article 22(3) MiFID Org Reg. requires that persons involved in the compliance function must not be involved in the performance of services or activities they monitor and the method of determining their remuneration must not, and must not be likely to, compromise their objectivity. Article 25 MiFID Org Reg. requires an Investment Firm to ensure that senior management, and, where appropriate,	Sections 87, 80 (1) sentences 1, 3 of the WpHG in conjunction with Articles 21 - 26 MiFID Org Reg.

[6] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
2. **What requirements govern firms' designation of supervisory personnel, and the authority, responsibility and capacity of those personnel?**			
	An Investment Firm must appoint a compliance officer responsible for the compliance function and for any reporting concerning compliance matters required by MiFID. The persons involved in the compliance function must not be involved in the performance of services or activities they monitor and the method of determining their remuneration must not, and must not be likely to, compromise their objectivity. Article 22(3) MiFID Org Reg. Investment Firms must, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of the investment services and activities undertaken in the course of that business, establish and maintain a risk management function that operates independently. This function must be responsible for the implementation of relevant	the supervisory function, are responsible for ensuring that the Investment Firm complies with its obligations under MiFID. Where appropriate, Articles 23 and 24 MiFID Org Reg. require Investment Firms to establish an independent risk management function and an internal audit function, which will assist the Investment Firm in ensuring that it complies with its obligations under MiFID. These requirement are analogous to the designation requirement set forth in Exchange Act rule 15Fh-3(h)(2).	

SEC Requirement/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
2. **What requirements govern firms' designation of supervisory personnel, and the authority, responsibility and capacity of those personnel?**			
	policies and procedures and the provision of reports and advice to senior management. Article 23 MiFID Org Reg. Investment Firms must, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of that business, establish and maintain an internal audit function which is separate and independent from the other functions and activities of the Investment Firm. The responsibilities of this function must include to: establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the Investment Firm's systems, internal control mechanisms and arrangements; issue recommendations based on the result of this work and verify		

SEC Requirement/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
2. **What requirements govern firms' designation of supervisory personnel, and the authority, responsibility and capacity of those personnel?**			
	compliance with those recommendations; and report to senior management in relation to internal audit matters. Article 24 MiFID Org Reg.		
Capacity Firms must designate at least one qualified person with authority to carry out supervisory responsibilities. The designation requirement applies to each type of business for which registration is required. Exchange Act rule 15Fh-3(h)(2)(i) [17 CFR 240.15Fh-3(h)(2)(i)].[7]	**Capacity** Investment firms (among other obligations) must: employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them; and ensure that the performance of multiple functions by their relevant persons does not and is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally. Article 21 MiFID Org Reg.	**Capacity** The Article 21 MiFID Org Reg. requirements regarding skills, knowledge and expertise are comparable to the supervisory personnel requirements set forth in Exchange Act rule 15Fh-3(h)(2).	Section 80 (1) sentences 1, 3 of the WpHG in conjunction with Article 21 (1) (d) MiFID Org Reg.

[7] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
3. **What requirements govern the qualification of supervisory personnel?**			
Comparability of outcomes: The EU requirements regarding the qualification of supervisory personnel provide a comparable regulatory outcome to the SEC requirements regarding the qualification of supervisory personnel. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2)(ii) and MiFID are consistent in that each requires firms to ensure that supervisory personnel are qualified to carry out their responsibilities. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Qualification Firms must make use of supervisors that are qualified to carry out their responsibilities. Qualification may be established via experience or training. Exchange Act rule 15Fh-	**Qualification** MiFID imposes general qualification requirements on an Investment Firm's relevant staff and internal functions with regards to their knowledge, skills and expertise. These include: • Investment Firms must employ personnel with the skills, knowledge and	**Qualification** Article 21 MiFID Org Reg. requires firms to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them; and ensure that the performance of multiple functions by their relevant persons does not and is not likely to prevent those persons from	Sections 87, 80 (1) sentences 1 - 3 of the WpHG in conjunction with Articles 21 (1) (d), 22 (3) (a) MiFID Org Reg.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
3. **What requirements govern the qualification of supervisory personnel?**			
3(h)(2)(ii) [17 CFR 240.15Fh-3(h)(2)(ii)].[8]	expertise necessary for the discharge of the responsibilities allocated to them. Article 21 MiFID Org Reg. • The compliance function must have, among other things, the necessary expertise in order to be able to discharge its responsibilities properly and independently. Article 22(3) MiFID Org Reg. • An Investment Firm's management body must define, approve and oversee the skills, knowledge and expertise required by personnel, the resources, the procedures and the arrangements for the provision of services and activities, taking into account the nature, scale and complexity of its business and	discharging any particular function soundly, honestly, and professionally. Article 9(3) MiFID requires a firm's management body to define, approve and oversee the skills, knowledge and expertise required by personnel. Additionally, Article 22 MiFID Org Reg. requires that persons involved in the compliance function must have appropriate expertise. These requirements are analogous to the supervisory personnel qualification requirements set forth in Exchange Act rule 15Fh-3(h)(2)(ii).	

[8] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Supervisory Systems, Responsible Individuals and Qualified Supervisors			
3. **What requirements govern the qualification of supervisory personnel?**			
	all the requirements the Investment Firm has to comply with. Article 9(3) MiFID. Regulators must (under MiFID) and may (under CRD IV) refuse authorization if they are not satisfied that the members of the management body are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their functions, or if there are objective and demonstrable grounds for believing that the management body may pose a threat to effective, sound and prudent management and to the adequate consideration of the interest of clients and the integrity of the market. Article 9(4) MiFID and Article 23 CRD IV.		

c. Subcategory: Supervisory System Policies and Procedures

Firms are required to establish, maintain and enforce written supervisory policies and procedures that are reasonably designed to prevent violations of applicable law. When making a substituted compliance determination with regard to supervision requirements, the SEC will consider whether "the mandates for supervisory systems under the requirements of the foreign financial regulatory system, and the duties imposed by the foreign financial regulatory system" are comparable to those associated with the applicable Exchange Act provisions and underlying rules. Exchange Act rule 3a71-6(d)(1) [17 CFR 240.3a71-6(d)(1)].[9]

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. **In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?**			
<u>Comparability of outcomes</u>: The EU requirements to establish and enforce written supervisory policies and procedures provide a comparable regulatory outcome to the SEC requirements to establish and enforce supervisory policies and procedures. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2)(iii) and MiFID and CRD IV are consistent in that each requires firms to establish a variety of policies and procedures meant to ensure that effective and thorough supervisory systems are in place to mitigate risk. MiFID requires the establishment of a 'three lines of defence' model in relation to governance, risk and compliance oversight by Investment Firms. The first line of defence comprises the front office, as directed by the policies and procedures (including in respect of conflicts of interest) that the Investment Firm is obliged to establish and front office staff are required to follow. The second line of defence comprises the compliance and risk management teams – these teams conduct supervision of the front office. The third line of defence comprises the internal/external audit team, which ensures the effectiveness of the compliance and risk management teams.			

[9] https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. **In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?**			
While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Supervisory policies and procedures: **Establishing robust risk management systems** SEC rules require that firms establish, maintain and enforce written policies and procedures that address the firm's security-based swap business, including associated persons. Those policies and procedures must be	**Supervisory policies and procedures**: **Establishing robust risk management systems** **<u>MiFID</u>** Investment Firms must establish adequate policies and procedures sufficient to ensure compliance of the Investment Firm, including its managers, employees and tied agents, with its obligations under MiFID. Article 16(2) MiFID. Investment Firms must have sound administrative and	**Supervisory policies and procedures**: **Establishing robust risk management systems** Article 16(5) MiFID requires Investment Firms to have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems. Article 23 MiFID Org Reg. requires Investment Firms to establish, implement and maintain adequate risk management policies and procedures	Sections 80 (1) sentences 1 - 3, 80 (6) of the WpHG in conjunction with Articles 21 - 24 MiFID Org Reg., Section 80 (1) sentence 2 no.2 of the WpHG

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
"reasonably designed to prevent violations" of applicable securities laws and regulations. Exchange Act rule 15Fh-3(h)(2)(iii) [17 CFR 240.15Fh-3(h)(2)(iii)].[10] Under SEC rules, those policies and procedures at a minimum must include certain elements (addressed below). In adopting these requirements, the SEC noted that the minimum requirements listed in the rule "are not an exhaustive list," and that entities "should	accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems. Article 16(5) MiFID. Investment Firms must establish, implement and maintain adequate risk management policies and procedures that identify the risks relating to the Investment Firm's activities, processes and systems and, where appropriate, set the level of risk tolerated by the Investment Firm. The requirement encompasses monitoring the effectiveness and adequacy of the Investment Firm's risk management policies and procedures, together with the level of compliance by the Investment Firm and its personnel	that identify the risks relating to the Investment Firm's activities, processes and systems and, where appropriate, set the level of risk tolerated by the Investment Firm. Article 21(3) MiFID Org Reg. requires that Investment Firms must establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the case of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of investment services and activities. In practice, these requirements result in written policies and procedures that are comparable to the supervisory system requirements under Exchange Act rule 15Fh-3(h)(2)(iii) Article 74 CRD IV requires CRR Firms to have robust governance arrangements, with adequate internal control mechanisms, including sound	

[10] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
keep in mind their overarching obligation . . . to establish and maintain a supervisory system that is reasonably designed to prevent violations of applicable federal securities laws and the rules and regulations thereunder" relating to the firm's security-based swap business. *See* Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR at 30005-06 (May 13, 2016) (**Business Conduct Adopting Release**)[11] (suggesting that entities "generally should consider" providing for the supervisory review of	with the arrangements, processes and mechanisms adopted and the adequacy and effectiveness of measures taken to address deficiencies in them. Article 23 MiFID Org Reg. A specific risk management function is required where appropriate and proportionate that must: (i) operate independently, (ii) implement the Investment Firm's risk management policies and procedures, and (iii) provide required reports and advice. Article 23(2) MiFID Org Reg. An Investment Firm must take reasonable steps to ensure continuity and regularity in the performance of its regulated activities. To this end, the Investment Firm must employ	administrative and accounting procedures. Article 76(1) CRD IVrequires that CRR Firm management must approve and periodically review the strategies and policies for taking up, managing, monitoring and mitigating the risks the entity is or might be exposed to, including those posed by the macroeconomic environment in which it operates in relation to the status of the business cycle. Article 76(3) CRD IV also requires firms of significant size, internal organization, and nature, scope and complexity of their activities to establish a risk committee composed of members of the management body who do not perform any executive function in the entity concerned. Article 103 CRR requires CRR Firms that carry out trading activities to design and implement trading book policies and procedures which include position	

[11] https://www.federalregister.gov/documents/2016/05/13/2016-10918/business-conduct-standards-for-security-based-swap-dealers-and-major-security-based-swap

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
recorded oral communications, and consider how to supervise certain disclosures orally communicated). The supervisory system must encompass procedures for compliance with duties set forth in Exchange Act section 15F(j). Exchange Act rule 15Fh-3(h)(2)(iii)(I) [17 CFR 240.15Fh-3(h)(2)(iii)(I)].[12] Section 15F(j) contains self-executing requirements that, *inter alia*, impose on firms duties related to:	appropriate and proportionate systems, resources and procedures, and ensure, when relying on a third-party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Articles 16(4), 16(5) MiFID. Investment Firms must establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the case of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of investment services and activities,	limits that must be set and monitored for appropriateness.	

[12] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
Exchange Act section 15F(j)(2) [15 U.S.C. 78o-10(j)(2)];[13] and Exchange Act rule 15Fh-3(h)(2)(iii)(I) [17 CFR 240.15Fh-3(h)(2)(iii)(I)];[14]	or, where that is not possible, the timely recovery of such data and functions and the timely resumption of their investment services and activities. This requires Investment Firms to establish and maintain a business continuity and disaster recovery plan, which must allow for the timely resumption of its investment services and activities and for the preservation of essential data and functions. Article 21(3) MiFID Org Reg. An Investment Firm, where appropriate and proportionate, must have an internal audit function, separate and independent from the other functions that is responsible for establishing, implementing and maintaining an audit plan to		

[13] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[14] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. **In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?**			
	evaluate the adequacy and effectiveness of the Investment Firm's systems and internal control mechanisms and arrangements; and to issue and oversee the implementation of recommendations based on the plan. Article 24 MiFID Org Reg. **<u>CRD IV</u>** CRR Firms must have robust governance arrangements, with adequate internal control mechanisms, including sound administrative and accounting procedures. Article 74 CRD IV. The management body must approve and periodically review the strategies and policies for taking up, managing, monitoring and mitigating the risks the CRR Firm is or might be exposed to, including those posed by the macroeconomic environment in		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
	which it operates in relation to the status of the business cycle. Article 76(1) CRD IV. CRR Firms that are significant in terms of size, internal organization and nature, scope and complexity of their activities must establish a risk committee composed of members of the management body who do not perform any executive function in the entity concerned. Article 76(3) CRD IV. **<u>CRR</u>** CRR Firms that carry out trading activities must design and implement trading book policies and procedures which include position limits that must be set and monitored for appropriateness. Article 103 CRR. CRR Firms that have permission to use internal models for calculating		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
	their CCR requirements required to establish and maintain a CCR management framework are specifically required to take into account trading and credit limits for the purposes of their CCR risk framework, and are required to include information about appropriate measures taken in terms of position limits in their daily reports on the output of their risk measurement models. Articles 286, 293 and 221 CRR.		
Disclosing certain information to regulators Firms must disclose, to the SEC and prudential regulators (as applicable), information concerning: terms and conditions of its security-based swaps;	**Disclosing certain information to regulators** Reports to the Investment Firm's regulator must be made in respect of transactions in financial instruments which are (a) admitted to trading, or traded, on a trading venue or for which a request for admission to trading has been made; (b) the underlying is a financial instrument traded on	**Disclosing certain information to regulators** Article 26 MiFIR requires Investment Firms to make reports to regulators, where relevant, containing granular trade-by-trade information including with respect to parties and precise trade details. These requirements are comparable to the requirements	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
security-based swap trading operations, mechanisms, and practices; financial integrity protections relating to security-based swaps; and other information relevant to the firm's trading in security-based swaps. Exchange Act section 15F(j)(3) [15 U.S.C. 78o-10(j)(3)];[15]	a trading venue; or (c) the underlying is an index or a basket composed of financial instruments traded on a trading venue. For these purposes, "trading venues" include EU regulated markets (i.e. exchanges), multilateral trading facilities and organized trading facilities. Transaction reporting contains very granular trade-by-trade information, including (among others), the parties, the precise trade details (e.g. instrument type, position taken, price, quantity, etc.) and the decision makers (e.g. the natural person executing the trade) (the Transaction Reporting RTS sets out the full fields to be addressed in these reports). Article 26 MiFIR.	under Exchange Act rule 15F(j)(3) [15 U.S.C. 78o-10(j)(3)].	
Obtaining necessary information	**Obtaining necessary information**	**Obtaining necessary information**	

[15] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. **In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?**			
Firms must establish and enforce internal systems and procedures to obtain information needed to perform functions required by law or regulation, and to provide the information to the SEC and prudential regulators on request. Substituted compliance similarly is not available in connection with the information provision part of that duty. *See* Exchange Act rule 3a71-6(d)(1) [17 CFR 240.3a71-6(d)(1)][16] (further excluding section 15F(j)(4)(B) from the availability of substituted	Please see "**Establishing robust risk management systems**" above in response to the question set forth in this section 3.c.1 in relation to robust operations, mechanisms and practices. An Investment Firm must establish adequate policies and procedures sufficient to ensure compliance of the Investment Firm including its managers, employees and tied agents with its obligations under MiFID. Article 16(2) MiFID. Investment Firms must establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the Investment Firm. Article 21(1) MiFID Org Reg. Regulators have broad information-gathering powers.	Article 21(1) MiFID Org Reg. requires an Investment Firm to establish adequate policies and procedures sufficient to ensure compliance of the Investment Firm including its managers, employees and tied agents with its obligations under MiFID. Article 21 (1) MiFID Org Reg. requires Investment Firms to establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the Investment Firm. Article 69(2) MiFID and Article 65 CRD IV provide applicable regulators with broad information-gathering powers. This means that, in practice, CRR Firms must have the relevant systems and procedures to enable them to comply with such requests. These requirements are comparable to the requirements under Exchange Act	Section 81 (1) of the WpHG

[16] https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
compliance. Exchange Act section 15F(j)(4) [15 U.S.C. 78o-10(j)(4)]);[17]	This means that, in practice, CRR Firms must have the relevant systems and procedures to enable them to comply with such requests. Article 69(2) MiFID and Article 65 CRD IV.	section 15F(j)(4) [15 U.S.C. 78o-10(j)(4)].	
Implementing conflict of interest systems and procedures Exchange Act section 15F(j)(5) [15 U.S.C. 78o-10(j)(5)];[18] and	**Implementing conflict of interest systems and procedures** An Investment Firm must maintain and operate effective organizational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients. Article 16(3) MIFID. The management body must define, oversee and is accountable for the implementation of the governance arrangements that	**Implementing conflict of interest systems and procedures** Article 16(3) MIFID requires an Investment Firm to maintain and operate effective organizational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients. Article 88 CRD IV and Article 9(1) MiFID require the management body to define, oversee and be accountable for the implementation of the governance arrangements that ensure effective	Section 80 (1) sentence 2 no. 2 of the WpHG in conjunction with Articles 33, 34 MiFID Org Reg.

[17] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[18] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?			
	ensure effective and prudent management, including the segregation of duties in the organization and the prevention of conflicts of interest. Article 88 CRD IV and Article 9(1) MiFID.	and prudent management, including the segregation of duties in the organization and the prevention of conflicts of interest. These requirements are comparable to the requirements addressing conflicts of interest under Exchange Act section 15F(j)(5) [15 U.S.C. 78o-10(j)(5)].	
Addressing antitrust considerations Exchange Act section 15F(j)(6) [15 U.S.C. 78o-10(j)(6)].[19]	**Addressing antitrust considerations** Under the EU antitrust regime, EU regulated firms including CRR Firms are required to comply with EU antitrust laws.	**Addressing antitrust considerations** Because the EU antitrust regime requires CRR Firms to comply with antitrust laws, the ultimate regulatory outcome of the EU antitrust regime is comparable to that set forth in Exchange Act section 15F(j)(6).	

[19] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
2. **In what ways are firms required to have supervisory policies and procedures for the review of transactions?**			
<u>Comparability of outcomes</u>: The EU requirements for supervisory review of transactions provide a comparable regulatory outcome to the SEC requirements for supervisory review of transactions. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2)(iii)(A) and MiFID are consistent in that each requires that firms establish procedures through which qualified supervisors review transactions. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Review of transactions Firms are required to have procedures for supervisory review of transactions for which registration as a dealer is required. Exchange Act rule 15Fh-3(h)(2)(iii)(A) [17 CFR	**Review of transactions** An Investment Firm must establish adequate policies and procedures sufficient to ensure its compliance with its obligations under MiFID. Article 16(2) MiFID. These policies will need to address the monitoring of the transactions entered into by the	**Review of transactions** Article 16(2) MiFID requires Investment Firms to have policies and procedures that address the monitoring of all the Investment Firm's activities, including its transactions in security-based swaps. Article 103 CRR requires CRR Firms that carry out trading activities to design and implement trading book	Section 82 (1) – (4) of the WpHG

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
2. In what ways are firms required to have supervisory policies and procedures for the review of transactions?			
240.15Fh-3(h)(2)(iii)(A)].[20]	Investment Firm, including security-based swap transactions. CRR Firms that carry out trading activities must design and implement trading book policies and procedures which include position limits that must be set and monitored for appropriateness. Article 103 CRR. CRR Firms that have a permission to use internal models for calculating their CCR requirements are required to establish and maintain a CCR management framework, are specifically required to take into account trading and credit limits for the purposes of their CCR risk framework, and are required to include information about appropriate measures taken in terms of position limits in their daily reports on the output of	policies and procedures which include position limits that must be set and monitored for appropriateness. Article 27 MiFID also requires review of client orders and transactions to monitor the effectiveness of order execution policies, as applicable. This requirement is comparable to that set forth in Exchange Act rule 15Fh-3(h)(2)(iii)(A).	

[20] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
2. In what ways are firms required to have supervisory policies and procedures for the review of transactions?			
	their risk measurement models. Articles 286, 293 and 221 CRR. Investment Firms must take all sufficient steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature and any other consideration relevant to the execution of the order. Article 27(1) MiFID. To this end, Investment Firms must establish and implement effective arrangements and, in particular, Investment Firms must establish and implement an order execution policy to allow them to obtain, for their client orders, the best possible result. Article 27(4) MiFID. Investment Firms who execute client orders must monitor the effectiveness of their order execution arrangements and execution policy in order to identify and, where appropriate,		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
2. **In what ways are firms required to have supervisory policies and procedures for the review of transactions?**			
	correct any deficiencies. Article 27(7) MiFID.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
3. **In what ways are firms required to have supervisory policies and procedures for the review of correspondence and internal communications? Are firms also required to have supervisory policies and procedures for the supervision of oral communications?**			
Comparability of outcomes: The EU requirements to supervise communications provide for a comparable regulatory outcome to the SEC requirements to supervise communications. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2)(iii)(B) and MiFID are consistent in that each requires that firms establish procedures to supervise all types of external and internal communications in order to mitigate risk. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements**:			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
3. **In what ways are firms required to have supervisory policies and procedures for the review of correspondence and internal communications? Are firms also required to have supervisory policies and procedures for the supervision of oral communications?**			
The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Supervised communications Supervisory policies and procedures at a minimum must include elements regarding: Correspondence and internal communication review: Firms are required to have procedures for supervisory review of incoming and outgoing written – including electronic – correspondence with counterparties or potential counterparties, and of internal written communications	**Supervised communications** Investment Firms must establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the Investment Firm. Article 21 MiFID Org Reg. An Investment Firm must arrange for records to be kept of all services, activities and transactions undertaken by it which must be sufficient to enable the regulator to fulfil its supervisory tasks and to enforce MiFID, MiFIR, MAR and CSMAD, and in particular to ascertain that the Investment Firm has complied with all obligations including those with respect to clients or potential clients and to the	**Supervised communications** Article 21 MiFID Org Reg. requires Investment Firms to establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the Investment Firm. Article 16(7) MiFID and Article 76 MiFID Org Reg. require Investment Firms to record all forms of telephone conversations and electronic communications regarding client orders (even where these do not result in the conclusion of a transaction or the provision of a service). These requirements are comparable, and even more onerous with regards to supervision of oral communications, to the supervisory requirements set forth in Exchange Act rule 15Fh-3(h)(2)(iii)(B).	Section 83 (1), (3) – (8) of the WpHG in conjunction with Article 76 MiFID Org Reg.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
3. In what ways are firms required to have supervisory policies and procedures for the review of correspondence and internal communications? Are firms also required to have supervisory policies and procedures for the supervision of oral communications?			
relating to the firm's security-based swap business. Exchange Act rule 15Fh-3(h)(2)(iii)(B) [17 CFR 240.15Fh-3(h)(2)(iii)(B)].[21]	integrity of the market. Article 16(6) MiFID. To this end, Investment Firms must record all forms of telephone conversations and electronic communications regarding client orders (even where these do not result in the conclusion of a transaction or the provision of a service). Investment Firms must notify new and existing clients that telephone communications or conversations between the Investment Firms and clients that result or may result in transactions, will be recorded. Investment Firms must not provide, by phone, investment services and activities to clients who have not been notified in advance about the recording of their telephone communications or conversations,		

[21] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
3. **In what ways are firms required to have supervisory policies and procedures for the review of correspondence and internal communications? Are firms also required to have supervisory policies and procedures for the supervision of oral communications?**			
	where such investment services and activities relate to the reception, transmission and execution of client orders. Article 16(7) MiFID and Article 76 MiFID Org Reg.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
4. **In what ways are firms required to have supervisory policies and procedures for annual or periodic review that are intended to prevent and detect violations of applicable law?**			
<u>Comparability of outcomes</u>: The EU periodic supervisory review requirements provide a comparable regulatory outcome to the SEC periodic supervisory review requirements. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2)(iii)(C) and MiFID are consistent in that each requires that firms establish procedures to periodically review their compliance with applicable laws. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
4. **In what ways are firms required to have supervisory policies and procedures for annual or periodic review that are intended to prevent and detect violations of applicable law?**			
<u>Comparability of specific requirements</u>: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Periodic Review Firms are required to have procedures for periodic review, at least annually, of the firm's security-based swap business that are "reasonably designed to assist in detecting and preventing violations" of applicable requirements. Exchange Act rule 15Fh-3(h)(2)(iii)(C) [17 CFR 240.15Fh-3(h)(2)(iii)(C)].[22]	**Periodic Review** Senior management must receive on a frequent basis, and at least annually, written reports on the matters regarding compliance, risk management and internal audit (covered by Articles 22, 23 and 24 MiFID Org Reg.) indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies. The supervisory function, if any, must receive on a regular basis written reports on the same matters. Article 25 MiFID Org Reg.	**Periodic review** Article 25 MiFID Org Reg. requires that an Investment Firm's senior management receive on a frequent basis, and at least annually, written reports on the matters regarding compliance, risk management and internal audit (covered by Articles 22, 23 and 24 MiFID Org Reg.) indicating whether appropriate remedial measures have been taken in the event of any deficiencies. The supervisory function, if any, must receive on a regular basis written reports on the same matters. Article 22 MiFID Org Reg. requires the compliance function to monitor and regularly assess the actions taken to	Under German law, every investment service provider is obliged to be audited by external auditors according to Section 89 of the WpHG. This annual audit covers the relevant rules of conduct. BaFin receives a copy of the report upon request.

[22] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
4. **In what ways are firms required to have supervisory policies and procedures for annual or periodic review that are intended to prevent and detect violations of applicable law?**			
	Investment Firms must establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the Investment Firm to comply with its obligations under MiFID, as well as the associated risks, and put in place adequate measures and procedures designed to minimise such risk and to enable the regulators to exercise their powers effectively under MiFID. Article 22 MiFID Org Reg. The compliance function must monitor and regularly assess the actions taken to address any deficiencies in an Investment Firm's compliance with its obligations under MiFID. Article 22 MiFID Org Reg. Investment Firms are obligated to establish, implement and maintain adequate risk management policies and	address any deficiencies in an Investment Firm's compliance with its obligations under MiFID. Article 24 MiFID Org Reg. imposes a similar requirement in relation to Investment Firms' internal audit function. Article 23 MiFID Org Reg. requires Investment Firms to establish, implement and maintain adequate risk management policies and procedures that identify the risks related to the Investment Firms' activities processes and systems. These requirements are comparable to those set forth in Exchange Act rule 15Fh-3(h)(2)(iii)(C).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
4. **In what ways are firms required to have supervisory policies and procedures for annual or periodic review that are intended to prevent and detect violations of applicable law?**			
	procedures that identify the risks relating to the Investment Firms' activities, processes and systems (please see the response to the question set forth in section 3.c.1 above). Article 23 MiFID Org Reg. Investment Firms are obligated to have, where appropriate and proportionate, an internal audit function responsible for establishing, implementing and maintaining an audit plan to evaluate the adequacy and effectiveness of the Investment Firm's systems and internal control mechanisms (please see the response to the question set forth in section 3.b.2 above). Article 24 MiFID Org Reg. The compliance risk assessment should be performed regularly to ensure that the focus and the scope of compliance monitoring and advisory activities remain valid. Guideline 1 para. 14 ESMA		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
4. **In what ways are firms required to have supervisory policies and procedures for annual or periodic review that are intended to prevent and detect violations of applicable law?**			
	Guidelines on compliance function.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
5. **In what ways are firms required to have supervisory policies and procedures for investigating the character, business repute, qualifications, and experience of associated persons?**			
<u>Comparability of outcomes</u>: The EU requirements to investigate personnel provide a comparable regulatory outcome to the SEC requirements to investigate personnel. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2)(iii)(D) and MiFID are consistent in that each requires that firms establish procedures to ensure that personnel associated with the firm are sufficiently qualified and of good character. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**:			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
5. **In what ways are firms required to have supervisory policies and procedures for investigating the character, business repute, qualifications, and experience of associated persons?**			
The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Investigation of personnel Firms are required to have procedures for investigation of "the good character, business repute, qualifications, and experience" of persons prior to their association with the firm. Exchange Act rule 15Fh-3(h)(2)(iii)(D) [17 CFR 240.15Fh-3(h)(2)(iii)(D)].[23]	**Investigation of personnel** Each member of the management body of CRR Firms must be of sufficiently good repute and possess sufficient knowledge, skills and experience to perform their duties and to act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management where necessary and to effectively oversee and monitor management decision-making. Article 9(1) MiFID and Article 91(1) CRD IV. Member state laws will, in many cases, expand the scope of these	**Investigation of personnel** Article 91(1) CRD IV and Article 9(1) MiFID require each member of the management body of a CRR Firm to be of sufficiently good repute and possess sufficient knowledge, skills and experience to perform their duties. Article 91(8) CRD IV requires each member of the management body to act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management where necessary and to effectively oversee and monitor management decision-making. Guideline 172 of the EBA/ESMA Guidelines on Management Suitability requires, *inter alia*, disclosure of criminal records, investigations, enforcement	

[23] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
5. **In what ways are firms required to have supervisory policies and procedures for investigating the character, business repute, qualifications, and experience of associated persons?**			
	requirements to include other relevant staff of a CRR Firm. Information including, among other items, disclosure of criminal records, investigations, enforcement proceedings and dismissals, should be provided to regulators in order to enable them to assess the suitability of members of the management body. Guideline 172 of the EBA/ESMA Guidelines on Management Suitability. Investment Firms must employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them. Article 21(1)(a) MiFID Org Reg. Investment Firms must take all reasonable steps to identify conflicts of interest between themselves, including their	proceedings and dismissals of management body members to regulators for assessment. Article 21(1)(a) MiFID Org Reg. requires Investment Firms employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them. These regulations are comparable to the requirements set forth in Exchange Act rule 15Fh-3(h)(2)(iii)(D). We note that Exchange Act rule 15Fh-3(h)(2)(iii)(D) requires personnel considerations to take place prior to the relevant individual's association with the firm. While the EU requirements do not specify that such considerations must be made prior to an individual's association with a CRR Firm, the stated obligations are on-going and therefore apply at the outset and throughout such association.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
5. **In what ways are firms required to have supervisory policies and procedures for investigating the character, business repute, qualifications, and experience of associated persons?**			
	managers, employees and tied agents or any persons directly or indirectly linked to them by control and their clients or between one client and another, that arise in the course of providing any investment and ancillary services, or combinations thereof. Article 23(1) MiFID.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
6. **In what ways are firms required to have supervisory policies and procedures for approving and supervising the outside trading of associated persons?**			
<u>Comparability of outcomes</u>: The EU requirements regarding the supervision of associated persons provide a comparable regulatory outcome to the SEC requirements regarding the supervision of associated persons. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2)(iii)(E) and MiFID			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
6. **In what ways are firms required to have supervisory policies and procedures for approving and supervising the outside trading of associated persons?**			
are consistent in that each requires that firms establish procedures to supervise actions of associated persons and ensure that such actions do not put the firm at risk. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Actions of associated persons Firms are required to have procedures to consider whether associated persons may establish or maintain securities or commodities accounts or trading relationships at other firms, and, if permitted, procedures for the supervision of that outside trading.	**Actions of associated persons** MiFID imposes a range of requirements, including in relation to personal transactions, to ensure that a firm's staff comply with their obligations. Articles 28 and 29 MiFID Org Reg. Investment Firms must establish, implement and maintain adequate arrangements aimed at preventing certain staff from entering into personal transactions, advising or	**Actions of associated persons** Articles 28 and 29 MiFID Org Reg. impose a range of requirements in relation to personal transactions to ensure that an Investment Firm's staff comply with their obligations. Article 29 MiFID Org Reg. requires Investment Firms, among other things, to establish, implement and maintain adequate arrangements aimed at preventing certain staff from entering into personal transactions. Article 37 MiFID Org Reg. imposes specific personal transactions restrictions on	Section 81 (1) of the WpHG

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
6. **In what ways are firms required to have supervisory policies and procedures for approving and supervising the outside trading of associated persons?**			
Exchange Act rule 15Fh-3(h)(2)(iii)(E) [17 CFR 240.15Fh-3(h)(2)(iii)(E)].[24]	recommending that others enter into transactions, or disclosing information that would or would be likely to result in a person entering into a transaction or advising or recommending that another person enters into a transaction, in each case where doing so would be prohibited under MAR (i.e. contrary to inside information and market abuse restrictions), involve the misuse or improper disclosure of that confidential information, or would conflict or be likely to conflict with an obligation of the investment firm under MiFID. Article 29 MiFID Org Reg. Specific restrictions apply in respect of financial analysts and other staff involved in the production of investment research such that they cannot trade in a personal capacity, for	financial analysts and other staff involved in the production of investment research. Article 16(2) MiFID require the maintenance of a range of risk management records, including personal transaction records. These requirements are comparable to the requirements set forth in Exchange Act rule 15Fh-3(h)(2)(iii)(E).	

[24] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
6. **In what ways are firms required to have supervisory policies and procedures for approving and supervising the outside trading of associated persons?**			
	another person (including the relevant Investment Firm) in financial instruments to which investment research relates, or in any related financial instruments. Article 37 MiFID Org Reg. MiFID requires the maintenance of a range of risk management records, including personal transaction records. Article 16(2) MiFID.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. **Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?**			
<u>Comparability of outcomes</u>: The EU prohibitions against self-supervision provide a comparable regulatory outcome to the SEC prohibitions against self-supervision. In particular, the regulatory outcomes pursued under Exchange			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. **Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?**			
Act rule 15Fh-3(h)(2)(iii)(G) and MiFID and CRD IV are consistent in that each requires that firms establish procedures to prevent self-supervision and address it where unavoidable in furtherance of risk mitigation efforts. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Self-supervision Firms must keep records of descriptions of supervisory systems, including titles, qualifications, locations and responsibilities of supervisory persons. Exchange Act rule 15Fh-3(h)(2)(iii)(F) [17	**Self-supervision** **<u>MiFID</u>** MiFID requires the establishment of a 'three lines of defense' model in relation to governance, risk and compliance oversight by Investment Firms. The first line of defense comprises the front office, as directed by the policies and procedures (including in respect of conflicts of interest)	**Self-supervision** Article 22 MiFID Org Reg. requires Investment Firms to appoint a compliance officer responsible for the compliance function, ensure that persons involved in the compliance function are not involved in the performance of services or activities they monitor and the method of determining their remuneration must not, and must not be likely to, compromise their objectivity. Article	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?			
CFR 240.15Fh-3(h)(2)(iii)(F)];[25] and Prohibitions against self-supervision: Firms are required to have procedures prohibiting an associated person who performs a supervisory function from supervising his or her own activities or reporting to, or having his or her compensation or continued employment determined by, a person or persons he or she is supervising. This prohibition does not apply if the firm determines compliance is not possible "because of the firm's	that the Investment Firm is obliged to establish and front office staff are required to follow. The second line of defense comprises the compliance and risk management teams – these teams conduct supervision of the front office. The third line of defense comprises the internal/external audit team, which ensures the effectiveness of the compliance and risk management teams. Investment Firms must establish and maintain a permanent and effective compliance function which operates independently and has responsibilities including advising and assisting relevant persons responsible for carrying out investment services and activities to comply with the Investment Firm's obligations	92(2) CRD IV requires senior management and staff engaged in control functions (among others) to be subjected to enhanced remuneration oversight requirements. Staff in control functions must be independent from the business units they oversee, have appropriate authority, and are remunerated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control. Article 92(2) CRD IV further requires that remuneration of senior officers in the risk management and compliance functions be directly overseen by the remuneration committee or, if such a committee has not been established, by the management body in its supervisory function. These requirements are comparable to the requirements to establish procedures to prevent self-	

[25] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?			
size or a supervisory person's position within the firm." In that case the firm must document the factors used to reach that determination, and how the supervisory arrangement with respect to that supervisory personnel otherwise complies with the diligent supervision requirement. Exchange Act rule 15Fh-3(h)(2)(iii)(G) [17 CFR 240.15Fh-3(h)(2)(iii)(G)].[26]	under MiFID. Article 22 MiFID Org Reg. The persons involved in the compliance function must not be involved in the performance of services or activities they monitor and the method of determining their remuneration must not, and must not be likely to, compromise their objectivity. Article 22(3)(d)-(e) MiFID Org Reg. Where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of that business, Investment Firms must also establish an independent function. Article 23 MiFID Org Reg. Together, these provisions	supervision set forth in Exchange Act rule 15Fh-3(h)(2)(iii)(G). We note that the EU regulations are generally calibrated such that self-supervision will not arise (per the requirement in Article 22(3) MiFID Org Reg. that staff in the compliance function must not be involved in the performance of services or activities they monitor). To the extent that this is unavoidable (which is expected to be very rare), Article 23(1) MiFID regarding the identification, prevention and, where necessary, management of conflicts of interests provides a robust mechanism through which such issues can be resolved.	

[26] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. **Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?**			
	ensure the independence of the second line of defense such that front office staff do not self-supervise. Investment Firms must, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of investment services and activities undertaken in the course of that business, establish and maintain an internal audit function which is separate and independent from the other functions and activities of the Investment Firm. Article 24 MiFID Org Reg. This ensures the independence of the third line of defense such that compliance and risk management staff do not self-supervise.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. **Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?**			
	Further provisions on conflicts of interest apply across all three lines of defense: (a) An Investment Firm must maintain and operate effective organizational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients. Article 16(3) MiFID; (b) Investment Firms must take all reasonable steps to identify conflicts of interest between themselves, including their managers, employees and tied agents or any persons directly or indirectly linked to them by control and their clients or between one client and another, that arise in the		Section 80 (1) of the WpHG

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. **Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?**			
	course of providing any investment and ancillary services, or combinations thereof. Article 23(1) MiFID; and (c) A CRR Firm's management body must define, oversee and be accountable for the implementation of the governance arrangements that ensure effective and prudent management of the CRR Firm, including the segregation of duties in the organization and the prevention of conflicts of interest. Article 88 CRD IV and Article 9(1) MiFID. **<u>CRD IV</u>** Provisions under CRD IV are focused on preventing structural		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. **Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?**			
	conflicts of interest and self-supervision. CRR Firms must have remuneration policies and practices that are consistent with and promote sound and effective risk management. Article 74 CRD IV. Senior management and staff engaged in control functions (among others) must be subjected to enhanced remuneration oversight requirements. Article 92(2) CRD IV. Staff in control functions must be independent from the business units they oversee, have appropriate authority, and be remunerated in accordance with the achievement of the objectives linked to their functions, independent of the performance		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
7. **Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-supervision is unavoidable?**			
	of the business areas they control. Article 92(2)(e) CRD IV. The remuneration of senior officers in the risk management and compliance functions must be directly overseen by the remuneration committee or, if such a committee has not been established, by the management body in its supervisory function. Article 92(2)(f) CRD IV.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
8. **In what ways are firms required to have supervisory policies and procedures to prevent the supervisory system from being compromised due to conflicts of interest?**			
Comparability of outcomes:			

The EU requirements to prevent conflicts of interest in supervisory systems provide a comparable regulatory outcome to the SEC requirements to prevent conflicts of interest in supervisory systems. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(2)(iii)(H) and Exchange Act section 15F(j)(5) and MiFID and CRD IV are consistent in that each requires that firms establish procedures to prevent supervisory systems from being compromised due to conflicts of interest. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The following EU requirements taken together are comparable to those set forth in Exchange Act rule 15Fh-3(h)(2)(iii)(H) and Exchange Act section 15F(j)(5):			
Conflicts of interest policies and procedures: Firms are required to have procedures reasonably designed to prevent the supervisory system from being compromised due to the conflicts of interest with respect to associated persons, including their positions, the revenue they generate, or compensation that the supervisor may derive	**Conflicts of interest policies and procedures**: Please refer to the response to the question set forth in section 3.c.7 above with regards to the following requirements: 1. **Independence**. **Segregation of duties**. The persons involved in the compliance function not being involved in the performance of services or activities they monitor and the restrictions around their method of determining their remuneration. Article 22(3) MiFID Org Reg.	**Conflicts of interest policies and procedures**: 1. **Independence**. **Segregation of duties**. Article 23(1) MiFID requires Investment Firms to take all reasonable steps to identify and address conflicts of interest that they know or should know between themselves, including their managers, employees and tied agents or any persons directly or indirectly linked to them by control and their clients or between one client and another, that arise in the course of providing any investment and ancillary services, or combinations thereof. Article 16(3) MIFID	Section 80 (1) Sentence 2 no. 2 of the WpHG in conjunction with Articles 33 - 35 MiFID Org Reg.

from the associated person being supervised. Exchange Act rule 15Fh-3(h)(2)(iii)(H) [17 CFR 240.15Fh-3(h)(2)(iii)(H)].[27] The supervisory system must encompass procedures for compliance with duties set forth in Exchange Act section 15F(j), including implementing conflict of interest systems and procedures. Exchange Act rule 15Fh-3(h)(2)(iii)(I) [17 CFR 240.15Fh-3(h)(2)(iii)(I)];[28] and Exchange Act section 15F(j)(5) [15 U.S.C. 78o-10(j)(5)].[29]	The obligation on Investment Firms to establish and maintain an internal audit function separate and independent from the other functions and activities of the Investment Firm. Article 24 MiFID Org Reg. The obligation on Investment Firms to identify conflicts of interest and related requirements. Article 23(1) MiFID. The obligation on the management body to define, oversee and be accountable for the implementation of the governance arrangements, including in relation to segregation of duties matters. Article 88 CRD IV and Article 9(1) MiFID. The obligation on an Investment Firm to maintain and operate effective organizational and administrative arrangements	requires an Investment Firm to maintain and operate effective organizational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients. Article 22 MiFID Org Reg. requires Investment Firms to appoint a compliance officer responsible for the compliance function and ensure that persons involved in the compliance function must not be involved in the performance of services or activities they monitor and the method of determining their remuneration must not, and must not be likely to, compromise their objectivity. Article 24 MiFID Org Reg. requires an Investment Firm to establish and maintain an internal audit function separate and independent from the other functions and activities of the Investment Firm. Article 88 CRD IV and Article 9(1) MiFID require that a CRR Firm's	

[27] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8
[28] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8
[29] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

	to prevent conflicts of interest. Article 16(3) MIFID. 2. **Remuneration**. The obligation on CRR Firms to have remuneration policies and practices consistent with sound and effective risk management. Article 74 CRD IV. The requirement regarding (i) staff in control functions to be independent from the business units they oversee, have appropriate authority, and be remunerated independently of the performance of the business areas they control. Article 92(2)(e) CRD IV; and (ii) staff and staff engaged in control functions (among others) to be subjected to enhanced remuneration oversight requirements. Article 92(2) CRD IV. The requirement that the remuneration of senior officers in the risk management and compliance functions to be directly overseen by the remuneration committee or by the management body in its	management body oversees and is accountable for the prevention of conflicts of interest. 2. **Remuneration**. Article 74 CRD IV requires CRR Firms to have remuneration policies and practices consistent with sound and effective risk management. Article 92(2) CRD IV requires staff in control functions to be remunerated independently of the performance of business areas they control and to be subjected to enhanced remuneration oversight requirements, including (where necessary) through oversight by a remuneration committee or the management body. 3. **Conflicts of interest documentation**. Article 34 MiFID Org Reg. requires Investment Firms to have a written conflicts of interest policy appropriate to the size and organization of the Investment Firm. Under Article 35 MiFID Org Reg., Investment Firms must keep and regularly update a record of the kinds of investment or ancillary service or investment activity carried out by or on behalf of the Investment Firm in which a conflict of interest entailing a	

	supervisory function. Article 92(2)(f) CRD IV. 3. **Conflicts of interest documentation.** Investment Firms must have a written conflicts of interest policy appropriate to the size and organization of the Investment Firm. Where the Investment Firm is in a group, this policy must also take into account the circumstances which may give rise to conflicts of interest arising as a result of the structure and business activities of other members of the group. Article 34 MiFID Org Reg. The conflicts policy must identify the circumstances which might give rise to a conflict entailing a material risk of damage to the interests of one or more client and specify procedures to be followed to manage such conflicts. The procedures must include (as necessary/appropriate): (i) procedures to prevent/control information exchange; (ii) separate supervision of persons who provide services to clients whose interests may	material risk of damage to the interests of one or more clients has arisen or, in the case of an ongoing service or activity, may arise.	

	conflict (with other clients or with the Investment Firm); (iii) removal of any direct link between the remuneration of persons engaged in one activity and the remuneration of different persons, engaged in a different activity, where there may be a conflict in relation to those activities; (iv) preventing/limiting any person from exercising inappropriate influence over provision of a service; and (v) preventing/controlling the simultaneous/sequential involvement of a person in different activities where such involvement might impair management of conflicts of interest. Article 34(3) MiFID Org Reg. Investment Firms must keep and regularly update a record of the kinds of investment or ancillary service or investment activity carried out by or on behalf of the Investment Firm in which a conflict of interest entailing a material risk of damage to the interests of one or more clients has arisen or, in the case of an ongoing		

	service or activity, may arise. Article 35 MiFID Org Reg.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
9. **When are firms required to amend their policies and procedures?**			
<u>Comparability of outcomes</u>: The EU policy and procedure amendment requirements provide a comparable regulatory outcome to the SEC policy and procedure amendment requirements. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(4) and MiFID are consistent in that each requires that firms establish procedures to review and amend procedures to account for deficiencies, including deficiencies caused by changes to regulations and business conduct. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Amendments Firms must amend their written supervisory procedures to reflect material changes in applicable laws or	**Amendments** An Investment Firm must establish adequate policies and procedures sufficient to ensure compliance of the Investment Firm including its managers,	**Amendments** Article 25 MiFID Org Reg. requires senior management (and, where appropriate, the supervisory function) to assess and periodically review the effectiveness of the policies,	Section 81 of the WpHG

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
9. **When are firms required to amend their policies and procedures?**			
regulations, or in the firm's business or supervisory system. Material amendments must be promptly communicated to relevant associated persons. Exchange Act rule 15Fh-3(h)(4) [17 CFR 240.15Fh-3(h)(4)].[30]	employees and tied agents with its obligations under MiFID. Article 16(2) MiFID. The compliance function must monitor and regularly assess the actions taken to address any deficiencies in an Investment Firm's compliance with its obligations under MiFID. Article 22 MiFID Org Reg. Investment Firms must ensure that their relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities; establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the Investment Firm; and establish, implement and maintain effective internal reporting and communication of information at	arrangements and procedures put in place to comply with the obligations under MiFID, and to take appropriate measures to address any deficiencies. Article 25 MiFID Org Reg. also requires that senior management and the supervisory function must receive on a frequent basis, and at least annually, written reports on compliance, risk management and internal audit (covered by Articles 22, 23 and 24 MiFID Org Reg.) indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies. These requirements are comparable to the requirements in Exchange Act rule 15Fh-3(h)(4)(i). We note that the Exchange Act requirements to promptly communicate amendments to supervisory policies to relevant associated persons are not expressly set forth in the EU regulations. However, in practice this obligation	

[30] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
9. **When are firms required to amend their policies and procedures?**			
	all relevant levels of the Investment Firm. Article 21 MiFID Org Reg. In practice, this means that changes to policies and procedures reflecting changes in applicable laws or regulations, or in the Investment Firm's business or supervisory system must be communicated at all levels of the Investment Firm in order to be able to comply with Article 21 MiFID Org Reg. Senior management must receive on a frequent basis, and at least annually, written reports on the matters regarding compliance, risk management and internal audit (covered by Articles 22, 23 and 24 MiFID Org Reg.) indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies. The supervisory function, if any, must receive on a regular basis written reports on	applies in order for Investment Firms to meet their obligation under Article 21 MiFID Org Reg. to have effective internal reporting and communication of information at all relevant levels of the Investment Firm and for the relevant persons to be able to properly discharge their responsibilities.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
9. **When are firms required to amend their policies and procedures?**			
	the same matters. Article 25 MiFID Org Reg. Investment Firms must assess and periodically review, on an at least annual basis, the conflicts of interest policy. Article 35 MiFID Org Reg. requires senior management to receive on a frequent basis, and at least annually, written reports on the client conflicts of interest record. Article 34 MiFID Org Reg. Investment Firms must review their best execution policy and arrangements at least annually. Articles 65 and 66 MiFID Org Reg. CRR Firms' remuneration policies must be reviewed at least on an annual basis. Article 92 CRD IV.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
10. **What is the potential liability that firms or their personnel may face for failing to supervise compliance with requirements applicable to their security-based swap businesses? Does following policies and procedures provide a safe harbour from this potential liability or otherwise reduce the potential liability? If so, what are the prerequisites (e.g., no "red flags") for that safe harbour or reduction of liability?**			
A firm or its associated personS will not be deemed to have failed to diligently supervise if the firm establishes, maintains and applies written policies and procedures that would reasonably be expected to prevent and detect violations, so long as the firm and its associated persons reasonably have discharged the associated duties and did not have a reasonable basis to believe that the policies and procedures were not being followed. Exchange Act rule 15Fh-	There are a range of supervisory actions that regulators can take in response to failures in CRR Firms' implementation of CRD IV and CRR. These include increases in own funds and liquid assets, enhancements to policies and procedures, and enhanced reporting requirements (among others). Article 104 CRD IV and Article 69 MiFID. Regulators have the power to issue public statements of breach, cease and desist orders, and monetary fines of up to 10% annual net turnover (legal persons) or EUR 500,000 (natural persons). Article 66 CRD IV and Article 70 MiFID. The severity of the consequence (e.g. the amount of fines) is determined at the discretion of	**Comparability of outcomes**: The regulatory outcomes pursued under Exchange Act rule 15Fh-3(h)(3) and CRD IV are consistent in that each subject firms and/or their personnel to potential liability for failure to supervise or satisfy other compliance obligations. The EU regime is more onerous in this respect, as it does not provide for a safe harbour for compliance with a CRR Firm's policies and procedures, etc.	Sections 120, 6 (9, 10), 109 (2) of the WpHG **Comment on EU Assessment:** Article 66 CRD IV provides for a monetary fine of up to EUR 5,000,000 for natural persons.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Supervisory System Policies and Procedures			
10. **What is the potential liability that firms or their personnel may face for failing to supervise compliance with requirements applicable to their security-based swap businesses? Does following policies and procedures provide a safe harbour from this potential liability or otherwise reduce the potential liability? If so, what are the prerequisites (e.g., no "red flags") for that safe harbour or reduction of liability?**			
3(h)(3) [17 CFR 240.15Fh-3(h)(3)].[31]	regulators in accordance with member state laws. There is no formal safe harbour established in EU law for compliance with a CRR Firm's policies and procedures, etc. (though these may be established in the laws of member states).		

[31] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

d. Subcategory: Chief Compliance Officer Designation, Reporting Authority and Job Security

The supervision and CCO requirements in part address the need for firms to designate individuals with responsibility and adequate authority over compliance matters. In making a substituted compliance determination, the SEC will consider the specificity of the CCO designation, duties and annual report requirements set forth in Exchange Act section 15F, and will consider whether "the requirements of the foreign financial regulatory system regarding CCO obligations" are comparable. Exchange Act rule 3a71-6(d)(2) [17 CFR 240.3a71-6(d)(2)].[32]

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Chief Compliance Officer Designation, Reporting Authority and Job Security			
1. **Are firms required to establish a chief compliance officer or similar function?**			
CCO appointment The Exchange Act requires firms to designate an individual to serve as a CCO. Exchange Act section 15F(k)(1) [15 U.S.C. 78o-10(k)(1)];[33] *see* also Exchange Act rule 15Fk-1(a) [17 CFR 240.15Fk-1(a)].[34]	**CCO appointment** An Investment Firm must appoint a compliance officer responsible for the compliance function and for any reporting as to compliance. Article 22(3) MiFID Org Reg.	**<u>Comparability of outcomes and specific requirements</u>**: While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **CCO appointment** Exchange Act section 15F(k)(1) and Exchange Act rule 15Fk-1(a) and MiFID are consistent in that each requires that firms appoint a CCO. *See* Article 22(3) MiFID Org Reg., which requires that Investment Firms appoint a compliance officer responsible for the	Section 87 (5) of the WpHG

[32] https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf
[33] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[34] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Chief Compliance Officer Designation, Reporting Authority and Job Security			
1. **Are firms required to establish a chief compliance officer or similar function?**			
		compliance function and for any reporting as to compliance.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Chief Compliance Officer Designation, Reporting Authority and Job Security			
2. **How do the requirements of your jurisdiction address lines of reporting for the chief compliance officer or similar function? How do those requirements otherwise help ensure that those persons have necessary authority and resources?**			
CCO reporting line The CCO must report "directly to the board of directors or to the senior officer" of the firm. Exchange Act section 15F(k)(2)(A) [15 U.S.C. 78o-10(k)(2)(A)];[35] *see also* Exchange Act rule 15Fk-	**CCO reporting line** The compliance officer may only be appointed and replaced by the management body. Article 22(3) MiFID Org Reg. The compliance officer must submit reports directly to senior management, frequently, and at least annually, and directly to the management body. Articles 22(2)(c) and 25(2) MiFID Org Reg. In practice, these requirements dictate that the	**<u>Comparability of outcomes</u>**: The EU requirements for compliance officer reporting, authority and resources provide a comparable regulatory outcome to the SEC requirements for compliance officer reporting, authority and resources. In particular, the regulatory outcomes pursued under Exchange Act section 15F(k)(2)(A) and Exchange Act rule 15Fk-1(b)(1) and MiFID are consistent in that each ultimately requires that	

[35] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Chief Compliance Officer Designation, Reporting Authority and Job Security			
2. **How do the requirements of your jurisdiction address lines of reporting for the chief compliance officer or similar function? How do those requirements otherwise help ensure that those persons have necessary authority and resources?**			
1(b)(1) [17 CFR 240.15Fk-1(b)(1)].[36]	compliance officer will be a senior member of staff.	the CCO has a reporting line to the management body. *See* also Article 22(3) MiFID Org Reg., which provides that the CCO may only be appointed and replaced by the management body.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Chief Compliance Officer Designation, Reporting Authority and Job Security			
3. Do the requirements of your jurisdiction provide protections to the chief compliance officer or similar function with regard to removal, compensation or sanctioning? If so, what are those protections?			
CCO removal, compensation and sanctioning A majority of a firm's board of directors must	**CCO removal, compensation and sanctioning** The remuneration of senior officers in the risk management and compliance functions must be	**<u>Comparability of outcomes</u>**: The EU requirements regarding the removal, compensation and sanctioning of compliance officers provide a comparable regulatory	

[36] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Chief Compliance Officer Designation, Reporting Authority and Job Security			
3. Do the requirements of your jurisdiction provide protections to the chief compliance officer or similar function with regard to removal, compensation or sanctioning? If so, what are those protections?			
approve the compensation and removal of a CCO. Exchange Act rule 15Fk-1(d) [17 CFR 240.15Fk-1(d)].[37]	directly overseen by the remuneration committee or, if such a committee has not been established, by the management body in its supervisory function. Article 92 CRD IV. The method for determining the remuneration of staff in the compliance function, which will include the CCO, must not compromise their objectivity or be likely to do so. Article 22(3)(e) MiFID Org Reg. An Investment Firm that can demonstrate that, due to the nature, scale and complexity of its business and the nature and range of the investment services and activities that it conducts, is not obliged to meet this requirement so long as its compliance function continues	outcome to the SEC requirements regarding the removal, compensation and sanctioning of compliance officers. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fk-1(d) and MiFID and CRD IV are consistent in that, although MiFID and CRD IV do not specifically address CCO compensation and removal requirements, each require management to oversee and decide upon such matters. *See* Article 92 CRD IV, which provides that remuneration of senior officers in the risk management and compliance functions must be directly overseen by the remuneration committee or, if such a committee has not been established, by the management body in its supervisory function. *See also* Article 22(3) MiFID Org Reg., which provides that the CCO may only be	

[37] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Chief Compliance Officer Designation, Reporting Authority and Job Security			
3. Do the requirements of your jurisdiction provide protections to the chief compliance officer or similar function with regard to removal, compensation or sanctioning? If so, what are those protections?			
	to be effective. This effectiveness must be assessed on a regular basis). Investment Firms must establish and maintain a permanent and effective compliance function which operates independently. Article 22(2) MiFID Org Reg. In addition, Article 22(3) MiFID Org Reg. provides that the CCO may only be appointed and replaced by the management body.	appointed and replaced by the management body.	

e. Subcategory: Chief Compliance Officer Policies and Procedures

CCOs must ensure that firms establish, follow and update appropriate compliance policies and procedures. When making a substituted compliance determination, the SEC will consider the specificity of the CCO designation, duties and annual report requirements set forth in Exchange Act section 15F, and will consider whether "the requirements of the foreign financial regulatory system regarding CCO obligations" are comparable. Exchange Act rule 3a71-6(d)(2) [17 CFR 240.3a71-6(d)(2)].[38]

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<tr><th>SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)</th><th>EU Requirement and/or Policy Goal Summary</th><th>Comparability Assessment</th><th>National Measures Germany</th></tr>
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<tr><td colspan="3">1. Is the chief compliance officer or similar function required periodically to review the firm's compliance with applicable requirements? Is a written assessment required?</td><td></td></tr>
<tr><td colspan="3"><u>Comparability of outcomes</u>:

The EU requirements regarding periodic compliance review provide a similar regulatory outcome to the SEC requirements regarding periodic compliance review. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fk-1(b)(2)(i) and MiFID are consistent in that each requires that the CCO or a similar function periodically reviews a firm's policies and procedures to ensure compliance with applicable laws.

While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.

<u>Comparability of specific requirements</u>:

The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:</td><td></td></tr>
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[38] https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
1. Is the chief compliance officer or similar function required periodically to review the firm's compliance with applicable requirements? Is a written assessment required?			
CCOs must "review the compliance" of a firm. Exchange Act section 15F(k)(2)(B) [15 U.S.C. 78o-10(k)(2)(B)].[39] CCOs must review a firm's compliance with respect to requirements under Exchange Act section 15F and underlying rules and regulations, "where the review shall involve preparing the registrant's annual assessment of its written policies and procedures reasonably designed to achieve compliance with" the statute and the rules by a firm. Exchange Act rule 15Fk-1(b)(2)(i) [17	Senior management must receive on a frequent basis, and at least annually, written reports on compliance, risk management and internal audit (covered by Articles 22, 23 and 24 MiFID Org Reg.) indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies. The supervisory function, if any, must receive on a regular basis written reports on the same matters. Article 25 MiFID Org Reg.	Article 25 MiFID Org Reg. requires that senior management must receive on a frequent basis, and at least annually, written reports on compliance, risk management and internal audit indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies. The supervisory function, if any, must receive on a regular basis written reports on the same matters. This requirement is comparable to the requirement set forth in Exchange Act rule 15Fk-1(b)(2)(i).	

[39] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
1. **Is the chief compliance officer or similar function required periodically to review the firm's compliance with applicable requirements? Is a written assessment required?**			
CFR 240.15Fk-1(b)(2)(i)].[40]			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
2. **Is the chief compliance officer or similar function required to ensure that the firm implements policies and procedures to remediate noncompliance? What methods are to be used to identify noncompliance?**			
Comparability of outcomes: The EU requirements to ensure compliance and identify noncompliance provide a comparable regulatory outcome to the SEC requirements to ensure compliance and identify noncompliance. In particular, the regulatory outcomes pursued under Exchange Act section 15F(k)(2) and Exchange Act rule 15Fk-1(b) and MiFID are consistent in that each requires that the CCO or a similar function ensure that firms implement policies and procedures to identify and remediate noncompliance. In practice it is likely that the CCO will head the compliance function and will ensure the implementation of changes recommended by the audit function. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.			

[40] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
2. **Is the chief compliance officer or similar function required to ensure that the firm implements policies and procedures to remediate noncompliance? What methods are to be used to identify noncompliance?**			
<u>Comparability of specific requirements</u>: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Ensure compliance CCOs must "ensure compliance". Exchange Act section 15F(k)(2)(E) [15 U.S.C. 78o-10(k)(2)(E)].[41] CCOs must take "reasonable steps" to ensure that: A firm "establishes, maintains and reviews written policies and procedures reasonably designed to achieve compliance with" the Exchange Act and	**Ensure compliance** An Investment Firm must establish a compliance function to monitor and regularly assess the actions taken to address any deficiencies in an Investment Firm's compliance with its obligations under MiFID. The compliance function must report to senior management on the implementation and effectiveness of the overall control environment. Article 22 MiFID Org Reg. Senior management (and, where appropriate, the supervisory function) must assess and	**Ensure compliance** Article 22 MiFID Org Reg. requires the compliance function to monitor and regularly assess the actions taken to address any deficiencies in an Investment Firm's compliance with its obligations under MiFID. Article 25 MiFID Org Reg. requires senior management (and, where appropriate, the supervisory function) to assess and periodically review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations under MiFID, and to take appropriate measures to address any deficiencies. Taken as a whole, these requirements are comparable to those set forth in	

[41] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
2. Is the chief compliance officer or similar function required to ensure that the firm implements policies and procedures to remediate noncompliance? What methods are to be used to identify noncompliance?			
underlying rules and regulations relating to its business as a dealer. Exchange Act rule 15Fk-1(b)(2) [17 CFR 240.15Fk-1(b)(2)];[42] The registrant establishes and follows procedures for the "handling, management response, remediation, retesting, and resolution" of non-compliance issues. Exchange Act rule 15Fk-1(b)(2)(iii) [17 CFR 240.15Fk-1(b)(2)(iii)];[43] and Exchange Act section 15F(k)(2)(G) [15 U.S.C. 78o-10(k)(2)(G)];[44] and	periodically review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations under MiFID, and to take appropriate measures to address any deficiencies. Article 25 MiFID Org Reg.	Exchange Act section 15F(k)(2) and Exchange Act rule 15Fk-1(b).	

[42] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[43] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[44] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
2. **Is the chief compliance officer or similar function required to ensure that the firm implements policies and procedures to remediate noncompliance? What methods are to be used to identify noncompliance?**			
Identify noncompliance A firm "establishes, maintains and reviews" policies and procedures to remediate noncompliance issues that have been identified by means such as compliance office review, look-back, internal or external audit finding, self-reporting, and validated complaints. Exchange Act rule 15Fk-1(b)(2)(ii) [17 CFR 240.15Fk-1(b)(2)(ii)];[45] and Exchange Act section 15F(k)(2)(F) [15 U.S.C. 78o-10(k)(2)(F)].[46]	**Identify noncompliance** Where appropriate and proportionate, an Investment Firm must have an internal audit function, separate and independent from the other functions that is responsible for establishing, implementing and maintaining an audit plan to evaluate the adequacy of the Investment Firm's systems and internal control mechanisms, issuing and overseeing the implementation of recommendations based on the plan and reporting to senior management in relation to internal audit matters. Article 24 MiFID Org Reg. Non-compliance matters should be addressed in the written	**Identify noncompliance** Article 24 MiFID Org Reg. requires, where appropriate and proportionate, an Investment Firm to have an internal audit function, separate and independent from the other functions that is responsible for establishing, implementing and maintaining an audit plan to evaluate the adequacy of the Investment Firm's systems and internal control mechanisms, and to issue and oversee the implementation of recommendations based on the plan. These requirements are comparable to those set forth in Exchange Act rule 15Fk-1(b)(2)(ii) and Exchange Act section 15F(k)(2)(F).	

[45] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[46] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
2. Is the chief compliance officer or similar function required to ensure that the firm implements policies and procedures to remediate noncompliance? What methods are to be used to identify noncompliance?			
	compliance reports to senior management, where relevant, including: (a) a summary of major findings of the review of the policies and procedures; (b) a summary of on-site inspections or desk-based reviews performed by the compliance function including breaches and deficiencies in the Investment Firm's organization and compliance processes that have been discovered and appropriate measures taken as a result; (c) other significant compliance issues that have occurred since the last report; and (d) material correspondence with competent authorities (where senior management has not previously been made aware of		

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2. **Is the chief compliance officer or similar function required to ensure that the firm implements policies and procedures to remediate noncompliance? What methods are to be used to identify noncompliance?**			
	these through other channels). Guideline 3 para. 29 ESMA Guidelines on compliance function.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
3. **Is the chief compliance officer or similar function required to take steps to resolve conflicts of interest? To what extent are board members or senior personnel required to participate in the resolution of conflicts of interest?**			
Comparability of outcomes: The EU requirements for compliance officers and management to resolve conflicts of interest provide a similar regulatory outcome to the SEC requirements for compliance officers and management to resolve conflicts of interest. In particular, the regulatory outcomes pursued under Exchange Act section 15F(k)(2)(C) and Exchange Act rule 15Fk-1(b)(3) and MiFID and CRD IV are consistent in that each requires the CCO or a similar function to resolve conflicts of interest. Moreover, although the onus under MiFID is on the Investment Firm, given the obligation to appoint a CCO and to establish, implement and maintain an effective conflicts of interest policy, these duties will, in practice, fall to the CCO.			

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
3. **Is the chief compliance officer or similar function required to take steps to resolve conflicts of interest? To what extent are board members or senior personnel required to participate in the resolution of conflicts of interest?**			
While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Conflicts of interest resolution CCOs, in consultation with the board of directors or the senior officer of the firm, must "take reasonable steps to resolve any material conflicts of interest that may arise." Exchange Act rule 15Fk-1(b)(3) [17 CFR 240.15Fk-1(b)(3)];[47] and Exchange Act section 15F(k)(2)(C)	**Conflicts of interest resolution** Investment Firms must take all reasonable steps to identify conflicts of interest, as explained in response to the question set forth in section 3.c.5 above. Article 23(1) MiFID. An Investment Firm must maintain and operate effective organizational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of	**Conflicts of interest resolution** Article 23(1) MiFID requires Investment Firms to take all reasonable steps to identify conflicts and address conflicts of which they are or should be aware. Article 16(3) MIFID requires an Investment Firm to maintain and operate effective organizational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients. Article 25 MiFID Org Reg. requires	Section 80 (1) sentence 2 no. 2 of the WpHG in conjunction with Articles 33, 34 MiFID Org Reg.

[47] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
3. **Is the chief compliance officer or similar function required to take steps to resolve conflicts of interest? To what extent are board members or senior personnel required to participate in the resolution of conflicts of interest?**			
[15 U.S.C. 78o-10(k)(2)(C)].[48]	interest from adversely affecting the interests of its clients. Article 16(3) MIFID. As mentioned above in response to the question set forth in section 3.e.2, an Investment Firm must have a compliance function and, where appropriate, an audit function required, among other things, to monitor and regularly assess the actions taken to address any deficiencies in an Investment Firm's compliance with its obligations under MiFID (i.e., including with regards to conflicts of interest matters). Articles 22 and 24 MiFID Org Reg. Senior management (and, where appropriate, the supervisory function) must assess and periodically review the effectiveness of the policies,	senior management (and, where appropriate, the supervisory function) to assess and periodically review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations under MiFID, and to take appropriate measures to address any deficiencies. Taken as a whole, these requirements are comparable to those set forth in Exchange Act section 15F(k)(2)(C) and Exchange Act rule 15Fk-1(b)(3).	

[48] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
3. Is the chief compliance officer or similar function required to take steps to resolve conflicts of interest? To what extent are board members or senior personnel required to participate in the resolution of conflicts of interest?			
	arrangements and procedures put in place to comply with the obligations under MiFID, and to take appropriate measures to address any deficiencies. Article 25 MiFID Org Reg. Record-keeping requirements regarding conflicts of interest also apply, as fully described in response to the question set forth in section 3.c.8 above. Article 35 MiFID Org Reg.		
Senior management involvement CCOs, in consultation with the board of directors or the senior officer of the firm, must "take reasonable steps to resolve any material conflicts of interest that may arise." Exchange Act rule 15Fk-1(b)(3) [17 CFR 240.15Fk-	**Senior management involvement** The management body must define, oversee and be accountable for the implementation of the governance arrangements that ensure effective and prudent management of the CRR Firm, including the segregation of duties in the organization and the prevention of conflicts of interest.	**Senior management involvement** Article 88 CRD IV and Article 9(1) MiFID require that management bodies oversee and be accountable for the implementation of the governance arrangements that ensure effective and prudent management, including with regards to the prevention of conflicts of interest. Article 35 MiFID Org Reg. requires senior management to receive on a frequent basis, and at least annually, written reports on the client conflicts of interest record.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
3. **Is the chief compliance officer or similar function required to take steps to resolve conflicts of interest? To what extent are board members or senior personnel required to participate in the resolution of conflicts of interest?**			
1(b)(3)];[49] and Exchange Act section 15F(k)(2)(C) [15 U.S.C. 78o-10(k)(2)(C)].[50]	Article 9(1) MiFID Article 88 CRD IV.	These requirements are comparable to those set forth in Exchange Act section 15F(k)(2)(C) and Exchange Act rule 15Fk-1(b)(3).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
4. **Is the chief compliance officer or similar function required to administer all policies and procedures that are required by law?**			
Comparability of outcomes: The EU compliance officer requirements provide a comparable regulatory outcome to the SEC compliance officer requirements. While administrative responsibilities are slightly different under MiFID (responsibility rests with senior management, rather than with the CCO, to ensure that they assess and periodically review the effectiveness of the Investment Firm's policies, procedures and arrangements), in practice, the CCO of an Investment Firm will (i) head the compliance function and (ii) ensure that reports on that function are made to senior management.			

[49] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[50] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
4. **Is the chief compliance officer or similar function required to administer all policies and procedures that are required by law?**			
While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Required policies and procedures CCOs must administer each policy and procedure that is required to be established. Exchange Act rule 15Fk-1(b)(4) [17 CFR 240.15Fk-1(b)(4)];[51] and Exchange Act section 15F(k)(2)(D) [15 U.S.C. 78o-10(k)(2)(D)].[52]	**Required policies and procedures** Investment Firms must establish and maintain a permanent and effective compliance function that operates independently and has responsibilities including advising and assisting relevant persons responsible for carrying out investment services and activities to comply with the Investment Firm's obligations under MiFID. Article 22(2) MiFID Org Reg. An Investment Firm must appoint a compliance officer responsible	**Required policies and procedures** Article 22(2) MiFID Org Reg. requires Investment Firms to establish and maintain a permanent and effective compliance function that operates independently and has responsibilities including advising and assisting relevant persons responsible for carrying out activities to comply with the Investment Firm's obligations under MiFID. Article 25 MiFID Org Reg. requires an Investment Firm to ensure that senior management, and, where appropriate, the supervisory	

[51] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[52] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Chief Compliance Officer Policies and Procedures			
4. **Is the chief compliance officer or similar function required to administer all policies and procedures that are required by law?**			
	for the compliance function and for any reporting as to compliance required by Article 22(2) MiFID Org Reg. Article 22(3) MiFID Org Reg. An Investment Firm must ensure that senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the Investment Firm complies with its obligations under MiFID. Article 25 MiFID Org Reg.	function, are responsible for ensuring that the Investment Firm complies with its obligations under MiFID. Taken as a whole, these requirements are comparable to the requirements in Exchange Act section 15F(k)(2)(D) and Exchange Act rule 15Fk-1(b)(4).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany

e. Subcategory: Chief Compliance Officer Policies and Procedures			
5. **Are firms permitted to rely on another corporate officer to perform a similar function to a chief compliance officer? If so, to what extent is that job function similar the chief compliance officer job function described by Exchange Act requirements?**			
Performance of the CCO function Firms must appoint a CCO. *See* Exchange Act rule 15Fk-1 [17 CFR 240.15Fk-1];[53] and Exchange Act section 15F(k) [15 U.S.C. 78o-10(k)].[54]	**Performance of the CCO function** As explained above in response to the questions set forth in sections 3.d.2 and 3.b.2, respectively, Investment Firms must establish and maintain a permanent and effective compliance function and must also appoint a compliance officer responsible for the compliance function. Articles 22(2) and 22(3) MiFID Org Reg.	**<u>Comparability of outcomes</u>**: The EU requirements to establish a compliance framework and officer provide a comparable regulatory outcome to the SEC requirements to establish a compliance framework and officer. In particular, the regulatory outcomes pursued under Exchange Act section 15F(k) and Exchange Act rule 15Fk-1 and MiFID are consistent in that each requires the CCO and, from the EU perspective, a similar function to ensure a firm's policies and procedures are compliant with applicable regulations. *See* Article 22(2) of MiFID Org Reg., which requires Investment Firms to establish and maintain a permanent and effective compliance function that operates independently and has responsibilities including advising and assisting relevant persons, such as a CCO, responsible for carrying out investment services and activities to comply with the Investment Firm's obligations under MiFID. *See also* Article 22(3) MiFID Org Reg., which	

[53] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[54] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

		requires Investment Firms to appoint a compliance officer responsible for the compliance function and for any reporting as to compliance required by Article 22(2) MiFID Org Reg.	

f. Subcategory: Chief Compliance Officer Reports

The supervision and CCO requirements address the need for CCOs (or similar functions) to be responsible for appropriate periodic reports addressing compliance matters. When making a substituted compliance determination, the SEC will consider the specificity of the CCO designation, duties and annual report requirements set forth in Exchange Act section 15F, and will consider whether "the requirements of the foreign financial regulatory system regarding CCO obligations" are comparable. Exchange Act rule 3a71-6(d)(2) [17 CFR 240.3a71-6(d)(2)].[55]

The 2013 CFTC Comparability Determination for the European Union: Certain Entity-Level Requirements (**CFTC Entity-Level Guidance**) found substituted compliance to be applicable because the compliance officer requirements under MiFID, including compliance officer report requirements, are "generally identical in intent" and "comparable to and as comprehensive as" the CFTC requirements. Moreover, the CFTC Entity-Level Guidance recognized that substituted compliance is applicable despite no requirement to provide compliance reports to regulators so long as firms certify and furnish the annual compliance report to the CFTC. CFTC Entity-Level Guidance at 78928.[56]

SEC Requirement/or and Policy Goal Summary per SEC (with link to the US rule)	**EU Requirement and/or Policy Goal Summary**	**Comparability Assessment**	**National Measures Germany**
f. Subcategory: Chief Compliance Officer Reports			
1. **Are firms required to produce annual or other periodic compliance reports? If so, who is required to prepare them?**			
<u>Comparability of outcomes</u>: The EU Requirement and Policy Goal Summary provide for similar outcomes as the SEC Requirement and Policy Goal Summary. In particular, the regulatory outcomes pursued under Exchange Act section 15F(k)(3)(A) and MiFID are consistent in that each requires the CCO or a similar function to produce compliance reports at least annually. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**:			

[55] https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf
[56] https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-30980a.pdf

SEC Requirement/or and Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
1. **Are firms required to produce annual or other periodic compliance reports? If so, who is required to prepare them?**			
The below EU requirements are, when taken together, comparable to analogous SEC requirements in the following ways:			
Compliance report CCOs must prepare and sign a compliance report annually. Exchange Act section 15F(k)(3)(A) [15 U.S.C. 78o-10(k)(3)(A)].[57]	**Compliance report** Senior management must receive on a frequent basis, and at least annually, written reports on compliance, risk management and internal audit (covered by Articles 22, 23 and 24 MiFID Org Reg.), indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies. The supervisory function, if any, must receive on a regular basis written reports on the same matters. Article 25 MiFID Org Reg. These reports must be submitted to senior management by the compliance officer, the risk management department, and	**Compliance report** Article 25 MiFID Org Reg. requires that an Investment Firm's senior management receive on a frequent basis, and at least annually, written reports on compliance, risk management and internal audit (covered by Articles 22, 23 and 24 MiFID Org Reg.) indicating whether appropriate remedial measures have been taken in the event of any deficiencies. The supervisory function, if any, must receive on a regular basis written reports on the same matters. These reports must be submitted to senior management by the compliance officer, the risk management department, and the internal (or external) audit department, respectively. Articles	

[57] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement/or and Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
1. Are firms required to produce annual or other periodic compliance reports? If so, who is required to prepare them?			
	the internal (or external) audit department, respectively. Articles 22(3), 23(2) and 24(c) MiFID Org Reg.	22(3), 23(2) and 24(c) MiFID Org Reg. These requirements are comparable to the requirements in Exchange Act section 15F(k)(3)(A).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
2. What are the required contents of the compliance reports?			
Compliance report contents The compliance report must include: 1. Description of the firm's written compliance policies and procedures, including the code of ethics	**Compliance report contents** The compliance report submitted to senior management must address the implementation and effectiveness of the overall control environment for investment services and activities, on the risks that have been identified and on the complaints-handling reporting as well as remedies undertaken or to be	**<u>Comparability of outcomes and specific requirements</u>**: The EU compliance report content requirements provide a comparable regulatory outcome to the SEC compliance report content requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15F(k)(3)(A) and Exchange Act rule 15Fk-1(c)(2) and MiFID are consistent as to the contents of compliance reports in that each requires a description of a firm's	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
2. **What are the required contents of the compliance reports?**			
and conflict of interest policies. Exchange Act section 15F(k)(3)(A) [15 U.S.C. 78o-10(k)(3)(A)];[58] 2. Self-assessment of the effectiveness of the compliance policies and procedures. Exchange Act rule 15Fk-1(c)(2)(i)(A) [17 CFR 240.15Fk-1(c)(2)(i)(A)];[59] 3. Material changes to the firm's policies and	undertaken. Article 22(2) MiFID Org Reg. This compliance report (and any ad hoc reports, where necessary) must address any significant risk of failure by the Investment Firm to comply with its obligations under MiFID. Article 22(3)(c) MiFID Org Reg. The following matters should be addressed in the written compliance reports, where relevant: 1. a description of the implementation and effectiveness of the overall control environment for investment services and activities;	compliance procedures, assessment of such procedures, implementation of changes, areas of improvement, material non-compliance and deficiencies. *See* Article 22(2) MiFID Org Reg., which requires the compliance report submitted to senior management to address the implementation and effectiveness of the overall control environment for investment services and activities, on the risks that have been identified and on the complaints-handling reporting as well as remedies undertaken or to be undertaken. As this report must address compliance with all obligations under MiFID, it must include identification of risks that may arise from any lack of resources or other deficiencies in the compliance department.	

[58] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[59] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
2. **What are the required contents of the compliance reports?**			
procedures. Exchange Act rule 15Fk-1(c)(2)(i)(B) [17 CFR 240.15Fk-1(c)(2)(i)(B)];[60] 4. Areas for improvement. Exchange Act rule 15Fk-1(c)(2)(i)(C) [17 CFR 240.15Fk-1(c)(2)(i)(C)];[61] 5. Material non-compliance matters identified. Exchange Act rule 15Fk-1(c)(2)(i)(D) [17 CFR 240.15Fk-	2. a summary of major findings of the review of the policies and procedures; 3. a summary of on-site inspections or desk-based reviews performed by the compliance function including breaches and deficiencies in the Investment Firm's organization and compliance processes that have been discovered and appropriate measures taken as a result; 4. risks identified in the scope of the compliance function's monitoring activities; 5. relevant changes and developments in regulatory requirements over the period covered by the report and the measures taken and to be taken to ensure compliance with the changed		

[60] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[61] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
2. **What are the required contents of the compliance reports?**			
1(c)(2)(i)(D)];[62] and 6. Compliance resources and deficiencies. Exchange Act rule 15Fk-1(c)(2)(i)(E) [17 CFR 240.15Fk-1(c)(2)(i)(E)].[63]	requirements (where senior management has not previously been made aware of these through other channels); 6. other significant compliance issues that have occurred since the last report; and 7. material correspondence with competent authorities (where senior management has not previously been made aware of these through other channels). Guideline 3 para. 29 ESMA Guidelines on compliance function. The compliance function must have the necessary authority, resources, expertise and access to all relevant information. Article 22(3)(a) MiFID Org Reg.		

[62] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[63] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
3. **Are such reports required to disclose material non-compliance matters identified and the resources devoted to compliance efforts?**			
Compliance report disclosures The compliance report must include: 1. Material non-compliance matters identified. Exchange Act rule 15Fk-1(c)(2)(i)(D) [17 CFR 240.15Fk-1(c)(2)(i)(D)];[64] and 2. Compliance resources and deficiencies. Exchange Act rule 15Fk-1(c)(2)(i)(E) [17	**Compliance report disclosures** The compliance report submitted to senior management must address the implementation and effectiveness of the overall control environment for investment services and activities, on the risks that have been identified and on the complaints-handling reporting as well as remedies undertaken or to be undertaken. Article 22(2) MiFID Org Reg. This compliance report (and any ad hoc reports, where necessary) must address any significant risk of failure by the Investment Firm to comply with its obligations under MiFID. Article 22(3)(c) MiFID Org Reg. The compliance function must have the necessary authority,	**<u>Comparability of outcomes and specific requirements</u>**: The EU compliance report disclosure requirements provide a comparable regulatory outcome to the SEC compliance report disclosure requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15F(k)(3)(A) and Exchange Act rule 15Fk-1(c)(2) and MiFID are consistent as to the contents of compliance reports in that each requires a description of a firm's compliance procedures, assessment of such procedures, implementation of changes, areas of improvement, material non-compliance and deficiencies. *See* Article 22(2) MiFID Org Reg., which requires the compliance report submitted to senior management to address the implementation and effectiveness of the overall control environment for investment services and activities, on	

[64] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
3. **Are such reports required to disclose material non-compliance matters identified and the resources devoted to compliance efforts?**			
CFR 240.15Fk-1(c)(2)(i)(E)].[65]	resources, expertise and access to all relevant information. Article 22(3)(a) MiFID Org Reg.	the risks that have been identified and on the complaints-handling reporting as well as remedies undertaken or to be undertaken. As this report must address compliance with all obligations under MiFID, it must include identification of risks that may arise from any lack of resources or other deficiencies in the compliance department.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
4. **Are compliance reports subject to certification and internal review requirements? If so, how?**			
A compliance report must accompany each appropriate financial report that the firm is required to furnish to the SEC, and include a	**Internal review of compliance reports** Any compliance-related monitoring and reporting is subject to internal review by	**<u>Comparability of outcomes and specific requirements</u>**: The EU compliance report requirements provide a comparable regulatory outcome to the SEC	

[65] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
4. **Are compliance reports subject to certification and internal review requirements? If so, how?**			
certification that, under penalty of law, the report is accurate and complete. Exchange Act section 15F(k)(3)(B) [15 U.S.C. 78o-10(k)(3)(B)].[66] **Internal review of compliance reports** Compliance reports must be submitted to the firm's directors and audit committee (or equivalent bodies) and senior officer prior to submission to the SEC. Exchange Act rule 15Fk-1(c)(2)(ii)(B) [17 CFR 240.15Fk-1(c)(2)(ii)(B)].[67] Compliance reports and obligations must be discussed in one or	various functions or senior management within the Investment Firm. This includes the following requirements: • The compliance function must monitor and regularly assess the actions taken to address any deficiencies in an Investment Firm's compliance with its obligations under MiFID. Article 22 MiFID Org Reg. The Investment Firm's audit function, where one is required, must be separate and independent from the other functions and responsible for establishing, implementing and maintaining an audit plan to evaluate the adequacy of the Investment Firm's systems and internal control	compliance report requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15F(k)(3)(B) and Exchange Act rule 15Fk-1(c)(2) and MiFID are consistent as compliance reports are subject to internal review requirements. *See* Article 25 MiFID Org Reg., which requires that an Investment Firm's senior management receives on a frequent basis, and at least annually, written reports on the matters covered by Articles 22, 23 and 24 (compliance, risk management and internal audit) indicating whether appropriate remedial measures have been taken in the event of any deficiencies. The supervisory function, if any, must receive on a regular basis written reports on the same matters. We note that, although the EU regulatory framework does not require certification of a compliance	

[66] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[67] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
4. **Are compliance reports subject to certification and internal review requirements? If so, how?**			
more meetings conducted by the senior officer with the CCO in the preceding twelve months. Exchange Act rule 15Fk-1(c)(2)(ii)(C) [17 CFR 240.15Fk-1(c)(2)(ii)(C)].[68] Compliance reports must include a certification by the CCO or senior officer that, "to the best of his or her knowledge and reasonable belief and under penalty of law, the information contained in the compliance report is accurate and complete in all material respects." Exchange Act rule 15Fk-1(c)(2)(ii)(D)	mechanisms. Article 24 MiFID Org Reg. • Senior management (and, where appropriate, the supervisory function) must assess and periodically review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations under MiFID, and to take appropriate measures to address any deficiencies. Article 25 MiFID Org Reg. Investment Firms must (i) employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them; and (ii) ensure that the performance of multiple functions by their relevant persons does not and is not likely to prevent those persons from discharging any	report, Article 21 MiFID Org Reg. requires Investment Firms to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them; and ensure that the performance of multiple functions by their relevant persons does not and is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally. The CFTC Entity-Level Guidance specifically addresses this, finding that substituted compliance is generally applicable despite no requirement to certify compliance reports so long as firms certify and furnish the certified annual CCO report to the CFTC. CFTC Entity-Level Guidance at 78928.	

[68] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
4. **Are compliance reports subject to certification and internal review requirements? If so, how?**			
[17 CFR 240.15Fk-1(c)(2)(ii)(A)].[69]	particular function soundly, honestly, and professionally. Article 21 MiFID Org Reg. The compliance function must have, among other things, the necessary expertise in order to be able to discharge its responsibilities properly and independently. Article 22(3) MiFID Org Reg. Regulators must take into account compliance with these requirements during an Investment Firm's authorisation process and as part of their ongoing supervision of the Investment Firm. In some member states there is an obligation for the recipient of the compliance report to be expressly identified.		

[69] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
5. **Are the required reports required to be submitted to the regulator? Are reports with material errors or omissions required to be amended?**			
Compliance reports must be submitted to the SEC within thirty days[70] following the deadline for filing the firm's annual financial report. Exchange Act rule 15Fk-1(c)(2)(ii)(A) [17 CFR 240.15Fk-1(c)(2)(ii)(A)].[71] Specific rules address amendment of reports that have material errors or omissions, and incorporation by reference. Exchange Act rule 15Fk-1(c)(2)(iv), (v) [17 CFR 240.15Fk-1(c)(2)(iv), (v)].[72]	There is no requirement to report to a regulator. Regulators have very broad information-gathering powers to (among other actions): have access to any document or other data in any form which the regulator considers could be relevant for the performance of its duties and receive or take a copy of it; to require or demand the provision of information from any person and if necessary to summon and question a person with a view to obtaining information; to carry out on-site inspections or investigations; and to require existing recordings of telephone conversations or electronic communications or other data traffic records held by an Investment Firm, a Credit	**Comparability of outcomes** We note that, although the EU regulatory framework does not require submission of a compliance report to a regulator, regulators have very broad information-gathering powers to require the provision of such information by Investment Firms when they consider this to be necessary. The CFTC Entity-Level Guidance specifically addresses this, finding that substituted compliance is generally applicable despite no requirement to provide CCO reports so long as firms certify and furnish the annual CCO report to the CFTC. CFTC Entity-Level Guidance at 78928.	Section 6 of the WpHG

[70] Subject to extensions pursuant to Exchange Act rule 15Fk1(c)(2)(iii) [17 CFR 240.15Fk-1(c)(2)(iii)].
[71] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8
[72] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fk_61&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Chief Compliance Officer Reports			
5. **Are the required reports required to be submitted to the regulator? Are reports with material errors or omissions required to be amended?**			
	Institution, or any other entity regulated by MiFID or MiFIR. Article 69(2) MiFID. Regulators must have all information gathering and investigatory powers that are necessary for the exercise of their functions. Article 65 CRD IV.		

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~~March 12, 2020~~

19 May 2020: Comments by BaFin with new column "National Measures Germany"

IV. Counterparty Protection

ALLEN & OVERY

Comparability Assessment of Certain Securities and Exchange Commission and EU Requirements Applicable to Security-

Based Swap Dealers pursuant to SEC Staff Guidance on Substituted Compliance Applications

4. Category: Counterparty Protection Requirements

a. Executive Summary

The counterparty protection requirements are intended to bring professional conduct to, and increase transparency in, the security-based swap market and to require registered entities to treat parties to these transactions fairly. The SEC Guidance notes that the counterparty protection requirements set forth below generally only apply to a non-US firm's activities involving US counterparties (unless the transaction is arranged, negotiated or executed in the United States). The primary focus of the cross-border application of the counterparty protection requirements is on protecting counterparties by requiring security-based swap dealers to, among other things, provide certain disclosures to counterparties, [and] adhere to certain standards of business conduct".[1]

The comparability analysis will consider whether the foreign jurisdiction addresses the Exchange Act section 15F counterparty protection requirements of fair and balanced communications; disclosure of certain risks, characteristics, incentives and conflicts; and disclosure of daily marks. Specifically, the SEC will consider whether "the information that is required to be provided to counterparties pursuant to the requirements of the foreign financial regulatory system, the counterparty protections under the requirements of the foreign financial regulatory system, . . . and the duties imposed by the foreign financial regulatory system" are comparable to those associated with the applicable Exchange Act provisions and underlying rules. Exchange Act rule 3a71-6(d)(1) [17 CFR 240.3a71-6(d)(1)].[2]

b. Subcategory: Fair and Balanced Communications[3]

The counterparty protection requirements in part address the need to promote complete and honest communications as part of firms' security-based swap businesses to promote investor protection and prohibit firms "from overstating the benefits or understating the risks to inappropriately influence counterparties' investment decisions." *See* Business Conduct Adopting Release, 81 FR at 30001-02.[4]

[1] Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968, 31010 (May 23, 2013), *available at* https://www.sec.gov/rules/proposed/2013/34-69490.pdf.
[2] https://www.govinfo.gov/content/pkg/CFR-2017-title17-vol4/pdf/CFR-2017-title17-vol4-sec240-3a71-6.pdf
[3] Mandated by Exchange Act Section 15F(h)(3)(C) [15 U.S.C. 78o-10(h)(3)(C)] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf; and Exchange Act rule 15Fh-3(g) [17 CFR 240.15Fh-3(g)] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8.
[4] https://www.federalregister.gov/documents/2016/05/13/2016-10918/business-conduct-standards-for-security-based-swap-dealers-and-major-security-based-swap

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
1. To what extent are firms prohibited from engaging in communications that are misleading in fact or by omission?			
The SEC must adopt rules providing that firms communicate with counterparties "in a fair and balanced manner based on principles of fair dealing and good faith." Exchange Act section 15F(h)(3)(C) [15 U.S.C. 78o-10(h)(3)(C)];[5] and Exchange Act rule 15Fh-3(g) [17 CFR 240.15Fh-3(g)].[6]	Member States shall require that when providing investment services or, where appropriate, ancillary services to clients, an Investment Firm must act honestly, fairly and professionally in accordance with the best interests of its clients. Article 24(1) MiFID. All information, including marketing communications, addressed by an Investment Firm to clients or potential clients (retail clients, professional clients and MiFID ECPs) must be fair, clear and not misleading. Marketing communications must be clearly identifiable as such. Articles 24(3) and 30(1) MiFID. All information addressed or disseminated to retail or	**Comparability of outcomes**: The EU's prohibitions on engaging in misleading communications provide a comparable regulatory outcome to the SEC prohibitions against misleading communications. In particular, the regulatory outcomes pursued under Exchange Act section 15F(h)(3)(C) and MiFID are consistent in that each requires that Investment Firms communicate with counterparties truthfully and fairly and prohibit misleading information or material omissions, in order to protect market participants and promote information exchange and the integrity of the market.	**Sections 63 (1),(6), 68 (1) sentence 3 of the German Securities Trading Act (Wertpapierhandelsgesetz - WpHG)**

[5] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf
[6] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

	professional clients (but not ECPs) or potential clients must satisfy certain conditions, including: 1. the information includes the name of the Investment Firm; 2. the information is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument; 3. the information uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout ensuring such indication is prominent; 4. the information is sufficient for, and presented in a way that is likely to be		

	understood by, the average member of the group to whom it is directed, or by whom it is likely to be received; 5. the information does not disguise, diminish or obscure important items, statements or warnings; 6. the information is consistently presented in the same language throughout all forms of information and marketing materials that are provided to each client, unless the client has accepted to receive information in more than one language; and 7. the information is up-to-date and relevant to the means of communication used. Article 44(2) MiFID Org Reg.; Article 30 MiFID. Investment Firms are required, in their relationship with ECPs, to act honestly, fairly and		

	professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of such ECP and of its business. Article 30 MiFID. Additional requirements apply where the information provides comparisons between services or financial instruments, where indications are provided regarding past (including simulated) or future performance of a financial instrument, financial index or an investment service, or where the information refers to a particular tax treatment. Article 44(3)-(7) MiFID Org Reg. The dissemination of information, by any means, that gives or is likely to give false or misleading signals in relation to the supply of, demand for or price of certain financial instruments, or secures or is likely to secure the price of certain financial instruments at an abnormal or artificial level, in each case where the person knew or ought to have known that the information was false or misleading, is prohibited (in		

	addition to certain trading conduct which would also constitute market manipulation). Article 12(1)(c) MAR.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	**EU Requirement and/or Policy Goal Summary**	**Comparability Assessment**	**National Measures Germany**
b. Subcategory: Fair and Balanced Communications			
2. To what extent are firms required to provide counterparties with information that is sufficient to promote informed decision-making?			
Communications with counterparties must "provide a sound basis for evaluating the facts" with regard to particular	Investment Firms must disclose a significant range of information 'in good time' to clients before the provision of any investment services,	**<u>Comparability of outcomes</u>**: The EU's requirements that Investment Firms provide counterparties with information	**Sections 63 (7), 64 (1) sentence 1 of the WpHG in conjunction with Articles 46 and 48 (1) MiFID Org Reg.**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
2. To what extent are firms required to provide counterparties with information that is sufficient to promote informed decision-making?			
security-based swaps or trading strategies. Exchange Act rule 15Fh-3(g) [17 CFR 240.15Fh-3(g)].[7]	including in relation to a general description of the nature and risks of financial instruments, the nature of the specific type of financial instrument concerned, the functioning and performance of the financial instrument in different market conditions, including both positive and negative conditions, all costs and related charges and the risks particular to that specific type of financial instrument in sufficient detail to enable clients to take investment decisions on an informed basis. Article 24(4) MiFID II and Articles 46 and 48(1) MiFID Org Reg. The content, timing and manner of disclosure of such information is highly prescriptive under MiFID and	sufficient to make informed decisions provide a comparable regulatory outcome to the SEC counterparty communications requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(g) and MiFID are consistent in that each requires Investment Firms to provide counterparties with sufficient information in order to protect market participants and facilitate sound decision-making about security-based swap transactions. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.	

[7] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
2. To what extent are firms required to provide counterparties with information that is sufficient to promote informed decision-making?			
	the supporting legislation with a view to promoting investor protection, including by facilitating informed decision-making. The ESMA Q&As on MiFID investor protection topics further confirm that disclosures to clients are intended to enable clients to make informed decisions. A detailed description of some of the specific requirements aimed at providing clients with information that is sufficient to promote their informed decision-making is set out in response to the questions set forth in section 4.c below.	**Comparability of specific requirements**: Both regimes require firms to provide information about the underlying securities-based swaps and transaction strategies, but the EU regime contains more detailed requirements on the manner and content of such communications.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
3. To what extent do relevant requirements address statements regarding past performance or predictions regarding future performance?			
Communications with counterparties "may not imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast". Exchange Act rule 15Fh-3(g) [17 CFR 240.15Fh-3(g)].[8]	MiFID imposes disclosure requirements in relation to both past and future performance statements. **Past performance statements** Where information provided to a professional client or a retail client (but not an ECP) contains an indication of past performance of a financial instrument, a financial index or an investment service, Investment Firms must ensure that the following conditions are satisfied: 1. that the indication is not the most prominent feature of the communication; 2. the information must include appropriate performance	<u>**Comparability of outcomes**</u>: The EU's requirements that Investment Firms qualify statements regarding past and future performance provide a comparable regulatory outcome to the SEC requirements on communications regarding past performance and future performance predictions. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(g) and MiFID are consistent in that each prohibit Investment Firms from making unwarranted inferences about future performances based on past performances, or about future performances, in order to protect market participants from misleading information and facilitate sound decision-making about securities transactions.	**Section 63 (6) of the WpHG in conjunction with Article 44 (4) – (6) MiFID Org Reg.**

[8] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
3. To what extent do relevant requirements address statements regarding past performance or predictions regarding future performance?			
	information which covers the preceding five years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided where less than five years, or such longer period as the Investment Firm may decide, and in every case that performance information is based on complete twelve-month periods; 3. the reference period and the source of information is clearly stated; 4. the information contains a prominent	While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements**: Both regimes regulate how firms may communicate with respect to past and future performances, but the EU regime contains more detailed requirements on the manner and content of such communications.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
3. To what extent do relevant requirements address statements regarding past performance or predictions regarding future performance?			
	warning that the figures refer to the past and that past performance is not a reliable indicator of future results; 5. where the indication relies on figures denominated in a currency other than that of the member state in which the retail client or potential retail client is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations; 6. where the indication is based on gross performance, the effect of commissions, fees or		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
3. To what extent do relevant requirements address statements regarding past performance or predictions regarding future performance?			
	other charges are disclosed. Article 44(4) MiFID Org Reg. and Article 30 MiFID. Broadly similar requirements apply in respect of information referring to or including simulated past performance. Article 44(5) MiFID Org Reg. **Future performance statements** Where information provided to a professional client or retail client (but not ECPs) contains information on future performance, Investment Firms must ensure that the following conditions are satisfied: 1. the information is not based on or refers to simulated past performance;		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
3. To what extent do relevant requirements address statements regarding past performance or predictions regarding future performance?			
	2. the information is based on reasonable assumptions supported by objective data; 3. where the information is based on gross performance, the effect of commissions, fees or other charges is disclosed; 4. the information is based on performance scenarios in different market conditions (both negative and positive scenarios), and reflects the nature and risks of the specific types of instruments included in the analysis; and 5. the information contains a prominent warning that such forecasts are not a		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
3. To what extent do relevant requirements address statements regarding past performance or predictions regarding future performance?			
	reliable indicator of future performance. Article 44(6) MiFID Org Reg. and Article 30 MiFID. Investment Firms are required, in their relationship with ECPs, to act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the ECP and of its business. Article 30 MiFID.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
Risk disclosure	The European legislation aimed at promoting investor	**<u>Comparability of outcomes</u>**:	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
Communications with counterparties that refer to potential opportunities or advantages presented by a security-based swap must include "an equally detailed statement of the corresponding risks." Exchange Act rule 15Fh-3(g) [17 CFR 240.15Fh-3(g)].[9] Firm "communications with counterparties will be subject to the specific antifraud provisions added to the Exchange Act under Title VII of the Dodd-Frank Act, as well as general antifraud provisions under the federal securities laws." Substituted compliance is not available in connection with those	protection, including with regards to informed investment decision-making, generally contains broad and highly specific disclosure requirements on Investment Firms, requiring that information provided to clients or potential clients is presented in a contextual and balanced manner, containing appropriate disclaimers or warnings. Examples of such instances are set out below. **Risks disclosure** Investment Firms must provide disclosure that meets prescribed conditions in relation to risks associated with the financial instruments in question. The response to the question set forth in section	The EU's disclaimer requirements provide a comparable regulatory outcome to the SEC disclaimer requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(g) and MiFID are consistent in that each prohibit Investment Firms from making fraudulent claims and require disclosure of relevant risks, in order to protect market participants and facilitate sound decision-making about securities transactions. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.	**Section 63 (6) of the WpHG in conjunction with Article 44 MiFID Org Reg.**

[9] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
antifraud provisions. *See* Business Conduct Adopting Release, 81 FR at 30001.[10]	4.c.1 below describes these conditions in further detail. **Clear and prominent statements** There are instances where MiFID disclosure provisions specifically require that clear and prominent statements are made to the client. As part of an Investment Firm's obligation to provide fair, clear and not misleading information to clients, Investment Firms are required to ensure that, where the indication contains an indication of past performance of a financial instrument, a financial index or an investment service, a warning is included to state that the return may increase or decrease as a result of currency fluctuations where	**Comparability of specific requirements**: Both regimes require firms to provide information about the underlying securities and transaction strategies, but the EU regime contains more detailed requirements on the manner and content of such communications.	

[10] https://www.federalregister.gov/documents/2016/05/13/2016-10918/business-conduct-standards-for-security-based-swap-dealers-and-major-security-based-swap

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
	the indication relies on figures denominated in a currency other than that of a member state in which the retail client is resident. Article 44(4)(e) MiFID Org Reg. Where the information refers to a particular tax treatment, it must prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future. Article 24(3) MiFID and Articles 44(4)(e) and 44(7) MiFID Org Reg. Where the information compares investment or ancillary services, financial instruments, or persons providing investment or ancillary services, Investment Firms must ensure that: (i) the comparison is meaningful and presented in a fair and		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
	balanced way, (ii) the sources of the information used for the comparison are specified, and (iii) the key facts and assumptions used to make the comparison are included. Article 44(3) MiFID Org Reg. The requirements of Articles 36 and 44 MiFID Org Reg. apply where the client is a professional client or retail client (but not an ECP). Investment Firms are required, in their relationship with ECPs, to act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the ECP and of its business. Article 30 MiFID. **Financial promotions** National member state laws may also require the inclusion		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
	of regulatory disclaimers or legends in offering documentation or marketing communications in relation to matters including financial promotion restrictions. For example, research recommendations must contain a statement that they have not been prepared in accordance with legal requirements designed to promote the independence of investment research and that it is not subject to any prohibition on dealing ahead of the dissemination of investment research (and if recommendations are not balanced an independent then they must be identified as marketing communications rather than research recommendations). Article 36(2) MiFID Org Reg.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
	MAR also requires that investment recommendations or other information recommending or suggesting an investment strategy are set out in such a matter that (a) facts are clearly distinguished from interpretations, estimates, opinions and other types of non-factual information; (b) all substantially material sources of information are clearly and prominently indicated; (c) all sources of information are reliable or, where there is any doubt as to whether a source is reliable, this is clearly indicated; (d) all projections, forecasts and price targets are clearly and prominently labelled as such, and the material assumptions made in producing or using them are indicated; (e) the date and time when the production of the recommendation was completed is clearly and		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
	prominently indicated. Article 3 MAR Investment Recommendations Regulation. **Selling restrictions** MiFID imposes product governance requirements on Investment Firms that manufacture financial instruments for sale to clients. Investment Firms must ensure that those financial instruments are designed to meet the needs of an identified target market of end clients within the relevant category of clients, the strategy for distribution of the financial instruments is compatible with the identified target market and Investment Firms must take reasonable steps to ensure that the financial instrument is distributed to the identified target market. Article 24(2) MiFID. This requirement does		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
4. To what extent do relevant requirements mandate that certain types of communications be balanced by disclaimers and/or by contextual information?			
	not apply where the client is an ECP (for purposes of MiFID). Article 30 MiFID. As part of their compliance arrangements regarding such product governance requirements, Investment Firms provide disclaimers and include selling restrictions in their offering documentation. Industry bodies such as the International Capital Markets Association and the Association for Financial Markets in Europe have assisted with the standardization of such disclaimers.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
5. Are the relevant requirements lessened or otherwise modified in connection with certain categories of counterparties? If so, how?			
Firms must communicate with all counterparties in a fair and balanced manner based on principles of fair dealing and good faith. Exchange Act rule 15Fh-3(g) [17 CFR 240.15Fh-3(g)];[11] and Exchange Act section 15F(h)(3)(C) [15 U.S.C. 78o-10(h)(3)(C)].[12]	MiFID information requirements discussed above in response to the questions set forth in sections 4.b.1-4.b.4 generally apply to all types of clients except, where noted, to ECPs (for purposes of MiFID). Where the requirements do not apply where the client is an ECP (for purposes of MiFID), Investment Firms are still required, in their relationship with ECPs, to act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the ECP and of its business. Article 30 MiFID. The MAR disclosure requirements apply irrespective of the type of client in question, as their applicability is not	**Comparability of outcomes**: The EU's requirements related to communications provide a comparable regulatory outcome to the SEC disclaimer requirements. In particular, the regulatory outcomes pursued under Exchange Act sections 15Fh-3(g) and 15F(h)(3)(C) and MiFID are consistent in that both regimes generally require disclaimers be made to all counterparties to promote honest communications as part of firms' security-based swap businesses. Both regimes aim to protect all market participants and facilitate sound decision-making about securities-based swap transactions. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed	**Section 68 (1) of the WpHG**

[11] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8
[12] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
b. Subcategory: Fair and Balanced Communications			
5. Are the relevant requirements lessened or otherwise modified in connection with certain categories of counterparties? If so, how?			
	driven by the type of client to whom the disclosure is made.	comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The specific requirements under the EU regime are comparable to those under the US regime. Whilst the EU regime stipulates that certain MiFID disclosure requirements do not apply where the client is an ECP, Article 30 MiFID still requires Investment Firms, in their relationship with ECPs, to act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the ECP and of its business.	

c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest[13]

The objective of the required disclosure of material risks and characteristics is to provide information to a counterparty to help them assess whether, and under what terms, they want to enter into the transaction.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
1. To what extent are firms required to provide counterparties or potential counterparties with information regarding the features of financial instruments? Is there required disclosure regarding the risks of financial instruments? Is there required disclosure regarding the terms of financial instruments?			
The SEC must adopt rules providing that firms must disclose to counterparties – other than counterparties that are dealers, participants, swap dealers or major swap participants – information regarding the material risks and characteristics[14] of the security-based swap, and	Investment Firms must provide appropriate information in good time to clients/potential clients with regards to matters including the financial instruments and proposed investment strategies, execution venues and all costs and related charges. Article 24(4) MiFID and Articles 46-50 MiFID Org Reg. The information on financial instruments and proposed investment strategies must	**Comparability of outcomes**: The EU's financial instrument disclosure requirements provide a comparable regulatory outcome to the SEC financial instrument disclosure requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15F(h)(3)(B) and MiFID are consistent in that both regulatory regimes require Investment Firms to provide counterparties with details of financial instruments, in	**Sections 63 (7), 64 (1) of the WpHG in conjunction with Articles 46 – 50 MiFID Org Reg.**

[13] Mandated by Exchange Act section 15F(h)(3)(B)(i), (ii) [15 U.S.C. 78o10(h)(3)(B)(i), (ii)] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf; and Exchange Act rule 15Fh-3(b) [17 CFR 240.15Fh-3(b)] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8.

[14] "Material risks and characteristics" may include: (i) market, credit, liquidity, foreign currency, legal, operational, and other applicable risks; and (ii) material economic terms of the security-based swap, terms relating to the operation of the security-based swap, and the rights and obligations of the parties during the term of the security-based swap. Exchange Act rule 15Fh3(b)(1) [17 CFR 240.15Fh-3(b)(1)].

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
1. To what extent are firms required to provide counterparties or potential counterparties with information regarding the features of financial instruments? Is there required disclosure regarding the risks of financial instruments? Is there required disclosure regarding the terms of financial instruments?			
any material incentives[15] or conflicts of interest that the firm may have in connection with the security-based swap. Exchange Act section 15F(h)(3)(B)(i), (ii) [15 U.S.C. 78o-10(h)(3)(B)(i), (ii)].[16]	include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies and whether the financial instrument is intended for retail or professional clients, taking account of the identified target market. Article 24(4)(b) MiFID. Investment Firms must provide clients/potential clients in good time before the provision of investment services with a general description of the nature and risks of financial instruments, taking into account the client's	order to protect market participants and facilitate sound decision-making about securities transactions. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements**: Both the EU regime and the US regime require the disclosure of risks and other features of the	

[15] The term "incentives" does not refer "to any profit or return that the [entity] would expect to earn from the security-based swap itself, or from any related hedging or trading activities . . . but rather to any other financial arrangements pursuant to which [the entity] may have an incentive to encourage the counterparty to enter into the transaction." *See* Business Conduct Adopting Release, 81 FR at 29986.

[16] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
1. To what extent are firms required to provide counterparties or potential counterparties with information regarding the features of financial instruments? Is there required disclosure regarding the risks of financial instruments? Is there required disclosure regarding the terms of financial instruments?			
	classification (e.g., as an ECP (for purposes of MiFID), professional or retail client). The description must explain: 1. the nature of the specific type of instrument concerned, 2. the functioning and performance of the instrument in different market conditions (including positive and negative conditions), and 3. risks particular to the specific type of instrument in sufficient detail to enable the client to take	financial instruments involved. Requirements under Articles 24(3), (4) MiFID and Article 48 MiFID Org Reg. are comparable to those under Exchange Act section 15F(h)(3)(B)(i), (ii); the EU requirements are, in some respects, more detailed on how Investment Firms must describe the risks and other features of financial instruments. Please also see below the comparability of outcomes and specific requirements in relation to the question set forth in section 4.c.2 with regards to conflicts of interest and revenues from third-parties.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
1. To what extent are firms required to provide counterparties or potential counterparties with information regarding the features of financial instruments? Is there required disclosure regarding the risks of financial instruments? Is there required disclosure regarding the terms of financial instruments?			
	investment decisions on an informed basis. Article 48(1) MiFID Org Reg. The description of risks must include the following: 1. the risks associated with that type of financial instrument including an explanation of leverage and its effects and the risk of losing the entire investment including the risks associated with insolvency of the issuer or related events, such as bail in; 2. the volatility of the price of such instruments and any		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
1. To what extent are firms required to provide counterparties or potential counterparties with information regarding the features of financial instruments? Is there required disclosure regarding the risks of financial instruments? Is there required disclosure regarding the terms of financial instruments?			
	limitations on the available market for such instruments; 3. information on impediments or restrictions for disinvestment, for example as may be the case for illiquid financial instruments or financial instruments with a fixed investment term, including an illustration of the possible exit methods and consequences of any exit, possible constraints and the estimated time frame for the sale of the financial instrument before recovering the initial costs of the		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
1. To what extent are firms required to provide counterparties or potential counterparties with information regarding the features of financial instruments? Is there required disclosure regarding the risks of financial instruments? Is there required disclosure regarding the terms of financial instruments?			
	transaction in that type of financial instruments; 4. the fact that an investor might assume, as a result of transactions in such instruments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the instruments; and 5. any margin requirements or similar obligations, applicable to instruments of that type.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
1. To what extent are firms required to provide counterparties or potential counterparties with information regarding the features of financial instruments? Is there required disclosure regarding the risks of financial instruments? Is there required disclosure regarding the terms of financial instruments?			
	Article 48(2) MiFID Org Reg. Where financial instruments incorporate a guarantee or capital protection, the Investment Firm must provide a client/potential client with information about the scope and nature of such guarantee or capital protection. Article 48(5) MiFID Org Reg. **Conflicts of interest** Please see the response below to the question set forth in 4.c.2 with regards to conflicts of interest requirements. **Incentives. Revenues from third-parties** Please see the response below to the question set forth in 4.c.2 with regards to incentives		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
1. To what extent are firms required to provide counterparties or potential counterparties with information regarding the features of financial instruments? Is there required disclosure regarding the risks of financial instruments? Is there required disclosure regarding the terms of financial instruments?			
	and revenues from third-parties requirements.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
<u>Comparability of outcomes</u>: The EU's conflicts of interest disclosure requirements provide a comparable regulatory outcome to the SEC conflicts of interest disclosure requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15F(h)(3)(B) and MiFID and MAR are consistent in that both regulatory regimes require disclosure of conflicts of interest and revenues from third-parties, in order to protect market participants and facilitate sound decision-making about securities-based swaps transactions.			**Sections 80 (1) sentence 2 no. 2, 63 (2) of the WpHG in conjunction with Article 34 (4) MiFID Org Reg.**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The specific requirements under the EU regime and the US regime are comparable in the following ways:			
Conflicts of interest: The SEC must adopt rules providing that firms must disclose to counterparties – other than counterparties that are dealers, participants, swap dealers or major swap participants – information regarding the material risks and characteristics of the security-based swap, and any material incentives or conflicts of interest that the firm may have in	**Conflicts of interest**: Investment Firms are required to take all appropriate steps to identify and to prevent or manage conflicts of interests between themselves, or any person directly or indirectly linked to them by control and their clients, or between one client and another that arise in the course of providing investment services, including those caused by the receipt of inducements from third-parties. Article 23(1) MiFID.	**Conflicts of interest**: Requirements on disclosure of conflicts of interest to clients or potential clients under Article 23(2)-(3) MiFID and Article 20(1) MAR are comparable to those under Exchange Act sections 15F(h)(3)(B)(i), (ii). In addition, Article 23(1) MiFID and Article 34 MiFID Org Reg. focus on prevention and management of conflicts of interest, by requiring that Investment Firms take measures to detect and prevent conflict of	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
connection with the security-based swap. Exchange Act sections 15F(h)(3)(B)(i), (ii) [15 U.S.C. 78o-10(h)(3)(B)(i), (ii)].[17]	An Investment Firm must maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of the clients, for example by establishing, implementing and maintaining an effective conflicts of interest policy in accordance with specific requirements. Article 16(3) MiFID and Article 34 MiFID Org Reg. Where the organisational or administrative arrangements made by the Investment Firm are not sufficient to ensure with reasonable confidence that risks of damage to client	interest beforehand, which the US regime does not require. Notably, the CFTC Substituted Compliance Decision on Entity-Level Requirements found that substituted compliance for the Section 23.605(e) requirements regarding disclosure of conflicts of interest to clients or potential clients was appropriate via the general disclosure requirements of the MiFID standards by requiring that each dealer disclose to counterparties any material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a swap execution facility or designated contract maker, or to clear a derivative through a derivatives clearing organization. CFTC Substituted	

[17] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
	interests will be prevented, the Investment Firm must clearly disclose to the client the general nature and/or sources of conflicts of interest and the steps taken to mitigate those risks before undertaking business on its behalf. The disclosure must include sufficient detail, taking into account the nature of the client, to enable the client to take an informed decision with respect to the service in the context of which the conflict of interest arises. Article 23(2)-(3) MiFID. Such disclosure to clients is a measure of last resort that will only be used where the effective organisational and administrative arrangements made by the Investment Firm	Compliance Decision on Entity-Level Requirements at 78933.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
	are not sufficient. Article 34(4) MiFID Org Reg. MAR also requires that persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy take reasonable care to ensure that such information is objectively presented, and to disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates. Article 20(1) MAR. Any disclosure of conflicts of interest must meet the prescribed requirements set out in Articles 5 and 6 MAR Investment Recommendations Regulation.		**Sections 70, 80 (1) sentence 2 no. 2, 63 (1), (2), 68 of the WpHG**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
Revenues from third-parties: "Material incentives or conflicts of interest" may encompass "any compensation or other incentives from any source other than the counterparty in connection with the security-based swap to be entered into with the counterparty." Exchange Act rule 15Fh-3(b)(2) [17 CFR 240.15Fh-3(b)(2)].[18]	**Revenues from third-parties**: Investment Firms are regarded as not fulfilling their obligation to act in the client's best interest and to manage conflicts of interest where they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit in connection with the provision of an investment service, to or by any party except the client, except where the payment or benefit is designed to enhance the quality of the service and does not impair compliance with the Investment Firm's duty to act honestly, fairly and professionally in accordance with the best interest of the	**Revenue from third-parties**: Requirements on disclosure of revenues and incentives from third-parties under Article 24(9) MiFID and Article 11(5) MiFID Delegated Directive are comparable to those under Exchange Act rule 15Fh-3(b)(2), but the limitations on permissible revenues from third-parties are more onerous under the EU regime.	

[18] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
	client. Articles 23 and 24(9) MiFID. The existence, nature and amount (or method of calculating that amount where the amount cannot be ascertained) of such payment or benefit must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment service. The Investment Firm must also inform the client on mechanisms for transferring to the client the fee, commission, monetary or non-monetary benefit received in relation to the provision of the investment service, where applicable. Article 24(9) MiFID.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
	Pursuant to this obligation, Investment Firms must disclose to a professional client or a retail client (but not to MiFID ECPs) the following information: 1. prior to the provision of the relevant investment service, the Investment Firm must disclose to the client information on the payment or benefit concerned. Minor non-monetary benefits may be described in a generic way. Other non-monetary benefits received or paid by the Investment Firm in connection with the service provided to a client must be priced		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
	and disclosed separately; 2. where an Investment Firm is unable to ascertain on an ex-ante basis the amount of any payment or benefit to be received or paid, and instead disclosed to the client the method of calculating that amount, the Investment Firm must also provide its clients with information of the exact amount of the payment or benefit received or paid on an ex-post basis; and 3. at least once a year, as long as (ongoing) inducements are received by the		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
	Investment Firm in relation to the investment services provided to the relevant clients, the Investment Firm must inform its clients on an individual basis about the actual amount of payments or benefits received or paid. Minor non-monetary benefits may be described in a generic way. Article 11(5) MiFID Delegated Directive and Article 30 MiFID. Investment Firms are required, in their relationship with MiFID ECPs, to act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
2. To what extent are firms required to provide counterparties or potential counterparties with information regarding the incentives or conflicts of interest facing the firms? Are firms required to disclose the revenue they receive from third-parties?			
	of the ECP and of its business. Article 30 MiFID.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
3. What provisions govern the timing and manner of required disclosure?			
Disclosures must be made at a "reasonably sufficient time prior" to entering into the security-based swap, and in a "manner reasonably designed to allow the counterparty to assess" risks, characteristics, incentives and conflicts. However, the obligation does not apply unless "the identity of the counterparty is	**Features, risks, terms of financial instruments** Investment Firms must provide clients/potential clients in good time before the provision of investment services with a general description of the nature and risks of financial instruments. Article 48(1) MiFID Org Reg. In assessing what constitutes the provision of information 'in good time',	**<u>Comparability of outcomes</u>**: The EU's material risk disclosure requirements provide a comparable regulatory outcome to the SEC material risk disclosure requirements. In particular, the regulatory outcomes pursued under Exchange Act rule 15Fh-3(b) and MiFID are consistent in that both regulatory regimes require timely disclosure for counterparties to assess information and make	**Sections 63 (7), 64 (1) sentence 1 of the WpHG**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
3. What provisions govern the timing and manner of required disclosure?			
known" to the firm "at a reasonably sufficient time prior to execution" to permit the disclosure. Exchange Act rule 15Fh-3(b) [17 CFR 240.15Fh-3(b)].[19]	an Investment Firm should take into account, having regard to the urgency of the situation, the client's need for sufficient time to read and understand the information before taking an investment decision. A client is likely to require more time to review information given on a complex or unfamiliar product or service, or a product or service a client has no experience with than a client considering a simpler or more familiar product or service, or where the client has relevant prior experience. Recital 83 MiFID. **Incentives. Revenues from third-parties** The disclosure must be made, subject to the conditions outlined immediately above,	decisions, in order to protect market participants and facilitate sound decision-making about securities-based swap transactions. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **Comparability of specific requirements**: The specific requirements under Recital 83 MiFID are comparable to the requirements under Exchange Act rule 15Fh-3(b), in that both aim to provide counterparties with sufficient time and information (including the risks and other features of the financial	

[19] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
3. What provisions govern the timing and manner of required disclosure?			
	prior to the provision of service to the client. Yearly disclosure may also be required where ongoing incentives are received by the Investment Firm. Please see the responses set out above to the questions set forth in sections 4.c.1 and 4.c.2 for an outline on the manner and content of disclosure required in each case.	instruments involved and conflict of interest) to make decisions. The EU regime also lays out in detail factors that may affect the sufficiency of time and information provided to counterparties.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
4. Is the disclosure requirement lessened or eliminated in connection with certain categories of counterparties? If so, how?			
Firm duties to disclose material risks and characteristics, and material incentives and	Except where noted in response to the questions set forth in sections 4.b.1, 4.b.3, 4.b.4. 4.b.5, 4.c.1 and 4.c.2	**<u>Comparability of outcomes</u>**: The EU disclosure requirements provide for comparable outcomes	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
c. Subcategory: Disclosure of Material Risks and Characteristics, and Material Incentives or Conflicts of Interest			
4. Is the disclosure requirement lessened or eliminated in connection with certain categories of counterparties? If so, how?			
conflicts of interest do not apply when the counterparty is a dealer, participant, swap dealer or major swap participant. Exchange Act sections 15F(h)(3)(B)(i), (ii) [15 U.S.C. 78o-10(h)(3)(B)(i), (ii)].[20]	above in respect of ECPs (for purposes of MiFID), the disclosure requirements described above apply irrespective of the type of counterparty.	as the SEC disclosure requirements. The disclosure requirements under both regimes generally apply in respect of all clients, except ECPs (for purposes of MiFID) in certain cases. This exception reflects the common regulatory focus of protecting less sophisticated investors.	

[20] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

d. Subcategory: Daily Mark Disclosure[21]

Market participants need access to daily mark information to effectively understand and manage their security-based swap positions. The SEC rejected the suggestion that certain counterparties have the right to opt out of the receipt of daily mark disclosures. Business Conduct Adopting Release, 81 FR at 29990-91.[22]

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
Disclosure of Daily Mark Information The SEC must adopt rules providing that firms must disclose daily mark information to counterparties that are not certain types of dealers and participants. For cleared security-based swaps, this would encompass receipt of daily mark information from the clearing organization upon request of the counterparty. For	**Calculation of daily mark information** Whilst there is no strict regulatory requirement for parties to provide their counterparties with daily mark information as a matter of course, we note the following requirements relevant to the calculation of the daily mark information. **Mark-to-market**: FCs and NFC+s are required to mark the value of outstanding uncleared OTC derivative contracts to market on a daily basis. EMIR,	**<u>Comparability of outcomes</u>**: The EU's daily mark disclosure and calculation requirements are not strictly analogous to the SEC daily mark disclosure and calculation requirements. However, taken as a whole, the regulatory outcomes pursued under Exchange Act section 15F(h)(3)(B)(iii) and EMIR are consistent in that the effect of both regulatory regimes is that firms are required to disclose daily mark information to counterparties, in order to allow counterparties to effectively understand and manage their transactions and portfolios.	

[21] Mandated by Exchange Act section 15F(h)(3)(B)(iii) [15 U.S.C. 78o-10(h)(3)(B)(iii)] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf; and Exchange Act rule 15Fh-3(c) [17 CFR 240.15Fh-3(c)] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8.

[22] https://www.federalregister.gov/documents/2016/05/13/2016-10918/business-conduct-standards-for-security-based-swap-dealers-and-major-security-based-swap

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
uncleared security-based swaps, this would encompass receipt of the daily mark from the firm. Exchange Act section 15F(h)(3)(B)(iii) [15 U.S.C. 78o-10(h)(3)(B)(iii)].[23]	Article 11(2). The mark-to-market value should be based on the end of day settlement price of the market (or CCP) from which the prices are taken as reference. If an end of day settlement price is not available, then the mark-to-market value should be based on the closing mid-price of the market concerned. For transactions cleared by a CCP, counterparties should use the CCP's valuation in accordance with EMIR RTS 2017/104, Article 3(5). ESMA Q&A on EMIR, TR Question 3b(a2). The mark-to-market value should represent the total value of the contract, rather than a daily change in the valuation of the contract. ESMA Q&A on EMIR, TR Question 3b(a3).	While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The specific requirements under both the EU and the US regimes are comparable in the following way: • **Daily mark information**. The daily mark information to be disclosed under EMIR, Article 11(2) and RTS 2017/104, Annex, Table 1, Field 17 is comparable to the information	

[23] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78o-10.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
	Mark-to-model: where market conditions prevent marking-to-market, a reliable and prudent marking-to-model must be used. Market conditions which may prevent marking-to-market include: (a) the market is inactive, or (b) the range of reasonable fair values estimates is significant and the probabilities of the various estimates cannot reasonably be assessed. RTS 149/2013, Article 16. Where a marking-to-model is used, the entity subject to the requirement must have a model that: (a) incorporates all factors that counterparties would consider in setting a price, including using as much as possible marking-to-market information; (b) is consistent with accepted economic methodologies for pricing financial instruments; (c) is	required under Exchange Act section 15F(h)(3)(B)(iii).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
	calibrated and tested for validity using prices from any observable current market trades in the same financial instrument or based on any available observable market data; (d) is validated and monitored independently by another division than the division taking the risk; and (e) is duly documented and approved by the board of directors as frequently as necessary, following any material change and at least annually. This approval may be delegated to a committee. RTS 149/2013, Article 17. **Disclosure of daily mark information** Whilst there is no strict regulatory requirement for parties to provide their counterparties with daily mark information as a matter of		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
	course, we nonetheless note the following relevant obligations: **Portfolio reconciliation**: FCs and NFCs are required to have a written reconciliation process which covers key trade terms, including, at least, the valuation attributed to each contract in accordance with Article 11(2) of EMIR. Reconciliation is only required to be performed on a daily basis (i.e. on each business day) for FCs and NFC+s where the counterparties have 500 or more OTC derivative contracts outstanding with each other. Further details are provided in response to the question set forth in section 1.f.1. EMIR, Article 11(1)(b) and RTS 149/2013, Article 13. NFC-s (NFC below the threshold) are not required to calculate the mark-to-market or		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
	mark-to-model valuation of their transactions and, as such, are able to rely on their counterparties' valuations or on other means for the purposes of portfolio reconciliation. ESMA Q&A on EMIR, OTC Question 14(e). **Dispute resolution**: FCs and NFCs are also required to have in place detailed procedures and processes in relation to the identification, recording and monitoring of disputes relating to the recognition or valuation of the contract (recording at least the length of time for which the dispute remains outstanding, the counterparty and the amount which is disputed), as further detailed in response to the question set forth in section 1.f.1. RTS 149/2013, Article 15(1).		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
	Reporting: Counterparties[24] and CCPs are required to report the valuation of a contract on a daily basis to a trade repository registered or recognised under EMIR. For contracts cleared by a CCP, the counterparty must report the valuation provided by the CCP in accordance with Fields 17 to 20 in Table 1 of the Annex to RTS 148/2013. Field 17 relates to the value of the contract and specifically, the CCP's valuation for a cleared trade. RTS 2017/104, Article 3(5). For contracts not cleared by a CCP, the counterparty must report, in accordance with Fields 17 to 20 in Table 1 of the Annex to RTS 148/2013, the valuation performed in		

[24] Counterparties is understood in this context to mean EU FCs and EU NFCs. *See* TR Answer 15 in the ESMA EMIR Question and Answers Document for further details.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
	accordance with the methodology defined in International Financial Reporting Standard 13 Fair Value Measurement (as adopted by the Union and referred to in the Annex to Commission Regulation (EC) No 1126/2008). Field 17 relates to the value of the contract and specifically the mark-to-market valuation, or the mark-to-model valuation where applicable under Article 11(2) of EMIR. EMIR RTS 2017/104, Article 3(6). The reporting obligation currently applies to both parties to a transaction (i.e. two-sided reporting is required).[25]. Whilst parties are not required to agree on the valuation		

[25] Following changes made by EMIR Refit 2.1, from June 18, 2020 onwards, FCs must be solely responsible and legally liable for reporting the details of OTC derivative contracts they have concluded with NFC-s on behalf of both counterparties, as well as for ensuring the correctness of the reported details.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
1. To what extent are firms required to provide counterparties with daily mark information upon request or as a matter of course? How are daily marks calculated for those purposes?			
	reported, the valuation would be discussed between the parties for reporting purposes. EMIR, Article 9 and ESMA Q&A on EMIR, TR Question 3b(e). NFC-s shall not be required to report collateral, mark-to-market, or mark-to-model valuations of the contracts. EMIR RTS 2017/104, Article 3(4).		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
2. To what extent do firms also have to disclose underlying assumptions, methodologies or information sources related to daily mark calculations?			
For uncleared security-based swaps, the firm must disclose "the midpoint between the bid and offer, or the	FCs and NFCs are required to have a written reconciliation process which covers key trade terms, including, at least, the valuation attributed to each	**<u>Comparability of outcomes</u>**: *See* response to the above question set forth in section 4.d.1.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
2. To what extent do firms also have to disclose underlying assumptions, methodologies or information sources related to daily mark calculations?			
calculated equivalent thereof, as of the close of business, unless the parties agree in writing otherwise to a different time, on each business day during the term of the security-based swap." That daily mark "may be based on market quotations for comparable security-based swaps, mathematical models or a combination thereof," and the firm must disclose its data sources and a description of the underlying methodology and assumptions, and promptly disclose any material changes to the data sources, methodology and assumptions during the term of the security-	contract in accordance with Article 11(2) of EMIR. FCs and NFCs are also required to have in place detailed procedures and processes in relation to the identification, recording and monitoring of disputes relating to the recognition or valuation of the contract. Consequently, to the extent there is any divergence in the valuation attributed by each counterparty, parties may be requested to clarify their underlying methodologies, assumptions and information sources relating to daily mark calculations, as part of these portfolio reconciliation and dispute resolution processes. Further details are provided in the response to the question set forth in section 1.f.1. EMIR,	The regulatory outcome is comparable.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
2. To what extent do firms also have to disclose underlying assumptions, methodologies or information sources related to daily mark calculations?			
based swap. Exchange Act rule 15Fh-3(c) [17 CFR 240.15Fh-3(c)].[26]	Article 11(1)(b) and RTS 149/2013, Article 13.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
3. Can firms restrict recipients' use of this daily mark information, or charge recipients for the information?			
Firms must provide the daily mark to the counterparty without charge or restrictions on internal use. Exchange Act rule 15Fh-3(c) [17 CFR 240.15Fh-3(c)].[27]	There are no specific regulatory requirements under EMIR or MiFID which relate to counterparties providing the daily mark information without charge or restrictions on internal use.	**<u>Comparability of outcomes</u>**: The EU requirements do not provide for comparable outcomes to the SEC requirements. Since the EU regime does not directly address this issue, firms may restrict the use of daily mark information or charge counterparties for such information.	

[26] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8
[27] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
4. Is the disclosure requirement lessened or eliminated in connection with certain categories of counterparties? If so, how?			
The disclosure requirement is lessened for cleared security-based swaps as firms must only disclose the daily mark received from the clearing agency upon their counterparty's request.	The required frequency of portfolio reconciliation (whereby parties compare daily mark valuations) varies depending on the status of the counterparty and the number of outstanding OTC derivative contracts between the specific counterparties. For FCs and NFC+s, portfolio reconciliation must be performed: 1. on each business day when the counterparties have 500 or more OTC derivative contracts outstanding with each other, 2. once per week when the counterparties have between fifty-one and 499 OTC derivative contracts outstanding with each	**Comparability of outcomes**: The EU regime does not prescribe daily mark disclosure requirements such as those required under the SEC regime, but in practice valuation disclosure must occur to satisfy the EU portfolio reconciliation requirements. The EU portfolio reconciliation requirements impose less frequent reconciliation requirements as the number of outstanding OTC derivative contracts decreases among the parties.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
d. Subcategory: Daily Mark Disclosure			
4. Is the disclosure requirement lessened or eliminated in connection with certain categories of counterparties? If so, how?			
	other at any time during the week, and 3. once per quarter when the counterparties have fifty or less OTC derivative contracts outstanding with each other at any time during the quarter. For NFC-s, portfolio reconciliation must be performed: 1. once per quarter when the counterparties have more than 100 OTC derivative contracts outstanding with each other at any time during the quarter, or 2. once per year when the counterparties have 100 or less OTC derivative contracts outstanding with each other. RTS 149/2013, Article 13(3).		

e. Subcategory: Know Your Counterparty

Dealers must obtain essential counterparty information to promote effective compliance and risk management. Exchange Act rule 15Fh-3(e) [17 CFR 240.15Fh-3(e)][28] addresses this need.

Dealers must establish, maintain and enforce written policies and procedures "reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known . . . that are necessary for conducting business with such counterparty." Exchange Act rule 15Fh-3(e) [17 CFR 240.15Fh-3(e)].[29] The rule further specifies that those "essential facts" are: facts required to "comply with applicable laws, regulations and rules"; facts required to implement the dealer's credit and operational risk management policies in connection with transactions involving the counterparty; and information regarding the authority of any person acting for the counterparty.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	**EU Requirement and/or Policy Goal Summary**	**Comparability Assessment**	**National Measures Germany**
e. Subcategory: Know Your Counterparty			
1. To what extent are firms required to obtain counterparty information necessary to promote compliance with applicable laws and regulations?			
Dealers must establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain a record of the facts required to "comply with applicable laws, regulations and rules" in connection with counterparty transactions. Exchange	Investment Firms must obtain information from clients in order to categorise them as retail clients, professional clients or, to the extent relevant for the services to be provided, ECPs (for purposes of MiFID). Among other matters, Investment Firms must determine whether the client is an authorised entity (e.g. another Investment Firm), data on their financial standing (balance sheet total, net turnover and capital resources), and the knowledge and experience of the	**Comparability of outcomes**: The EU's requirements to obtain counterparty information provide a comparable regulatory outcome to the SEC requirements to obtain counterparty information. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(e) and MLD4, MLD5 and MiFID are consistent in that both require Investment Firms to collect and retain information about counterparties, in order to protect market participants	**Sections 67, 68 of the WpHG in conjunction with Articles 45, 71 MiFID Org Reg.** **§ 10 Abs. 1 Nr. 1-4 GwG**

[28] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8
[29] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
1. To what extent are firms required to obtain counterparty information necessary to promote compliance with applicable laws and regulations?			
Act rule 15Fh-3(e) [17 CFR 240.15Fh-3(e)].[30] This requirement "is consistent with basic principles of legal and regulatory compliance . . . ." *See* Business Conduct Adopting Release, 81 FR at 29994.[31]	client's staff in relation to the type of transaction to be conducted. Annex II MiFID. Investment Firms must establish adequate policies and procedures sufficient to ensure compliance of the Investment Firm including its managers, employees and tied agents with its obligations under MiFID. Article 16(2) MiFID. In particular, among other things, Investment Firms must implement appropriate written internal policies and procedures to categorise clients. Annex II Part II.2. MiFID. Please refer to the response to the question set forth in section 4.f.1 below regarding the suitability and appropriateness information that an Investment Firm must obtain from clients, where relevant.	and facilitate regulatory oversight and enforcement.	

[30] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8
[31] https://www.federalregister.gov/documents/2016/05/13/2016-10918/business-conduct-standards-for-security-based-swap-dealers-and-major-security-based-swap

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
1. To what extent are firms required to obtain counterparty information necessary to promote compliance with applicable laws and regulations?			
	Credit Institutions and Investment Firms are generally subject to MLD4 and MLD5 requirements which impose customer identification obligations. Credit Institutions and Investment Firms must apply customer due diligence measures when (i) establishing a business relationship, (ii) conducting transactions that meet certain thresholds, and (iii) there are doubts about the veracity or adequacy of previously obtained customer identification data. Article 11 MLD4. Enhanced diligence is required in respect of a 'politically exposed person' and other high risk customers. Ongoing monitoring requirements also apply. The MLD4 and MLD5 customer identification requirements are		**§ 11 Abs. 1 GwG** **§ 10 Abs. 3 Nr. 2, 4 GwG**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
1. To what extent are firms required to obtain counterparty information necessary to promote compliance with applicable laws and regulations?			
	supplemented by Member State-specific requirements.		**§ 12 GwG**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
2. To what extent are firms required to obtain counterparty information necessary for purposes of the firm's credit and operational risk management policies?			
Dealers must establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain a record of the facts required to implement the dealer's credit and operational risk management policies in connection with	CRR Firms must have robust governance arrangements, which include effective processes to identify, manage, monitor and report the risks they are or might be exposed to, adequate internal control mechanisms, and practices that are consistent with and promote sound and effective risk management. Article 74(1) CRD IV.	**Comparability of outcomes**: The EU's counterparty information collection requirements provide a comparable regulatory outcome to the SEC counterparty information collection requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(e) and MDL4 and MLD5 are consistent in that they require Investment Firms to	**Section 83 (2) of the WpHG in conjunction with Article 58 MiFID Org Reg.** **§ 10 Abs. 1, Nr. 1, Abs. 2 GwG**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
2. To what extent are firms required to obtain counterparty information necessary for purposes of the firm's credit and operational risk management policies?			
counterparty transactions. Exchange Act rule 15Fh-3(e) [17 CFR 240.15Fh-3(e)].[32] This requirement "is consistent with basic principles of . . . operational and credit risk management." *See* Business Conduct Adopting Release, 81 FR at 29994.[33]	CRR Firms must have in place sound, effective and comprehensive strategies and processes to assess and maintain on an on-going basis the amounts, types and distribution of internal capital that they consider to be adequate to cover the nature and level of the risks to which they are exposed. Article 73 CRD IV. Regulators must ensure that CRR Firms implement policies and procedures to evaluate and manage the exposure to operational risk, including model risk, and to cover low-frequency high-severity events, including an articulation of what constitutes operational risk. Article 85(1) CRD IV. These CRD IV requirements will oblige CRR Firms to obtain information on their counterparties	collect and retain counterparty information pursuant to internal risk management policies in order to protect market participants and facilitate regulatory oversight and enforcement.	

[32] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8
[33] https://www.federalregister.gov/documents/2016/05/13/2016-10918/business-conduct-standards-for-security-based-swap-dealers-and-major-security-based-swap

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
2. To what extent are firms required to obtain counterparty information necessary for purposes of the firm's credit and operational risk management policies?			
	to enable an assessment of credit and operational risk to be made.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
3. To what extent are firms required to obtain information regarding the authority of persons acting for the counterparty?			
Dealers must establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain a record of the information regarding the	Investment Firms are required to establish a record that includes the document or documents agreed between the Investment Firm and a client that sets out the rights and obligations of the parties, and the other terms on which the	**<u>Comparability of outcomes</u>**: The EU's counterparty due diligence requirements provide a comparable regulatory outcome to the SEC counterparty due diligence requirements. In particular, the	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
3. To what extent are firms required to obtain information regarding the authority of persons acting for the counterparty?			
authority of any person acting for the counterparty in connection with counterparty transactions. Exchange Act rule 15Fh-3(e) [17 CFR 240.15Fh-3(e)].[34]	Investment Firm will provide services to a client, which will typically identify the person(s) that are authorised to act on behalf of the Investment Firm's counterparty. Article 25(5) MiFID. When performing customer due diligence measures, Credit Institutions and Investment Firms must verify that any person purporting to act on behalf of the customer is authorized to do so and identify and verify the identity of that person. Article 13(1) MLD4.	regulatory outcomes pursued under Exchange Act section 15Fh-3(e) and MDL4 and MiFID are consistent in that they require Investment Firms to collect and retain information about the authority of persons acting on behalf of counterparties, in order to protect market participants from fraudulent acts and facilitate regulatory oversight and enforcement.	**§ 11 Abs. 1 S. 1 GwG.**

[34] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
4. Are such information gathering requirements lessened or eliminated in connection with certain categories of counterparties? If so, how?			
Dealers must establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty. Exchange Act rule 15Fh-3(e) [17 CFR 240.15Fh-3(e)].[35]	Credit Institutions and Investment Firms must conduct customer due diligence regardless of the nature of the counterparty. The MiFID customer due diligence requirements noted in response to the questions set forth in sections 4.e.1 and 4.f.1 apply in respect of all types of clients. Customer due diligence can either be simplified or enhanced, depending on a range of factors, including: (i) the types of customers in question – for example, legal persons or arrangements that are personal asset-holding vehicles, companies that have nominee shareholders or shares in bearer form, businesses that are cash-intensive, etc. may be considered higher risk customers for whom enhanced due diligence may be required; and (ii) the customers'	**<u>Comparability of outcomes</u>**: The EU's counterparty due diligence requirements provide a comparable regulatory outcome to the SEC counterparty due diligence requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(e) and MDL4 and MiFID are consistent in that they require Investment Firms to collect and retain information about all counterparties, in order to protect market participants and facilitate regulatory oversight and enforcement. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.	

[35] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
e. Subcategory: Know Your Counterparty			
4. Are such information gathering requirements lessened or eliminated in connection with certain categories of counterparties? If so, how?			
	geographical location. Annexes II and III of MLD4. Additional member state requirements and EU guidelines may also apply in this respect.	**Comparability of specific requirements**: The specific requirements under the two regimes are analogous except as follows: Annexes II and III of MLD4 allow different levels of due diligence on counterparties based on a number of risk-based factors, but the US regime does not explicitly allow or prohibit such practices.	**§10 Abs. 2 S. 2 GwG**

f. Subcategory: Suitability

The counterparty protection requirements in part account for the need to guard against dealers making unsuitable recommendations.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
1. To what extent are market participants prohibited from making unsuitable recommendations?			
The SEC has noted that "the obligation to make only suitable recommendations is a core business conduct requirement for broker-dealers and other financial intermediaries." *See* Business Conduct Adopting Release, 81 FR at 29997;[36] Exchange Act rule 15Fh-3(f) [17 CFR 240.15Fh-3(f)].[37]	MiFID suitability requirements are triggered where an Investment Firm provides investment advice or portfolio management services. Investment Firms must undertake a suitability assessment in relation to recommendations to buy a financial instrument and for all decisions whether to trade, including whether to buy, hold or sell an investment. Recital 87 MiFID Org Reg. **Provision of investment advice or portfolio management** When providing investment advice or portfolio management, Investment Firms must obtain the necessary information regarding the client's/potential client's knowledge and experience in the investment	**<u>Comparability of outcomes</u>**: The EU's suitability requirements provide a comparable regulatory outcome to the SEC suitability requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(f) and MiFID are consistent in that they prohibit firms from making unsuitable recommendations in order to protect market participants and facilitate sound decision-making. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness.	**Sections 63 (10), 64 of the WpHG**

[36] https://www.federalregister.gov/documents/2016/05/13/2016-10918/business-conduct-standards-for-security-based-swap-dealers-and-major-security-based-swap
[37] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
1. To what extent are market participants prohibited from making unsuitable recommendations?			
	field relevant to the specific type of product or service, that person's financial situation including their ability to bear losses, and their investment objectives including their risk tolerance, so as to enable the Investment Firm to recommend to the client/potential client the investment services and financial instruments that are suitable for the client and, in particular, are in accordance with their risk tolerance and ability to bear losses. Where the Investment Firm provides investment advice recommending a package of services or products bundled, the overall bundled package must be suitable. Article 25(2) MiFID. When providing investment advice or portfolio management, Investment Firms must not recommend or decide to trade where none of the services or instruments are suitable for the client. Article 54(10) MiFID Org Reg.	**Comparability of specific requirements**: The specific requirements under the EU regime are more detailed. In addition to the prohibition against unsuitable recommendations under Article 54(10) MiFID Org Reg., the EU regime also lays out factors to consider for evaluation of suitability under Article 25(2) MiFID and Recital 82 MiFID.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
1. To what extent are market participants prohibited from making unsuitable recommendations?			
	Provision of investment advice to retail clients When providing investment advice, the Investment Firm should specify in a written statement on suitability how the advice given meets the preferences, needs and other characteristics of the retail client. The responsibility to undertake the suitability assessment and to provide an accurate suitability report to the client lies with the Investment Firm and appropriate safeguards must be in place to ensure that the client does not incur a loss out as a result of the report presenting in an inaccurate or unfair manner the personal recommendation, including how the recommendation provided is suitable for the client and the disadvantages of the recommended course of action. Recital 82 MiFID.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
2. What types of activities constitute "recommendations" or otherwise trigger the application of your jurisdiction's suitability requirement?			
Whether a dealer has made a recommendation turns on the facts and circumstances of the particular situation. Relevant factors include whether the communication "reasonably could be viewed as a 'call to action'" and "reasonably would influence an investor to trade a particular security or group of securities." *See* Business Conduct Adopting Release, 81 FR at 29997.[38]	MiFID suitability requirements are triggered where an Investment Firm provides investment advice or portfolio management services. 'Investment advice' requires that a personal recommendation is made to a person in his capacity as an investor, or as an agent for the same, that is presented as suitable for that person, or based on a consideration of the circumstances of that person, and constitutes a recommendation to: buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument; or exercise or not exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument. A recommendation must not be considered a personal recommendation if it is issued	**<u>Comparability of outcomes</u>**: The EU's suitability requirements provide a comparable regulatory outcome to the SEC suitability requirements. In particular, although the two regimes describe "recommendations" with different language, actions that are treated as "recommendations" under one regime would very likely be treated the same under the other. Both regimes aim to capture "recommendation" broadly to facilitate investor protection.	

[38] https://www.federalregister.gov/documents/2016/05/13/2016-10918/business-conduct-standards-for-security-based-swap-dealers-and-major-security-based-swap

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
2. What types of activities constitute "recommendations" or otherwise trigger the application of your jurisdiction's suitability requirement?			
	exclusively to the public. Article 9 MiFID Org Reg.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
3. To what extent do firms and their personnel need to understand the risks and rewards of products subject to the suitability requirement?			
A dealer that recommends a security-based swap, or a trading strategy involving a security-based swap, to a counterparty (other than a counterparty that is a dealer or participant) must undertake "reasonable diligence" to understand the potential risks and rewards associated with the recommendation. Exchange Act rule 15Fh-	Investment Firms are required to ensure and to be able to demonstrate to their national regulators on request that natural persons giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the Investment Firm possess the necessary knowledge and competence to comply with the requirement that all information provided to clients is fair, clear and not misleading. Article 24(3) MiFID and Article 25(1) MiFID. In practice,	**<u>Comparability of outcomes</u>**: The EU's requirements for natural persons giving recommendations provide a comparable regulatory outcome to the SEC natural person recommendation requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(f)(1) and MiFID are consistent in that they require that the person giving recommendations must have necessary knowledge about the features of the financial instruments involved. A person that satisfies the	**Sections 87 (1), (2), 63 (6) of the WpHG**

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
3. To what extent do firms and their personnel need to understand the risks and rewards of products subject to the suitability requirement?			
3(f)(1) [17 CFR 240.15Fh-3(f)(1)].[39]	this means that the relevant individuals at the Investment Firm must be able to understand the potential risks and rewards associated with the recommendations they make in order to be able to comply with Articles 24(3) and 25(1) MiFID. National Member States criteria apply in assessing such knowledge and competence.	knowledge requirement under Articles 24(3) and 25(1) MiFID is very likely to satisfy the "reasonable diligence" requirement under Exchange Act rule 15Fh-3(f)(1). Both regimes aim to protect market participants from misleading information.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
4. To what extent do firms and their personnel need to have a reasonable basis to conclude that the recommendation is suitable for the counterparty? What information must they obtain about the counterparty to comply with this requirement?			
A dealer that recommends a security-	When providing investment advice or portfolio management services,	**<u>Comparability of outcomes</u>**:	

[39] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
4. To what extent do firms and their personnel need to have a reasonable basis to conclude that the recommendation is suitable for the counterparty? What information must they obtain about the counterparty to comply with this requirement?			
based swap, or a trading strategy involving a security-based swap, to a counterparty (other than a counterparty that is a dealer or participant) must have a "reasonable basis" to believe that the recommendation is suitable for the counterparty, based on information such as the counterparty's investment profile, trading objectives and ability to absorb potential losses. Exchange Act rule 15Fh-3(f)(1) [17 CFR 240.15Fh-3(f)(1)].[40]	the Investment Firm must collect from the client all 'necessary information' required by Article 25(2) MiFID and Article 54(2) MiFID Org Reg. In cases where the Investment Firm does not obtain such information, it must not recommend investment services or financial instruments to that client or potential client. Article 54(8) MiFID Org Reg. The required information has to be considered in light of all the features of the investment advice or portfolio management services. The Investment Firm has to be able to assess the client's ability to understand and financially bear the relevant risks associated with the investment. The depth and detail of the required information are subject to the proportionality principle, for	The EU's requirement that recommendations be made only after all 'necessary information' has been obtained provides a comparable regulatory outcome to the SEC's requirement that recommendations be made only if the dealer has a "reasonable basis" to believe the recommendation is suitable. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(f)(1) and MiFID and ESMA are consistent in that they require that firms determine the suitability of recommendations based on counterparty-specific information, in order to protect market participants and facilitate sound decision making. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific	**Section 64 (3) of the WpHG in conjunction with Article 54 MiFID Org Reg.**

[40] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
4. To what extent do firms and their personnel need to have a reasonable basis to conclude that the recommendation is suitable for the counterparty? What information must they obtain about the counterparty to comply with this requirement?			
	example they can vary depending on the complexity, risks and structure of the financial instrument and on the nature and extent of the service provided. In particular, for more complex and risky products, as well as for the illiquid ones, the Investment Firm should consider whether more in-depth information may need to be collected, so as to be able to carry out the assessment. Article 54(2) MiFID Org Reg. Investment Firms are responsible for ensuring that the information collected from clients is reliable and need to take reasonable steps to this effect, in accordance with Article 54(7) MiFID Org Reg. **Examples of information required** The information regarding the financial situation of the client/potential client must include, where relevant, information on the	requirements below for completeness. **Comparability of specific requirements**: The specific requirements under the EU regime are comparable to those under the US regime. The counterparty-specific information that Investment Firms must collect and consider when making suitability assessments under Article 25 MiFID and Article 54 MiFID Org Reg. is comparable to the information required under Exchange Act rule 15Fh-3(f)(1).	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
4. To what extent do firms and their personnel need to have a reasonable basis to conclude that the recommendation is suitable for the counterparty? What information must they obtain about the counterparty to comply with this requirement?			
	source and extent of their regular income, their assets, investments and real property, and their regular financial commitments. Article 54(4) MiFID Org Reg. The information regarding the investment objectives of the client/potential client must include, where relevant, information on the length of time for which the client wishes to hold the investment, their preferences regarding risk taking, their risk profile, and the purposes for their investment. Article 54(5) MiFID Org Reg. ESMA has provided guidance with regards to the requirements applicable to Investment Firms and their personnel when (i) collecting the suitability-related information and (ii) making their suitability assessments. Question 7 ESMA		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
4. To what extent do firms and their personnel need to have a reasonable basis to conclude that the recommendation is suitable for the counterparty? What information must they obtain about the counterparty to comply with this requirement?			
	Q&As on MiFID and MiFIR Investor Protection.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
5. Which counterparties are covered by your jurisdiction's suitability requirement? To what extent is the suitability requirement excused or otherwise lessened in connection with certain types of counterparties, such as institutional counterparties?			
A dealer may fulfil its "reasonable basis" requirement with respect to an eligible contract participant (**ECP**)[41] (except those that are non-financial corporations, benefit plans, government entities and individuals),	Where an Investment Firm provides investment advice or portfolio management services to a professional client, the Investment Firm is entitled to assume that the client has the necessary level of experience and knowledge, and therefore is not required to obtain extensive	**Comparability of outcomes**: The scope of the EU's suitability requirements provide a comparable regulatory outcome to the SEC's suitability requirements. In particular, the regulatory outcomes pursued under Exchange Act section 15Fh-3(f) and MiFID and ESMA are consistent in that	**Sections 67, 63 (3) of the WpHG in conjunction with Article 54 (3) MiFID Org Reg**

[41] The definition of "eligible contract participant" under Commodity Exchange Act section 1a(18) [7 U.S.C. 1a(18)] includes: corporations and other entities with more than $10 million in assets; individuals with more than $10 million invested on a discretionary basis (or $5 million if hedging); entities with a net worth of at least $1 million that are hedging commercial risk; financial institutions; insurance companies; certain investment companies; commodity pools with more than $5 million in assets under management; certain employee benefit plans; governmental entities; certain brokers and dealers; and certain futures commission merchants.

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
5. Which counterparties are covered by your jurisdiction's suitability requirement? To what extent is the suitability requirement excused or otherwise lessened in connection with certain types of counterparties, such as institutional counterparties?			
or other persons with at least $50 million in total assets (**institutional counterparty**) if the dealer reasonably determines that the counterparty, or an agent with decision-making authority, is capable of independently evaluating investment risks; the counterparty or agent affirms it is exercising independent judgment; and the dealer discloses that it is acting as counterparty and is not assessing suitability. Exchange Act rule 15Fh-3(f)(1), (4) [17 CFR 240.15Fh-3(f)(1), (4)].[42] A dealer may satisfy its "reasonable diligence"	information from the client. Article 54(3) MiFID Org Reg. Where the investment service consists of the provision of investment advice to a per se professional client (i.e. not a retail client that has elected to be treated as a professional client), the Investment Firm is entitled to assume that the client is able to financially bear any related investment risks consistent with the investment objectives of that client and therefore is not generally required to obtain information on the financial situation of the client. Article 54(3) MiFID Org and paras. 40-41 of the ESMA Guidelines on suitability. Unlike other activities relating to dealing in financial instruments, clients cannot be classified as ECPs	they provide for less-onerous suitability requirements for more sophisticated counterparties. The US regime allows exemptions when the counterparty is a professional, experienced market participant, while the EU regime permits Investment Firms to assume certain levels of knowledge and expertise without conducting the client suitability assessment in certain circumstances. While the SEC Guidance does not require that the EU have analogues to every requirement under SEC rules in order to be deemed comparable, we note the comparability of specific requirements below for completeness. **<u>Comparability of specific requirements</u>**: The specific requirements under the EU regime are comparable to those under the US regime, except the following:	

[42] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
5. Which counterparties are covered by your jurisdiction's suitability requirement? To what extent is the suitability requirement excused or otherwise lessened in connection with certain types of counterparties, such as institutional counterparties?			
obligation if the dealer receives written representations that, for a counterparty that is not a special entity,[43] the counterparty has complied with policies and procedures reasonably designed to ensure that the persons evaluating the recommendation and making trading decisions are capable of doing so. Rule 15Fh-3(f)(3) [17 CFR 240.15Fh-3(f)(3)].[44]	for the purposes of investment advice – they must be treated as either retail clients or professional clients – and so even the most sophisticated clients must receive this protection.	• **Disclosure**. One of necessary conditions for exemption under the US regimes is that the dealer must disclose that it is not assessing suitability for the counterparty. The EU regime does not require such disclosure.	

[43] The definition of "special entity" under Exchange Act rule 15Fh-2(d) [17 CFR 240.15Fh-2(d)] includes: US persons that are federal agencies, certain state and local agencies and political subdivisions and instrumentalities, certain employee benefit plans and government plans, and endowments.

[44] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
6. To what extent does the suitability requirement apply – or not apply – in connection with cross-border activities?			
The suitability requirements generally apply only to a non-US firm's activities involving US counterparties (unless the transaction is arranged, negotiated or executed in the US). *See* Exchange Act rule 15Fh-3(f) [17 CFR 240.15Fh-3(f)].[45] For non-US dealers, the business conduct requirements under Exchange Act section 15F(h) (other than internal supervision requirements) apply only to the dealer's transactions with US counterparties (apart from certain transactions conducted through a foreign branch of the US	MiFID suitability requirements apply to Investment Firms in the context of investment advice (and portfolio management) to retail and professional clients, irrespective of the clients' origin or their physical location.	**Comparability of outcomes**: The applicability of the EU's suitability requirements to cross-border activities provides a comparable but more onerous, regulatory outcome to the SEC's cross-border suitability requirements. The regulatory outcomes pursued under MiFID and ESMA have broader coverage than those under the US regime. In particular, the US regime contains a national element and is applicable to non-US firms only when the counterparty is a US person or entity (or where the relevant transaction is arranged, negotiated or executed in the US). The applicability of the EU regime does not depend on the location or nationality of the counterparty and is therefore more onerous than the US requirements.	

[45] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
f. Subcategory: Suitability			
6. To what extent does the suitability requirement apply – or not apply – in connection with cross-border activities?			
counterparty), or to transactions arranged, negotiated or executed in the US. *See* Exchange Act rule 3a71-3(c) [17 CFR 240.3a71-3(c)];[46] Exchange Act rules 3a71-3(a)(3), (8) and (9) [17 CFR 240.3a71-3(a)(3), (8) and (9)].[47]			

[46] https://www.govinfo.gov/content/pkg/CFR-2016-title17-vol4/pdf/CFR-2016-title17-vol4-sec240-3a71-3.pdf
[47] https://www.govinfo.gov/content/pkg/CFR-2016-title17-vol4/pdf/CFR-2016-title17-vol4-sec240-3a71-3.pdf

g. Subcategory: Disclosure of Clearing Rights

Firms are required to disclose to a counterparty (other than a counterparty that is a dealer or participant) certain information regarding clearing rights. This obligation is only applicable if the identity of the counterparty is known "at a reasonably sufficient time prior to execution of the transaction". Exchange Act rule 15Fh-3(d) [17 CFR 240.15Fh-3(d)];[48] and Exchange Act section 3C [15 U.S.C. 78c-3].[49]

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
g. Subcategory: Disclosure of Clearing Rights			
1. To what extent does your jurisdiction mandate the clearing of relevant transactions? In the absence of mandatory clearing of all transactions of a particular type, does your jurisdiction permit counterparties to elect to require clearing? If so, does the counterparty have the right to select the clearing agency?			
Mandatory clearing obligation The SEC requires the clearing of security-based swaps it designates to be subject to mandatory clearing. The SEC has not made any such designations to date. Exchange Act section 3C(a)-(b) 15 U.S.C. 78c-3(a)-(b).[50] **Mandatory clearing: disclosure**	**Mandatory clearing obligation** **<u>EMIR</u>** All OTC derivative contracts of a class that has been declared subject to the clearing obligation entered into or novated between certain entities which are both required to clear that asset class on or after the date the clearing obligation takes effect must be cleared via a CCP authorized in accordance with Article 14 of EMIR or recognized in accordance with Article 25 of EMIR. EMIR, Article 4.	**<u>Comparability of outcomes</u>**: The EU's clearing requirements provide a comparable regulatory outcome to the SEC's clearing requirements. In particular, the regulatory outcomes pursued under Exchange Act sections 3C(a)-(b) and (g)(5), and 15Fh-3(d) and EMIR, MiFID and ESMA are consistent in that they require regulators have the power to designate certain types of derivatives to be subject to mandatory clearing. Also, under both the EU and US regimes, in respect of derivatives not subject to mandatory clearing,	

[48] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8
[49] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78c-3.pdf
[50] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78c-3.pdf

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
g. Subcategory: Disclosure of Clearing Rights			
1. To what extent does your jurisdiction mandate the clearing of relevant transactions? In the absence of mandatory clearing of all transactions of a particular type, does your jurisdiction permit counterparties to elect to require clearing? If so, does the counterparty have the right to select the clearing agency?			
For security-based swaps subject to mandatory clearing, the firm would have to: (i) disclose the names of the clearing agencies that accept the security-based swap, and identify which clearing agencies the firm is authorized to use; and (ii) notify the counterparty that it has the sole right to select which clearing agency must be used for clearing. Exchange Act rule 15Fh-3(d)(1) [17 CFR 240.15Fh-3(d)(1)].[51] **Voluntary clearing: disclosure** For security-based swaps not subject to mandatory	FCs above the "clearing threshold" and NFC+s are subject to mandatory clearing (to the extent they transact with each other or non-EEA equivalents and, in certain cases, if two non-EEA equivalents transact with each other). EMIR, Articles 4 and 4a. To date, certain interest rate and index credit derivative transactions have been declared subject to clearing and the requirements have now been phased in for all in-scope entities (*see* EMIR Clearing RTS). We note that there are various exceptions and derogations at a counterparty and transaction level. Article 5 of EMIR and the related draft technical standards set out the detailed process regarding	counterparties may choose to voluntarily clear and select the clearing agency (to the extent that a clearing agency clears the relevant contract type and, if relevant, is authorized or recognized under EMIR). The EU rules do not provide that a counterparty has the sole right to select the clearing agency (either in a mandatory clearing or voluntary clearing context) and, consequently, there is no related notification requirement. However, as a practical matter, both parties will need to agree the clearing agency that they wish to use for a particular transaction. We note that although the SEC has the power to require mandatory clearing for certain types of securities, it has not exercised this power. The EU regulators have already designated certain credit and interest rate	

[51] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
g. Subcategory: Disclosure of Clearing Rights			
1. To what extent does your jurisdiction mandate the clearing of relevant transactions? In the absence of mandatory clearing of all transactions of a particular type, does your jurisdiction permit counterparties to elect to require clearing? If so, does the counterparty have the right to select the clearing agency?			
clearing, the firm must: (i) determine whether the security-based swap is accepted for clearing by one or more clearing agencies; (ii) disclose the names of the clearing agencies that accept the security-based swap, and identify which clearing agencies the firm is authorized to use; and (iii) notify the counterparty that it may elect to require clearing and has the sole right to select the clearing agency (provided that the firm is authorized to clear through that clearing agency). Exchange Act	consideration of a class of OTC derivatives for the clearing obligation. If a class of OTC derivative contracts no longer has a CCP which is authorised or recognised to clear those contracts under EMIR, it must cease to be subject to the clearing obligation in Article 4 of EMIR and ESMA must publish a call for development of proposals for the clearing of the relevant class of derivatives. EMIR, Article 5(6). Authorisation of a CCP to clear can be withdrawn in certain circumstances (*see* EMIR, Article 20) but not simply at the request of ESMA or the EC. ESMA may request that the EC temporarily suspend mandatory clearing for specific classes of OTC derivatives contracts or for a specific	derivatives as subject to mandatory clearing and have therefore developed more detailed regulations relating to mandatory clearing under EMIR. *See* EMIR Clearing RTS.	

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
g. Subcategory: Disclosure of Clearing Rights			
1. To what extent does your jurisdiction mandate the clearing of relevant transactions? In the absence of mandatory clearing of all transactions of a particular type, does your jurisdiction permit counterparties to elect to require clearing? If so, does the counterparty have the right to select the clearing agency?			
rule 15Fh-3(d)(2) [17 CFR 240.15Fh-3(d)(2)].[52]	type of counterparty if certain conditions are met. EMIR, Article 6a. **<u>MiFIR</u>** All derivatives transactions concluded on a regulated market (i.e. all exchange-traded derivatives) must be cleared by a CCP. If a transaction is executed on a regulated market it will be an "exchange-traded derivative" for the purposes of MiFIR and will not be an "OTC derivative" for the purposes of EMIR (and thus will be outside the scope of EMIR clearing requirements). MiFIR, Article 29. The MiFIR RM Clearing Obligation RTS set out requirements that CCPs, trading venues and clearing members must comply with in respect of all cleared derivatives		

[52] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
g. Subcategory: Disclosure of Clearing Rights			
1. To what extent does your jurisdiction mandate the clearing of relevant transactions? In the absence of mandatory clearing of all transactions of a particular type, does your jurisdiction permit counterparties to elect to require clearing? If so, does the counterparty have the right to select the clearing agency?			
	(both exchange-traded and OTC) relating to effective systems, procedures and arrangements to ensure that transactions are submitted and accepted for clearing as quickly as technologically practicable. **Voluntary clearing** In the absence of mandatory clearing of transactions of a particular type, counterparties may elect to clear such transactions and non-EU entities are not required to clear such transactions via a CCP authorized or recognized in accordance with EMIR (although EU entities must clear such transactions via a CCP authorized or recognized in accordance with EMIR). In such circumstances, the counterparties may select any CCP that clears the relevant contract type.		

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
g. Subcategory: Disclosure of Clearing Rights			
2. To what extent does your jurisdiction require disclosure of applicable clearing rights?			
Firms must disclose certain clearing rights information to counterparties that are not also dealers. This information includes: (i) a list of clearing agencies that the dealer can use and will accept the swap; (ii) notice to the counterparty that it has the sole right to select which clearing agency from the list will be used, and for non-mandatory clearing; and (iii) notice to the counterparty that it may elect to require clearing. Exchange Act rules 15Fh-3(d)(1) and (2) [17 CFR 240.15Fh-3(d)(1) and (2)].[53] Firms must make written records of non-written	A clearing member must keep separate records and accounts that enable it to distinguish both in accounts held with the CCP and in its own accounts its assets and positions from the assets and positions held for the account of its clients at the CCP. EMIR, Article 39(4). A clearing member must offer its clients, at least, the choice between omnibus client segregation and individual client segregation and inform them of the costs and level of protection referred to in Article 39(7) of EMIR associated with each option. The client must confirm its choice in writing. EMIR, Article 39(5). CCPs and clearing members must publicly disclose the levels of protection and the costs associated with the different levels of	**<u>Comparability of outcomes</u>**: The EU's clearing rights disclosure requirements provide a comparable regulatory outcome to the SEC's clearing rights disclosure requirements. In particular, both regimes require the disclosure of certain clearing information and rights to clients to enable clients to understand which clearing agencies may be used for clearing. As discussed above, the EU rules do not provide that a counterparty has the sole right to select the clearing agency (either in a mandatory clearing or voluntary clearing context) and, consequently, there is no related notification requirement. However, as a practical matter, both parties will need to agree on the clearing agency that they wish to use for a particular transaction. The US regime stipulates the duties of firms to maintain records of clearing	

[53] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
g. Subcategory: Disclosure of Clearing Rights			
2. To what extent does your jurisdiction require disclosure of applicable clearing rights?			
disclosures, and provide written versions of the disclosures "in a timely manner, but in any case no later than the delivery of the trade acknowledgement." Exchange Act rule 15Fh-3(d)(3) [17 CFR 240.15Fh-3(d)(3)].[54]	segregation that they provide and must offer those services on reasonable commercial terms. Details of the different levels of segregation must include a description of the main legal implications of the respective levels of segregation offered including information on the insolvency law applicable in the relevant jurisdictions. EMIR, Article 39(7). We note that under changes made by EMIR Refit 2.1, with effect from June 18, 2021, without being obliged to contract, clearing members and clients which provide clearing services, whether directly or indirectly, must provide those services under fair, reasonable, non-discriminatory and transparent (**FRANDT**) commercial terms. EMIR Refit 2.1, introducing a new Article 4(3a). While the detail of the FRANDT rules is not yet final and may be subject to change, we note	rights under Exchange Act rule 15Fh-3(d)(3). There is no such general requirement under EMIR. However, we note that the EU regime requires that clearing members offer their clients, at least, the choice between omnibus client segregation and individual client segregation, must inform their clients of and must publicly disclose the costs and level of protection associated with each option and must offer those services on reasonable commercial terms (EMIR, Article 39(5) and (7)). The ESMA Q&A on EMIR provide that clearing members must comply with the requirements on segregation and portability under Article 39 of EMIR by the time that a relevant CCP is authorised under EMIR.	

[54] https://www.ecfr.gov/cgi-bin/text-idx?SID=9b882404cd3ca1bbabc9db86a0458e48&mc=true&node=se17.4.240_115fh_63&rgn=div8

SEC Requirement and/or Policy Goal Summary per SEC (with link to the US rule)	EU Requirement and/or Policy Goal Summary	Comparability Assessment	National Measures Germany
g. Subcategory: Disclosure of Clearing Rights			
2. To what extent does your jurisdiction require disclosure of applicable clearing rights?			
	that the ESMA Consultation Paper on FRANDT indicates that, amongst other things, clearing service providers will be required to publicly disclose the general standard contract terms under which they provide clearing services, presented in clearly divided sections, including scope and definitions, information, relationships between clearing service provider and client, termination and default provisions. The requirements on clearing members that are established in EMIR (e.g. those in Articles 38 and 39 of EMIR) apply to clearing members of all CCPs established in the EU. These obligations therefore come into force at and should be met by the time that the CCP is authorised under EMIR. ESMA Q&A on EMIR, CCP Question 8(c).		

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Banking Act
(*Gesetz über das Kreditwesen*)

Excerpt – Unofficial translation

September 2020

This working translation is for information purposes only. This translation is not official; the only authentic text is the German one as published in the Federal Law Gazette (*Bundesgesetzblatt*).

Section 1
Definition of terms

(1) [1]Credit institutions are undertakings which conduct banking business commercially or on a scale which requires commercially organised business operations. [2]Banking business comprises

1 the acceptance of funds from others as deposits or of other unconditionally repayable funds from the public, unless the claim to repayment is securitised in the form of bearer or order bonds, irrespective of whether or not interest is paid (deposit business),

1a the business specified in section 1 (1) sentence 2 of the Pfandbrief Act (*Pfandbriefgesetz*) (Pfandbrief business),

2 the granting of money loans and acceptance credits (credit business),

3 the purchase of bills of exchange and cheques (discount business),

4 the purchase and sale of financial instruments in the credit institution's own name for the account of others (principal broking services),

5 the safe custody and administration of securities for the account of others (safe custody business),

6 the Central Securities Depository activity referred to in subsection (6),

7 the entering into of a commitment to repurchase previously sold claims in respect of loans prior to their maturity,

8 the assumption of sureties, guarantees and other warranties on behalf of others (guarantee business),

9 the execution of cashless cheque collections (cheque collection business), bill collections (bill collection business) and the issuance of travellers' cheques (travellers' cheque business),

10 the purchase of financial instruments at the credit institution's own risk for placing in the market or the assumption of equivalent guarantees (underwriting business),

11 (repealed)

12 acting in the capacity of a central counterparty within the meaning of subsection (31).

(1a) [1]Financial services institutions are undertakings which provide financial services to others commercially or on a scale which requires commercially organised business operations, and which are not credit institutions. [2]Financial services comprise

1 the brokering of business involving the purchase and sale of financial instruments (investment broking),

1a providing customers or their representatives with personal recommendations in respect of transactions relating to certain financial instruments where the recommendation is based on an evaluation of the investor's personal circumstances or is presented as being suitable for the investor and is not provided exclusively via information distribution channels or for the general public (investment advice),

1b operating a multilateral facility, which brings together a large number of persons' interests in the purchase and sale of financial instruments within the facility according to set rules in a way that results in a purchase agreement for these financial instruments (operation of a multilateral trading facility),

1c the placing of financial instruments without a firm commitment basis (placement business),

1d the operation of a multilateral system which is not an organised market or a multilateral trading system and which brings together the interests of a large number of third parties in the purchase and sale of bonds, structured financial products, emission certificates or derivatives within the system in a way that results in a contract for the purchase of these financial instruments (operation of an organised trading system),

2 the purchase and sale of financial instruments on behalf of and for the account of others (contract broking),

3 the management of individual portfolios of financial instruments for others on a discretionary basis (portfolio management),

4 proprietary trading by

(a) continuously offering to purchase or sell financial instruments at self-determined prices for own account using own capital,

(b) undertaking trading, often for own account, in an organised and systematic manner on a substantial scale outside an organised market or a multilateral or organised trading facility where client orders are executed outside a regulated market or a

multilateral or organised trading system without operating a multilateral trading system (systematic internalisation),

(c) the purchase and sale of financial instruments for own account as a service for others or

(d) the purchase and sale of financial instruments for own account as a direct or indirect participant in a domestic organised market or in a multilateral or organised trading facility by means of a high-frequency algorithmic trading strategy characterised by

(aa) an infrastructure for minimising network latencies and other delays in order transmission (latencies), including at least one of the following devices for algorithmic order entry: collocation, proximity hosting or high-speed direct electronic access,

(bb) the ability of the system to initiate, generate, transmit or execute an order without human intervention within the meaning of Article 18 of Delegate Regulation (EU) 2017/565 of the Commission of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, p. 1), as amended, and

(cc) a high volume of intraday notifications within the meaning of Article 19 of Delegate Regulation (EU) 2017/565 in the form of orders, course information or cancellations,

also where no service for others is rendered (high frequency trading),

5 the brokering of deposit business with undertakings domiciled in a state outside the European Economic Area (non-EEA state) (non-EEA deposit broking),

6 the safekeeping, management and protection of cryptographic values or private cryptographic keys used to hold, store or transfer cryptographic values for others (crypto-custody business),

7 dealing in foreign notes and coins (foreign currency dealing),

8 (repealed)

9 the ongoing purchase of receivables on the basis of standard agreements, with or without recourse (factoring),

10 the conclusion of financial lease agreements in the capacity of the lessor and the management of asset-leasing vehicles within the meaning of section 2 (6) sentence 1 number 17 separately from the management of a collective investment scheme within the meaning of section 1 (1) of the Capital Investment Code (*Kapitalanlagegesetzbuch*) (financial leasing),

11 the purchase and sale of financial instruments separately from the management of a collective investment scheme within the meaning of section 1 (1) of the Capital

Investment Code for a community of investors, who are natural persons, on a discretionary basis with regard to the choice of financial instruments, where this is a core element of the product offered and serves the purpose of ensuring that these investors have a share in the performance of the financial instruments acquired (asset management),

12 the safe custody and administration of securities solely for alternative investment funds (AIF) within the meaning of section 1 (3) of the Capital Investment Code (limited custody business).

[3]The purchase and sale of financial instruments for own account which does not constitute proprietary trading within the meaning of section 1 (1a) sentence 2 number 4 (proprietary business) is also deemed to be a financial service if the proprietary business is conducted by an undertaking that

1 conducts this business commercially or on a scale which requires commercially organised business operations without already being classified as an institution for any other reason, and

2 belongs to a group of institutions, a financial holding group, a mixed financial holding group or a financial conglomerate which includes a CRR credit institution.

[4]An undertaking which conducts proprietary business deemed to be a financial service pursuant to sentence 3 is deemed to be a financial services institution. [5]Sentences 3 and 4 do not apply to resolution agencies pursuant to section 8a (1) sentence 1 of the Market Stabilisation Fund Act (*Stabilisierungsfondsgesetz*). [6]Whether there is frequent systematic trading within the meaning of sentence 2 number 4 letter b shall be determined by the number of transactions outside a trading venue within the meaning of section 2 (22) of the German Securities Trading Act (OTC trading) with a financial instrument for the execution of client orders which are executed for own account. [7]Whether a trade is significant within the meaning of sentence 2 number 4 letter b is determined either by the proportion of OTC trading in the company's total trading volume in a particular financial instrument or by the ratio of the company's OTC trading to the total trading volume in a particular financial instrument in the European Union. [8]The conditions for systematic internalisation are only fulfilled if both the upper limit for frequent systematic trading defined in Articles 12 to 17 of Delegate Regulation (EU) 2017/565 and the relevant upper limit for trading defined in the aforementioned Delegate Regulation are exceeded to a significant extent or if a company voluntarily submits to the rules applicable to systematic internalisation and submits a corresponding application for approval to the Federal Financial Supervisory Authority.

(1b) Institutions within the meaning of this Act are credit institutions and financial services institutions.

[…]

Section 6
Functions

(1) [1]BaFin exercises supervision over institutions pursuant to the provisions of this Act, the statutory orders enacted in connection therewith, Regulation (EU) No 575/2013 as last amended and legal acts enacted on the basis of Regulation (EU) No 575/2013 and Directive 2013/36/EU, as well as in accordance with the provisions of Regulation (EU) No 1024/2013 and Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing a framework for cooperation between the European Central Bank and national competent authorities and national designated authorities within the single supervisory mechanism (SSM framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1). [2]BaFin is the competent authority for the application of Article 458 of Regulation (EU) No 575/2013 as well as the competent authority pursuant to Article 4 (1) of Directive 2013/36/EU, unless the European Central Bank is considered the competent authority pursuant to Regulation (EU) No 1024/2013. [3]The Deutsche Bundesbank is the competent authority pursuant to Article 4 (1) of Directive 2013/36/EU within the scope of the functions assigned to it pursuant to section 7 (1), also in conjunction with subsection (1a), unless the European Central Bank is considered a competent authority under Regulation (EU) No 1024/2013.

(1a) BaFin exercises supervision over central counterparties additionally pursuant to Regulation (EU) No 648/2012 and to the legal acts enacted on the basis thereof.

(1b) For CRR institutions, BaFin is the sectoral competent authority within the meaning of Article 25a of Regulation (EC) No 1060/2009 as last amended and enforces compliance with the requirements of Regulation (EC) No 1060/2009 as last amended, unless Section 29 of the German Securities Trading Act applies.

(1c) BaFin is a competent authority within the meaning of Articles 11, 17 (1) and 55 (1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on the enhancement of securities settlement and clearing in the European Union and via central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

(1d) BaFin is the competent authority under this Act within the meaning of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on basic information sheets for packaged retail investment products and insurance investment products (PRIIP) (OJ L 352, 9.12.2014, p. 1, L 358, 13.12.2014, p. 50) as amended for institutions producing, selling or advising on PRIPs within the meaning of Article 4 (1) of this Regulation, provided that such PRIPs are also structured deposits within the meaning of Section 2 (15) of the German Securities Trading Act.

(1e) BaFin is the competent authority for

1. originators, original lenders and securitization special purpose vehicles as defined in Article 29 (4) of Regulation (EU) 2017/2402,
2. originators, sponsors and securitization special purpose vehicles pursuant to Article 29 (5) of Regulation (EU) 2017/2402 and

3. third parties within the meaning of Article 28 of Regulation (EU) 2017/2402

and shall enforce compliance with the requirements set out in Articles 6 to 9 in cases of number 1, with the requirements set out in Articles 18 to 27 in cases of number 2, and with the requirements set out in Article 28 of Regulation (EU) 2017/2402 and the acts adopted on the basis of Regulation (EU) 2017/2402 in cases of number 3 in accordance with the provisions of this Act, unless section 295 (1) (4) of the Insurance Supervision Act or section 5 (11) of the Investment Act applies.

(2) BaFin shall counteract undesirable developments in the lending and financial services sector which may endanger the safety of the assets entrusted to institutions, impair the proper conduct of banking business or provision of financial services or entail major disadvantages for the economy as a whole.

(3) [1]BaFin may, as part of its statutory mandate, issue orders to institutions and their senior managers that are appropriate and necessary to prevent or stop violations of regulatory provisions or to prevent or overcome undesirable developments at an institution which could endanger the safety of the assets entrusted to the institution or impair the proper conduct of its banking business or provision of financial services. [2]The power to issue orders pursuant to sentence 1 also applies vis-à-vis financial holding companies or mixed financial holding companies as well as vis-à-vis the persons who actually manage the business of these companies.

(4) In exercising its functions, BaFin shall duly consider the potential impact of its decisions on the stability of the financial system in the EEA states concerned.

(5) (Repealed)

Section 7
Cooperation with the Deutsche Bundesbank

(1) [1]BaFin and the Deutsche Bundesbank will cooperate as stipulated in this Act. [2]Without prejudice to further legal provisions, this cooperation encompasses the ongoing supervision of institutions by the Deutsche Bundesbank. [3]Ongoing supervision notably entails evaluating the documentation submitted by institutions, audit reports pursuant to section 26 and annual financial statements as well as performing and evaluating on-site inspections with a view to assessing institutions' capital adequacy and risk management procedures, as well as appraising inspection findings. [4]As a rule, the Deutsche Bundesbank's ongoing supervision is performed by its Regional Offices (*Hauptverwaltungen*).

(1a) Within the single supervisory mechanism within the meaning of Article 2 (9) of Regulation (EU) No 1024/2013, subsection (1) shall also apply where BaFin supports the European Central Bank in its tasks within the meaning of Article 6 (2) and (3) of Regulation (EU) No 1024/2013. In the cooperation referred to in subsection (1), BaFin and the Deutsche Bundesbank shall inform each other without delay of inquiries from the European Central Bank and exchange information received from the latter. If, in the course of performing their tasks

under this Act, BaFin or the Deutsche Bundesbank transmits observations, findings, data or other information to the European Central Bank, BaFin or the Deutsche Bundesbank shall simultaneously transmit them to the other body. Subsections (2) to (5) shall also apply accordingly within the framework of the single supervisory mechanism.

(2) [1]In this context, the Deutsche Bundesbank shall observe the guidelines issued by BaFin. [2]BaFin's guidelines on ongoing supervision shall be issued in agreement with the Deutsche Bundesbank. [3]Within the single supervisory mechanism, BaFin, when issuing the guidelines, observes the requirements of the European Central Bank pursuant to Article 6 (5) (a) of Regulation (EU) No 1024/2013. [4]If agreement cannot be reached within an appropriate period of time, the Federal Ministry of Finance will issue such guidelines in consultation with the Deutsche Bundesbank and in compliance with the specifications of the European Central Bank adopted within the single supervisory mechanism pursuant to Article 6 (5) (a) of Regulation (EU) No 1024/2013. [5]BaFin is responsible for the regulatory measures that apply to institutions, in particular general decrees and administrative decisions, including ordering inspections pursuant to section 44 (1) sentence 2 and section 44b (2) sentence 1. [6]As a rule, BaFin bases its regulatory measures on the Deutsche Bundesbank's inspection findings and appraisals.

(3) [1]BaFin and the Deutsche Bundesbank shall exchange observations and findings that are necessary for the performance of their respective functions. [2]In this regard, the Deutsche Bundesbank shall also communicate to BaFin the data that it obtains by virtue of collecting statistics pursuant to section 18 of the Bundesbank Act (*Gesetz über die Deutsche Bundesbank*). [3]It shall consult BaFin prior to ordering such collection of statistics; section 18 sentence 5 of the Bundesbank Act applies *mutatis mutandis*.

(4) [1]The cooperation pursuant to subsections (1) and (1a) and the communication pursuant to subsection (3) include the transmission of personal data needed by the recipient for the performance of its functions. [2]In order to perform their functions under this Act, BaFin and the Deutsche Bundesbank are permitted to access the data stored in each other's databases via automated means. [3]Every tenth time that BaFin retrieves personal data from the Deutsche Bundesbank's database, the Deutsche Bundesbank shall log the time, the details identifying the data records retrieved as well as the identity of the retriever. [4]The logged data shall be used solely for the purpose of safeguarding data protection or data security or for ensuring the proper functioning of the data processing system. [5]They shall be deleted at the end of the calendar year following that in which the data are logged, unless they are needed for an ongoing monitoring procedure. [6]Sentences 3 to 5 apply *mutatis mutandis* to data retrievals by the Deutsche Bundesbank from BaFin's database. [7]This is otherwise without prejudice to the provisions of the Federal Data Protection Act (*Bundesdatenschutzgesetz*).

(5) [1]BaFin and the Deutsche Bundesbank may set up joint data files. [2]Each party may alter, block or delete only those data that it itself has entered and is deemed to be the competent authority within the meaning of the Federal Data Protection Act only with regard to the data which it itself has entered. [3]If either party has grounds to suspect that the data entered by the other party are incorrect, it shall notify the other party thereof without delay. [4]When a joint data file is set up, it shall be determined which party is to take the technical and organisational measures pursuant to Articles 24, 25 and 32 of Regulation (EU) 2016/679 of the European

Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (basic data protection regulation) (OJ L 119, 4.5.2016, p. 1; L 314, 22.11.2016, p. 72; L 127, 23.5.2018, p. 2) as last amended. [5]The party designated pursuant to sentence 4 shall ensure that members of staff are granted access to personal data only to the extent necessary for performing their functions.

Section 8a
Special functions with regard to supervision on a consolidated basis

(1) Where BaFin is responsible for the consolidated supervision of a group of institutions, a financial holding group or a mixed financial holding group within the meaning of section 10a which is headed by an EU parent institution, an EU parent financial holding company or an EU parent mixed financial holding company, it will be responsible not only for the functions ensuing from this Act, but also for the following functions:

1 coordinating the collection and dissemination of relevant and essential information pursuant to section 8 (3) in the context of ongoing supervision as well as in emergency situations; this includes the collection and disclosure of information about the legal and organisational structure as well as the collection and disclosure of information regarding the arrangements for ensuring sound management;

2 planning and coordinating supervisory activities in the context of ongoing supervision as well as in emergency situations, particularly in the event of adverse developments at institutions or on the financial markets; BaFin and the Deutsche Bundesbank – insofar as it is acting under this Act – will cooperate as appropriate with the respective competent authorities of the other EEA states; in the context of ongoing supervision, such cooperation encompasses, in particular, the ongoing monitoring of institutions' risk management, cross-border inspections, measures in the event of organisational deficiencies pursuant to section 45b, disclosure by the institutions and the technical criteria concerning the organisation and treatment of risks laid down in Articles 76 to 87 and 92 to 96 of Directive 2013/36/EU; in emergency situations, particularly in the event of adverse developments at institutions or on the financial markets, cooperation will include the ordering of measures pursuant to sections 45 to 46b, the preparation of joint assessments, the implementation of contingency plans and communication to the public;

3 transmitting lists within the meaning of section 7a (3) to the respective competent authorities of the other EEA states.

[2]If the competent authorities of the other EEA states do not cooperate with BaFin to the extent necessary for it to perform its tasks pursuant to sentence 1, BaFin may request assistance from EBA pursuant to Article 19 of Regulation (EU) No 1093/2010.

[...]

Section 10a
Determining the own funds adequacy of groups of institutions, financial holding groups and mixed financial holding groups; authority to issue orders

(1) [1]A group of institutions, financial holding group or mixed financial holding group (group) in each case comprises a superordinated undertaking and one or more subordinated undertakings. [2]Superordinated undertakings are CRR institutions which pursuant to Article 11 of Regulation (EU) No 575/2013 are required to carry out consolidation as well as institutions which pursuant to section 1a in conjunction with Article 11 of Regulation (EU) No 575/2013 are required to carry out consolidation. [3]Subordinated undertakings are undertakings which must be included in consolidation pursuant to Article 18 of Regulation (EU) No 575/2013 or are voluntarily included in consolidation; institutions which qualify as CRR institutions pursuant to section 1a and which are not exclusively licensed to carry out the activities of a central counterparty within the meaning of section 1 (1) sentence 2 number 12 are deemed to be institutions within the meaning of Article 18 of Regulation (EU) No 575/2013. [4]If a credit institution which is not a CRR credit institution is a superordinated undertaking, entities which conduct banking business solely in the form of deposit business pursuant to section 1 (1) sentence 2 number 1 are also deemed to be subordinated undertakings. [5]Notwithstanding sentence 2, BaFin may, at the request of the superordinated undertaking, designate another group institution as the superordinated undertaking; the group institution shall be consulted beforehand. [6]If, in the case of cross-shareholdings, no institution within the group of institutions fulfils the conditions of sentence 2, BaFin shall designate the group's superordinated undertaking. [7]In the case of a horizontal group within the meaning of Article 18 (3) of Regulation (EU) No 575/2013, the group institution established in Germany with the highest total assets is deemed to be the superordinated undertaking. [8]If the superordinated undertaking is a credit institution which is exclusively licensed to perform the activities of a central counterparty within the meaning of section 1 (1) sentence 2 number 12, a financial services institution which solely provides financial services within the meaning of section 1 (1a) sentence 2 number 9 or 10, a group of institutions within the meaning of this provision is deemed to exist only if at least one CRR institution established in Germany is subordinated to it as a subsidiary.

(2) [1]If a financial holding company within the meaning of Article 4 (1) number 20 of Regulation (EU) No 575/2013 or a mixed financial holding company within the meaning of Article 4 (1) number 21 of Regulation (EU) No 575/2013 has several subordinated institutions established in Germany, the institution with the highest total assets is deemed to be the superordinated undertaking; at the superordinated institution's request, BaFin will designate a different group institution established in Germany as the superordinated undertaking; the group institution shall be consulted beforehand [2]At the request of a financial holding company or mixed financial holding established in Germany, and after having consulted the regulated entity which, pursuant to Article 11 (2) or Article 12 of Regulation (EU) No 575/2013 or sentence 1, is deemed to be the superordinated undertaking or was designated as such by BaFin, BaFin may designate the financial holding company or mixed financial holding company as the superordinated undertaking insofar as the latter has demonstrated that it has the structure and organisation needed to ensure compliance with the group-related obligations. [3]After having consulted the regulated entity which, pursuant to Article 11 (2) or Article 12 of Regulation (EU)

No 575/2013 or sentence 1, is deemed to be the superordinated undertaking or was designated as such by BaFin pursuant to sentence 1, BaFin may also designate a financial holding company or mixed financial holding company established in Germany as the superordinated undertaking without having been requested to do so insofar as this is necessary for prudential reasons, notably reasons pertaining to the organisation and structure of the financial holding company or mixed financial holding company. [4]The financial holding company or mixed financial holding company designated as the superordinated undertaking pursuant to sentence 2 or sentence 3 shall perform all the group-related obligations of a superordinated undertaking. [5]If the conditions for designation as the superordinated undertaking pursuant to sentence 2 or sentence 3 no longer exist, notably if the financial holding company or mixed financial holding company transfers its head office to another jurisdiction or is no longer in a position to ensure compliance with the group-related obligations, BaFin, after having consulted the financial holding company or mixed financial holding company, shall rescind its designation; section 35 (4) shall apply *mutatis mutandis*. [6]BaFin shall have all the powers over a financial holding company or mixed financial holding company designated as the superordinated undertaking pursuant to sentence 2 or sentence 3 and its management bodies which it has over an institution as the superordinated undertaking and its management bodies. [7]If, in the case of cross-shareholdings, no institution established in Germany fulfils the condition of itself not being subordinated to any other group institution, the institution with the highest total assets shall normally be deemed to be the superordinated undertaking; at the request of the superordinated undertaking BaFin will designate another group institution established in Germany as the superordinated undertaking; the group institution shall be consulted beforehand.

(3) [1]By way of derogation from subsection (1) sentences 1 to 3, a financial holding group or mixed financial holding group is deemed not to exist if the financial holding company within the meaning of Article 4 (1) number 30 or 31 of Regulation (EU) No 575/2013 or mixed financial holding company within the meaning of Article 4 (1) number 32 or 33 of Regulation (EU) No 575/2013 is established in another EEA state, and

1 the financial holding company or mixed financial holding company has at least one CRR institution established in its country of incorporation subordinated to it as a subsidiary, or

2 the financial holding company or mixed financial holding company has at least one CRR institution established in Germany and no CRR institution established in its country of incorporation subordinated to it, and the total assets of the CRR institution established in Germany are not higher than the total assets of another CRR institution established in another EEA state that is subordinated to the financial holding company or mixed financial holding company as a subsidiary.

[2]If, in a financial holding group or mixed financial holding group, more than one financial holding company within the meaning of Article 4 (1) number 30 or 31 of Regulation (EU) No 575/2013 or mixed financial holding company within the meaning of Article 4 (1) number 32 or 33 of Regulation (EU) No 575/2013 incorporated both in Germany and in another EEA state are parent undertakings and if at least one CRR institution is established in each of these countries,

a financial holding group or mixed financial holding group is deemed not to exist if the total assets of the CRR institution established in Germany is not higher than the total assets of another CRR institution established in another EEA state belonging to the financial holding group or mixed financial holding group as a subsidiary.

(4) [1]To calculate own funds adequacy pursuant to Articles 92 to 386 of Regulation (EU) No 575/2013 as last amended on a consolidated basis and to limit large exposure risk pursuant to Articles 387 to 403 of Regulation (EU) No 575/2013, the superordinated undertakings shall aggregate the group's own funds and the relevant risk exposures. [2]The accounting values of capital instruments pursuant to Article 26 (1) letter (a), Article 51 letter (a) and Article 62 letter (a) of Regulation (EU) No 575/2013 as last amended that are attributable to group entities shall be deducted from the own funds to be aggregated pursuant to sentence 1. [3]In the case of participations mediated by non-group undertakings, such accounting values shall each be deducted in proportion to the arithmetical share of the capital. [4]Where the accounting value of a participation is greater than the part to be aggregated as own funds pursuant to sentence 1 of the subordinated undertaking's Common Equity Tier 1 items pursuant to Article 26 (1) of Regulation (EU) No 575/2013 as last amended, the superordinated undertaking shall deduct the difference from the group's Common Equity Tier 1 capital pursuant to Article 50 of Regulation (EU) No 575/2013 as last amended. [5]Counterparty and credit risk exposures arising from legal relationships between group undertakings shall be disregarded. [6]In the case of subordinated undertakings which are not subsidiaries, the superordinated undertaking shall aggregate its own funds and the relevant risk exposures under Regulation (EU) No 575/2013 as last amended with the own funds and the relevant risk exposures of the subordinated undertakings, in each case in proportion to its capital share in the subordinated undertaking. [7]In other respects sentences 2 to 5 shall apply *mutatis mutandis*, in each case also in conjunction with the statutory order pursuant to subsection (7).

(5) [1]If the superordinated undertaking of a group of institutions is obliged to prepare group accounts pursuant to the provisions of the Commercial Code or if, pursuant to Article 4 of Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ EC L 243/1 of 11 September 2002) as last amended or pursuant to section 315a (2) of the Commercial Code, it is obliged to apply the international accounting standards adopted pursuant to Articles 3 and 6 of Regulation (EC) No 1606/2002 when preparing the group accounts, it shall base the determination of the aggregated own funds as well as of the aggregated risk exposures pursuant to Articles 24 to 386 of Regulation (EU) No 575/2013 as last amended on the group accounts no later than five years after the respective obligation comes into being. [2]If the superordinated undertaking of a group of institutions applies the aforementioned international accounting standards pursuant to section 315e (3) of the Commercial Code, sentences 1 and 2 shall apply *mutatis mutandis*; the coming into being of the obligation to apply the international accounting standards shall be replaced by the first-time application thereof. [3]Subsection (4) shall not apply to the cases in sentences 1 to 3. [4]In these cases the own funds and other relevant risk exposures of undertakings which are included in the group accounts and which are not group entities within the meaning of this provision shall be disregarded. [5]Own funds and other relevant risk exposures of undertakings not included in the group accounts which

are group entities within the meaning of this provision shall be additionally included, whereby the procedure pursuant to subsection (4) may be applied. [6]Sentences 1 to 6 shall apply *mutatis mutandis* to a financial holding group or mixed financial holding group if the financial holding company or mixed financial holding company is obliged under the aforementioned provisions to prepare group accounts or prepares group accounts according to the aforementioned international accounting standards pursuant to section 315e (3) of the Commercial Code.

(6) [1]A group which, pursuant to subsection (5), must base the calculation of the aggregated own funds and the aggregated risk exposures on the group accounts may, subject to BaFin's permission, use the procedure pursuant to subsection (4) for these purposes if the use of the group accounts is unsuitable in a particular case. [2]In this case, the group's superordinated undertaking shall apply the procedure pursuant to subsection (4) for at least three consecutive years.

(7) [1]The Federal Ministry of Finance, in consultation with the Deutsche Bundesbank, is authorised by way of a statutory order that does not require the consent of the Bundesrat to issue more detailed provisions on determining the own funds adequacy of groups, in particular with regard to

1 the use of data from the group accounts in determining the aggregated own funds adequacy when using the procedure pursuant to subsection (5),

2 the treatment of participations valued using the equity method when using the procedure pursuant to subsection (5).

[2]The Federal Ministry of Finance may delegate this authority to BaFin by way of a statutory order, subject to the proviso that the statutory order is issued in agreement with the Deutsche Bundesbank. [3]The central associations of the institutions shall be consulted before the statutory order is issued.

(8) [1]The superordinated undertaking is responsible for ensuring that the group has adequate own funds. [2]However, in meeting its obligations pursuant to sentence 1, it may exert influence on the group entities only insofar as this does not conflict with generally applicable company law.

(9) Groups are exempt from applying the requirements on a consolidated basis pursuant to Articles 11 to 23 of Regulation (EU) No 575/2013 if all the group institutions are not required to apply Articles 92 to 386 of Regulation (EU) No 575/2013 on an individual basis unless they were exempted pursuant to Article 7 of Regulation (EU) No 575/2013 from applying Articles 92 to 386 of Regulation (EU) No 575/2013 on an individual basis.

(10) In the case of sub-consolidation pursuant to Article 22 of Regulation (EU) No 575/2013, subsections (4) to (9) shall be applied *mutatis mutandis*.

Section 15
Loans to managers etc

(1) [1]Loans to

1 senior managers of the institution,

2 partners of the institution who are not senior managers if the institution is organised in the form of a commercial partnership or private limited company, and to general partners of an institution who are not senior managers if the institution is organised in the form of a limited partnership company,

3 members of a governing body of the institution appointed to monitor the management of the institution if the monitoring powers of the body are laid down by law (supervisory body),

4 holders of a general commercial power of attorney and authorised officers of the institution empowered to represent it in all aspects of its business,

5 spouses, life partners and minors of the persons specified in numbers 1 to 4,

6 silent partners of the institution,

7 undertakings organised in the form of a legal person or commercial partnership if a senior manager, a holder of a general commercial power of attorney or an authorised officer of the institution empowered to represent it in all aspects of its business is a legal representative or a member of the supervisory body of the legal person or a partner in the commercial partnership,

8 undertakings organised in the form of a legal person or commercial partnership if a legal representative of the legal person, a partner in the commercial partnership, a holder of a general commercial power of attorney or an authorised officer of this undertaking empowered to represent it in all aspects of its business is a member of the supervisory body of the institution,

9 undertakings in which the institution or a senior manager holds a participating interest of more than 10% of the undertaking's capital or in which the institution or a senior manager is a general partner,

10 undertakings which hold a participating interest in the institution of more than 10% of the institution's capital,

11 undertakings organised in the form of a legal person or commercial partnership if a legal representative of the legal person or a partner in the commercial partnership holds a participating interest in the institution of more than 10% of its capital, and

12 general partners, senior managers, members of the executive board or supervisory body, holders of a general commercial power of attorney and authorised officers empowered to represent in all aspects of business of an undertaking controlled by or controlling the institution, as well as their spouses, life partners and minors,

(loans to managers etc) may be granted only by virtue of a unanimous decision by all of the institution's senior managers and – other than as part of staff programmes – only on market terms and with the explicit permission of the supervisory body or, in the case of number 12, of the supervisory body of the undertaking controlling the institution; the above provisions pertaining to commercial partnerships shall apply *mutatis mutandis* to other partnerships. [2]A unanimous decision by all senior managers and the explicit approval of the supervisory body may be dispensed with if a CRSA risk weight of 0% can be applied to a loan to an undertaking pursuant to sentence 1 numbers 9 and 10 in accordance with Article 113 of Regulation (EU) No 575/2013. [3]A participating interest within the meaning of sentence 1 numbers 9 to 11 shall be deemed to be any holding of shares in the undertaking amounting to not less than one-quarter of the capital (nominal capital, sum total of the capital shares), irrespective of the duration of the holding. [4]The authorisation of withdrawals in excess of the remuneration due to a senior manager or a member of the supervisory body and, in particular, the authorisation of advances on such remuneration, shall be deemed to be equivalent to the granting of a loan. [5]Loans to managers etc which are not granted on market terms shall be backed by liable capital at the decree of BaFin pursuant to Article 26 of Regulation (EU) No 575/2013 as last amended.

(2) [1]In individual cases BaFin may impose upper limits for the granting of loans to managers etc; it shall be entitled to do so even after such a loan has been granted. [2]Loans to managers etc which exceed the limits imposed by BaFin shall be reduced to the stipulated limits upon a further order issued by BaFin; in the meantime, they shall be backed with liable capital pursuant to Article 26 of Regulation (EU) No 575/2013 as last amended.

(3) Subsection (1) shall not apply to

1. loans to holders of a general commercial power of attorney or authorised officers of an institution empowered to represent it in all aspects of its business as well as to their spouses, life partners and minors if the loan does not exceed the amount of one annual salary of the holder of a general commercial power of attorney or of the authorised officer of the institution empowered to represent it in all aspects of its business,
2. loans to persons or undertakings specified in subsection (1) sentence 1 numbers 6 to 11 if the loan amounts to less than 1% of the institution's liable capital pursuant to Article 4 (1) number 71 of Regulation (EU) No 575/2013 or to less than €50,000, and
3. loans which are increased by no more than 10% of the amount approved pursuant to subsection (1) sentence 1.

(4) [1]The decision by the senior managers and the decision on approval shall be taken before the loan is granted. [2]The decisions shall include provisions on the interest rate payable on, and the repayment of, the loan. [3]They shall be placed on record. [4]If a loan to be granted pursuant to subsection (1) sentence 1 numbers 6 to 11 is urgent, it is sufficient if all the senior managers and the supervisory body promptly approve the granting of the loan subsequently. [5]If the decision by the senior managers has not been taken retrospectively within two months or the decision by the supervisory body has not been taken retrospectively within four months of the date on which the loan was granted, the institution shall promptly notify BaFin of this fact. [6]For

certain lending operations and types of lending operations, the decision by the senior managers and the decision on the approval of loans to the persons specified in subsection (1) sentence 1 numbers 1 to 5 and 12 may be taken in advance, but no more than one year in advance.

(5) If, contrary to subsection (1) or (4), a loan is granted to a person specified in subsection (1) sentence 1 numbers 1 to 5 and 12, it shall be repaid immediately, irrespective of any arrangements to the contrary, unless all of the senior managers and the supervisory body promptly approve the granting of the loan subsequently.

Section 24
Reports

(1) An institution shall report to BaFin and the Deutsche Bundesbank without delay

1. the intention to appoint a senior manager and to authorise a person to represent the institution in all aspects of its business, stating the facts which are germane to assessing his/her trustworthiness, professional qualifications and sufficient availability to exercise his/her respective tasks, as well as the realisation, withdrawal or change of that intention;
2. the retirement of a senior manager and the revocation of the authorisation to represent the institution in all aspects of its business;
3. changes in the legal form, unless authorisation is already required pursuant to section 32 (1), and changes in the firm name;
4. a loss amounting to 25% of eligible capital pursuant to Article 72 of Regulation (EU) No 575/2013;
5. the relocation of the office or domicile;
6. the establishment, relocation and closure of a branch in a non-EEA state and the commencement and termination of the provision of cross-border services without establishing a branch;
7. the discontinuation of business operations;
8. the intention of its governing bodies appointed according to law and its articles of association to bring about a decision on the institution's liquidation;
9. a fall in the initial capital below the minimum requirements pursuant to section 33 (1) sentence 1 number 1, and the discontinuation of appropriate insurance cover pursuant to section 33 (1) sentences 2 and 3;
10. the acquisition or disposal of a major participating interest in its own institution, the reaching, exceeding or falling below the thresholds for participating interests of 20%, 30% and 50% of the voting rights or capital, and the fact that the institution becomes or

ceases to be the subsidiary of another undertaking, as soon as the forthcoming change in these participatory relationships comes to the institution's attention;

11 each case in which the counterparty to a securities repurchase agreement, reverse repo, or a lending transaction in securities or commodities did not discharge his/her settlement obligations;

12 the emergence of, change in or termination of a close link with another natural person or another undertaking;

13 the emergence of, change in the level or termination of a qualifying participating interest in other undertakings;

14 with submission of the same, the draft recommendation pursuant to section 25a (5) sentence 6;

14a by submitting an excerpt from the minutes of the meeting, the approval of a higher variable remuneration component pursuant to section 25a (5) sentence 5, including information on all approved maximum values exceeding the ratio pursuant to section 25a (5) sentence 2;

14b by submitting an excerpt from the minutes of the meeting, the resolution on the amendment of an approval of a higher variable remuneration pursuant to section 25a (5) sentence 5, including information on all approved maximum values exceeding the ratio pursuant to section 25a (5) sentence 2;

15 the appointment of a member of the supervisory body, stating the facts which are germane to assessing his/her trustworthiness, professional expertise and sufficient availability to exercise his/her respective tasks;

15a the retirement of a member of the supervisory body;

16 a change in the ratio of balance sheet capital to the sum of total assets, off-balance-sheet liabilities and the replacement cost for claims arising from off-balance-sheet transactions (modified balance sheet capital ratio) of at least 5% based on information on the financial situation (financial information) pursuant to section 25 (1) sentence 1, in each case at the end of a quarter, in relation to the institution's approved annual accounts; where the institution prepares its accounts according to international accounting standards or is required to prepare interim accounts under the German Securities Trading Act, a corresponding change in the modified balance sheet capital ratio shall also be reported based on the interim accounts in relation to the approved annual accounts according to international accounting standards;

17 loans

(a) to limited partners, to shareholders in a private or public limited company or in a limited partnership company, or to shareholders in a public institution if they own more than 25% of the capital (nominal capital, total amount of capital shares) of the institution, or if they hold more than 25% of the voting rights, if these have not been granted on market terms or if they are not adequately secured in line with banking practice, and

(b) to persons who have granted loans, insofar as these are not loans pursuant to letter (a), pursuant to Article 26 (1) letter (a) and Article 51 letter (a) of Regulation (EU) No 575/2013 as last amended, if these are more than 25% of the Tier 1 capital pursuant to Article 25 of Regulation (EU) No 575/2013 as last amended without taking account of capital pursuant to Article 26 (1) letter (a) and Article 51 letter (a) of Regulation (EU) No 575/2013 as last amended, if these have not been granted on market terms or if they are not adequately secured in line with banking practice.

(1a) An institution shall report to BaFin and the Deutsche Bundesbank annually

1 its close links with other natural persons or undertakings,

2 its qualifying participating interests in other undertakings,

3 the name and address of any holder of a major participating interest in the reporting institution and in the undertakings subordinated to it as described in section 10a that are domiciled abroad, as well as the amounts of these participating interests,

4 the number of its domestic branches,

5 the modified balance sheet capital ratio based on the approved annual accounts,

6 the classification as a major institution pursuant to section 17 of the Remuneration Ordinance for Institutions (*Institutsvergütungsverordnung*) of 16 December 2013 (Federal Law Gazette I page 4270) as well as a change in this classification,

7 if the institution is a CRR institution that is classified as significant within the meaning of the statutory ordinance pursuant to section 25a (6) of this Act or that has been requested to do so by BaFin or the Deutsche Bundesbank, the information that is required to compare remuneration trends and practices within the meaning of Article 75 (1) and (2) of Directive 2013/36/EU; the comparison also includes remuneration trends and practices relating to the members of the administrative and supervisory bodies;

8 if the institution is a CRR institution, the information pertaining to senior managers, members of the administrative and supervisory bodies and members of staff, each with a total annual remuneration of at least €1 million within the meaning of Article 75 (3) of Directive 2013/36/EU that the European Banking Authority requires for publishing aggregate information.

[…]

(3b) BaFin and the Deutsche Bundesbank may impose additional notification and reporting requirements on institutions or certain types or categories of institutions, in particular in order to obtain more in-depth insights into developments in the institutions' financial situation, into their principles of proper management or into the abilities of members of the institution's governing bodies where this is necessary to fulfil the tasks of BaFin and the Deutsche Bundesbank.

Section 24c
Automated access to account details

(1) [1]Credit institutions shall maintain a data file in which they must store the following data without delay

1. the number of any account which is subject to the obligation to verify proof of identity within the meaning of section 154 (2) sentence 1 of the Fiscal Code or of a safe custody account, as well as the dates on which the account was opened and closed,
2. the name – and for natural persons the date of birth – of the holder and of any party authorised to draw on the account, as well as – in the cases specified in section 10 (1) number 2 of the Money Laundering Act – the name and, if available, the address of any other economic beneficiary within the meaning of section 3 of the Money Laundering Act.

[2]A new data record shall be created without delay for each change in the data entered pursuant to sentence 1. [3]The data shall be deleted ten years after the account or safe custody account has been closed. [4]In the case of sentence 2 the previous data record shall be deleted three years after the new data record has been created. [5]The credit institution shall ensure that BaFin has automated access at all times to the data entered in the data file pursuant to sentence 1 by means of a procedure of BaFin's choice. [6]The institution shall ensure by means of technical and organisational measures that it cannot monitor such data retrievals.

(2) BaFin may access individual data entered in the data file pursuant to subsection (1) sentence 1 insofar as this is necessary to enable it to perform its prudential functions under this Act or the Money Laundering Act, in particular with respect to unauthorised banking business and financial services or the misuse of the institutions by means of money laundering or fraudulent activities to the detriment of the institutions, and if there is particular urgency in individual cases.

(3) [1]Upon request, BaFin will provide information entered in the data file pursuant to subsection (1) sentence 1 to

1. the supervisory authorities pursuant to section 9 (1) sentence 4 number 2 insofar as this is necessary to enable them to perform their prudential functions under the conditions set out in subsection (2),
2. the authorities or courts responsible for providing international judicial assistance in criminal cases, and otherwise for the prosecution and punishment of criminal offences, insofar as this is necessary to enable them to perform their statutory functions,
3. the national authority responsible for imposing restrictions on capital transfers and payment transactions pursuant to the Foreign Trade and Payments Act insofar as this is necessary to enable it to perform its functions ensuing from the Foreign Trade and Payments Act or from legal instruments of the European Union in connection with restrictions on economic and financial relations.

[2]BaFin will access the data stored in the data files by means of an automated procedure and transmit them to the authority making the request. [3]BaFin will verify the permissibility of such transmission only if it has particular grounds for doing so. [4]The responsibility for the permissibility of the transmission shall lie with the authority making the request. [5]BaFin may provide foreign agencies with information from the data file pursuant to subsection (1) sentence 1 for the purposes described in sentence 1. [6]Section 9 (1) sentences 5 and 6 and subsection (2) shall apply *mutatis mutandis*. [7]This is without prejudice to the provisions on international judicial assistance in criminal matters.

(4) [1]For the purpose of monitoring compliance with data protection rules on the part of the competent agency, BaFin will log the time of each data retrieval, the data used during the retrieval, the data retrieved, the name of the retriever, the reference number and, if the data are retrieved at the request of another agency, the name of that agency and its reference number. [2]The log data may not be used for any other purposes. [3]The log data will be kept for at least 18 months and will be deleted after two years at the latest.

(5) [1]The credit institution shall put in place, at its own expense, all the measures necessary for the automated data access in its area of responsibility. [2]These include, in each case in accordance with the relevant BaFin provisions, the procurement of the equipment necessary to ensure confidentiality and protection against unauthorised access, the installation of a suitable telecommunications link and participation in the closed user system, as well as the ongoing provision of these facilities.

(6) [1]The credit institution and BaFin shall put in place state-of-the-art measures to safeguard data protection and data security, which in particular shall guarantee the confidentiality and integrity of the retrieved and transmitted data. [2]The state of the art will be defined by BaFin in consultation with the Federal Office for Information Security (*Bundesamt für Sicherheit in der Informationstechnik*) by a procedure of BaFin's choice.

(7) [1]The Federal Ministry of Finance may, by way of a statutory order, permit exemptions from the obligation to transmit data by means of an automated procedure. [2]It may delegate this authority to BaFin by way of a statutory order.

(8) Insofar as the Deutsche Bundesbank maintains accounts and safe custody accounts for third parties, it will be deemed to be a credit institution within the meaning of subsections (1), (5) and (6).

Section 25a
Particular organisational duties; authority to issue orders

(1) [1]An institution shall have in place a proper business organisation which ensures compliance with the legal provisions to be observed by the institution as well as business requirements. [2]The management board is responsible for ensuring the institution’s proper business organisation; it shall take the necessary measures to formulate the applicable internal

guidelines except where such decisions are taken by the supervisory board. [3]A proper business organisation shall comprise, in particular, appropriate and effective risk management, on the basis of which an institution shall continuously safeguard its internal capital adequacy; risk management shall comprise, in particular,

1 the definition of strategies, in particular the definition of a business strategy geared to the institution's sustainable development and a risk strategy that is consistent therewith, as well as the establishment of processes for planning, implementing, assessing and adjusting the strategies;

2 processes for determining and safeguarding internal capital adequacy, which shall be based on a conservative determination of risks and of the available financial resources to cover them;

3 the establishment of internal control mechanisms consisting of an internal control system and an internal audit function, whereby the internal control system shall comprise, in particular,

   (a) rules on the organisational and operational structure that include a clear delineation of competencies,

   (b) processes for identifying, assessing, managing as well as monitoring and reporting risks in accordance with the criteria laid down in Title VII, Chapter 2 Section II Sub-Section 2 of Directive 2013/36/EU, and

   (c) a risk control function and a compliance function;

4 adequate staffing and technical and organisational resources;

5 the definition of an adequate contingency plan, especially for IT systems, and

6 suitable and transparent remuneration systems for both management board members and employees geared to the institution's sustainable development, paying due regard to subsection (5); this shall not apply if remuneration has been regulated in a collective agreement or, within its scope of application, in an agreement between the social partners applying the provisions of the collective agreement or, on the basis of a collective agreement, in a plant-level or service agreement.

[4]Risk management shall be geared to the nature, scope, complexity and riskiness of the institution's business activities [5]The institution shall regularly review the appropriateness and effectiveness of its risk management. [6]A proper business organisation shall additionally comprise

1 appropriate rules by means of which the institution's financial situation can be gauged with sufficient accuracy at all times;

2 complete documentation of business operations permitting seamless monitoring by BaFin for its area of responsibility; requisite records shall be retained for at least five years; this is without prejudice to section 257 (4) of the Commercial Code; section 257 (3) and (5) of the Commercial Code shall apply *mutatis mutandis;*

3 a procedure which enables employees, whilst ensuring that their identity is kept confidential, to report to competent agencies breaches of Regulation (EU) No 575/2013, Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1), as last amended by Regulation (EU) 2016/1033 (OJ L 175, 30.6.2016, p. 1; L 287, 21.10.2016, p. 320; L 306, 15.11.2016, p. 43; L 348, 21.12.2016, p. 83), Regulation (EU) No 600/2014, Regulation (EU) No. 1286/2014 or Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12) or of this Act or of statutory orders issued on the basis of this Act or of the Securities Trading Act or of statutory orders issued on the basis of the Securities Trading Act, as well as any criminal actions committed within the undertaking.

(2) [1]BaFin may lay down provisions on the modelling of a sudden and unexpected change in interest rates and on the methodology for computing the impact on the present value of the interest rate risk arising from non-trading book business. [2]In individual cases, BaFin may issue to an institution orders that are appropriate and necessary for ensuring a proper business organisation within the meaning of subsection (1) sentences 3 and 6 and for ensuring compliance with the provisions of sentence 1.

(3) [1]Subsections (1) and (2) shall apply *mutatis mutandis* to groups of institutions, financial holding groups and mixed financial holding groups as well as to institutions within the meaning of Article 4 of Regulation (EU) No 575/2013 subject to the proviso that the senior managers of the superordinated undertaking are responsible for the proper business organisation of the group of institutions, financial holding group or mixed financial holding group. [2]A group within the meaning of sentence 1 shall also include subsidiaries of a superordinated undertaking or of a subordinated subsidiary of a group of institutions, financial holding group or mixed financial holding group which is not subject to either Regulation (EU) No 575/2013 or section 1a. [3]The obligations resulting from inclusion in risk management at group level shall be fulfilled by group subsidiaries which are domiciled in a non-EEA state only insofar as these obligations do not conflict with applicable the law in the subsidiary's home state.

(4) (Repealed)

(5) [1]Institutions shall set appropriate ratios between the variable and fixed annual remuneration components for employees and management board members. [2]In the absence of a decision pursuant to sentence 5, the variable remuneration component shall not exceed 100% of the fixed remuneration component for each individual employee or management board member. [3]Institutions may discount the future value of up to 25% of the variable remuneration component to the point in time when the respective employees or management board members are notified of the amount of the variable remuneration component for an assessment period, provided that this part of the variable remuneration component is paid in

the form of instruments which are deferred for at least five years after this notification is given. [4]In cases of deferral, an entitlement and expectant right to this part of the variable remuneration component shall vest only after the deferral period has elapsed, and during the deferral period individuals shall solely have an entitlement to correct calculation of the unvested portion of this part of the variable remuneration component and not to this part of the variable remuneration component itself. [5]The shareholders, proprietors or members of the institution may decide whether to approve a higher variable remuneration component than that stipulated in sentence 2; this higher remuneration component shall not exceed 200% of the fixed remuneration component for each individual employee or management board member. [6]To seek approval of a higher variable remuneration component for employees than that stipulated in sentence 2 the management board and the supervisory board, and to seek approval of a higher variable remuneration component for members of the management board than that stipulated in sentence 2 the supervisory board only, shall submit a recommendation; the recommendation shall specify the reasons for the requested approval of a higher variable remuneration component than that stipulated in sentence 2 and its scope, including the number of employees and management board members affected together with their functions, as well as the expected impact of a higher variable remuneration component than that stipulated in sentence 2 on the requirement to maintain an adequate capital base. [7]The shareholders, owners or members of the institution shall be given sufficient notice of the recommendation to enable them to gather adequate information; where the shareholders, owners or members exercise their rights in the context of a meeting, the recommendation shall be disclosed when notice of the meeting is given. [8]The decision shall be approved by a majority of at least 66% of the votes submitted, provided that at least 50% of the voting rights are represented when the decision is taken, or by a majority of at least 75% of the votes submitted. [9]Shareholders, owners or members who, as employees or management board members, would benefit from a higher variable remuneration component than that stipulated in sentence 2 shall not be permitted to exercise their voting rights either directly or indirectly.

(6) [1]The Federal Ministry of Finance shall be authorised to issue by way of a statutory order that does not require the consent of the Bundesrat, in consultation with the Deutsche Bundesbank, more detailed provisions on

1 the structure of the remuneration systems pursuant to subsection (1) sentence 3 number 6, including the structure of

(a) the decision-making processes and competencies,

(b) the ratio between the variable and fixed remuneration components and of the remuneration instruments for the variable remuneration component,

(c) positive and negative remuneration parameters, performance periods and deferral periods, including the criteria and parameters for a complete loss or partial reduction of the variable remuneration component, and

of the manner of taking account of the institution-specific and group-wide business and remuneration strategy, including its application and implementation in undertakings

belonging to the group, and of the institution's objectives, values and long-term interests,

2 the discount factors for calculating the present value of the variable remuneration component prior to computing the ratio pursuant to subsection (5) sentences 2 to 4,

3 the institution's monitoring of the appropriateness and transparency of the remuneration systems and their ongoing refinement, also involving the remuneration committee and a remuneration officer,

4 disclosure of the structure of the remuneration systems and the component parts of the remuneration package, including the total amount of guaranteed bonus payments and individual contractual severance payments, stating the highest severance payment made and the number of beneficiaries, and

5 the disclosure medium and frequency of disclosure within the meaning of number 4.

[2]The rules shall be geared, in particular, to the institution's size and remuneration structure as well as to the nature, scope, complexity, riskiness and internationality of its business activities. [3]The provisions pursuant to sentence 1 number 4 shall be without prejudice to the commercial law provisions relating to the disclosure of remuneration pursuant to section 340a (1) and (2) in conjunction with section 340l (1) sentence 1 of the Commercial Code. [4]The Federal Ministry of Finance may delegate this authority to BaFin by way of a statutory order, subject to the proviso that the statutory order is issued in agreement with the Deutsche Bundesbank. [5]The central associations representing the institutions shall be consulted before the statutory order is issued.

Section 25b
Outsourcing of activities and processes

(1) [1]An institution shall, depending on the nature, scope, complexity and riskiness of outsourcing to another undertaking activities and processes that are material to the execution of banking business, financial services or any of an institution's other usual services, make appropriate arrangements in order to avoid incurring excessive additional risks. [2]Outsourcing shall impair neither the proper execution of such business and services nor the business organisation within the meaning of section 25a (1). [3]In particular, the institution shall ensure ongoing appropriate and effective risk management that includes the outsourced activities and processes.

(2) [1]Outsourcing shall not entail the delegation of management board responsibility to the external service provider. [2]In the event of outsourcing, the institution shall remain responsible for ensuring compliance with the legal provisions to be observed by the institution.

(3) [1]Outsourcing shall not prevent BaFin from performing its tasks; its right to request information, right to review and ability to supervise shall be ensured by means of suitable arrangements with regard to the outsourced activities and processes, including in the event of

outsourcing to an undertaking domiciled in another EEA state or in a non-EEA state. [2]This shall apply *mutatis mutandis* to the performance of the tasks of the institution's auditors. [3]Outsourcing shall require a written agreement which lays down the institution's rights to ensure compliance with the aforementioned stipulations, including the right to give instructions and the right to give notice, as well as the corresponding duties on the part of the external service provider.

(4) [1]If BaFin's right to review and ability to supervise are impaired in connection with outsourcing, BaFin may, in individual cases, issue orders that are appropriate and necessary to eliminate this impairment. [2]This is without prejudice to BaFin's powers pursuant to section 25a (2) sentence 2.

(5) [1]The Federal Ministry of Finance is authorised to enact by statutory instrument, which does not require the consent of the Bundesrat, in consultation with the Deutsche Bundesbank, more detailed provisions on

1 the existence of an outsourcing,

2 the precautions to be taken when outsourcing to avoid excessive additional risks,

3 the limits of outsourcing,

4 the inclusion of outsourced activities and processes in risk management and

5 the configuration of the outsourcing contracts.

[2]The Federal Ministry of Finance may transfer the authorisation by statutory order to the Federal Financial Supervisory Authority with the proviso that the statutory order is issued in agreement with the Deutsche Bundesbank. [3]The head associations of the institutions are to be heard before the statutory order is issued.

Section 25c
Management board members

(1) [1]The management board members of an institution shall have the necessary professional qualifications, be trustworthy and dedicate sufficient time to performing their functions. [2]A prerequisite for the professional qualifications of management board members is that they have adequate theoretical and practical knowledge of the business concerned, as well as managerial experience. [3]A person shall normally be assumed to have the necessary professional qualifications if he/she can demonstrate three years' managerial experience at an institution of comparable size and type of business.

(2) [1]The number of directorships which may be held by a member of the management board at the same time shall take into account individual circumstances and the nature, scale and complexity of the institution's activities. [2]The following persons may not be members of the management board of a CRR institution which is significant within the meaning of sentence 6:

1 members of the supervisory board of the same undertaking or

2 members of the management board of another undertaking or persons who are already a supervisory board member of more than two undertakings.

[3]Within the meaning of sentence 2 number 2, several directorships count as one directorship if the directorships are carried out at undertakings

1 which belong to the same group of institutions, financial holding group, mixed financial holding group or mixed holding group,

2 which are members of the same institutional protection scheme, or

3 in which the institution has a significant holding.

[4]Directorships at organisations and undertakings which do not pursue predominantly commercial objectives, in particular undertakings which provide public services, are not included in the maximum number of directorships pursuant to sentence 1 number 2. [5]Taking into account the specific circumstances and the nature, scope and complexity of the activities of the institution, group of institutions, financial holding group, financial holding company or mixed financial holding company, BaFin may permit a management board member to hold an additional directorship on a supervisory board provided that this does not prevent the member from devoting sufficient time to performing his/her functions in the undertaking in question. [6]An institution is significant within the meaning of sentence 2 if its total assets equal or exceed €15 billion on average over the reporting dates of the preceding three completed financial years; the following institutions are always deemed to be significant:

1 institutions which, pursuant to Article 6 (4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287/63 of 29 October 2013), are supervised by the European Central Bank,

2 institutions categorised as having the potential to pose a systemic threat within the meaning of section 20 (1) sentence 3 of the Reorganisation and Settlement Act (*Sanierungs- und Abwicklungsgesetz*), and

3 financial trading institutions within the meaning of section 25f (1).

(3) As part of their overall responsibility to ensure a proper business organisation, the management board shall

1 decide upon principles of proper governance which ensure the necessary diligence in the governance of the institution and, in particular, establish a segregation of duties in the organisation and measures to prevent conflicts of interest, as well as ensuring that these principles are implemented.

2 monitor and periodically assess the effectiveness of the principles established and implemented pursuant to number 1; the management board members shall take appropriate steps to address any deficiencies;

3 devote sufficient time to establishing strategies and to risks, in particular counterparty and credit risk, market risk and operational risk;

4 ensure an adequate and transparent business structure which is geared to the strategies of the undertaking and takes account of the transparency in the institution's business activities which is needed to ensure effective risk management, and have the necessary knowledge of the business structure and of the associated risks to achieve this; for management board members of a superordinated undertaking this obligation also applies to the group pursuant to section 25a (3);

5 ensure the accuracy of accounting and financial reporting, including the necessary controls and compliance with the law and relevant standards; and

6 oversee the processes with regard to disclosure and communications.

(4) Institutions shall devote adequate human and financial resources to easing the induction of management board members and facilitating such training as is necessary to ensure that they remain qualified for the position.

(4a) As part of its overall responsibility to ensure a proper business organisation of the institution pursuant to section 25a (1) sentence 2, the management board of an institution shall ensure that the institution has in place the following strategies, processes, procedures, functions and frameworks:

1 a business strategy geared to the institution’s sustainable development and a risk strategy that is consistent therewith, as well as processes for planning, implementing, assessing and adjusting the strategies pursuant to section 25a (1) sentence 3 number 1; as a minimum, the management board shall ensure that

(a) the overall objective, the objectives of the institution for each material business activity and the measures to achieve these objectives are documented at all times;

(b) the risk strategy covers at all times the objectives of the risk management of material business activities and the measures to achieve these objectives;

2 processes for determining and safeguarding internal capital adequacy pursuant to section 25a (1) sentence 3 number 2; as a minimum, the management board shall ensure that

(a) the institution's material risks, in particular counterparty and credit risk, market risk, liquidity risk and operational risk, are identified and defined regularly and on an *ad hoc* basis in the context of a risk inventory (overall risk profile);

(b) in the context of the risk inventory, risk concentrations are taken into account and possible material impairments of the financial position, financial performance or liquidity position are monitored;

3 internal control mechanisms consisting of an internal control system and an internal audit function pursuant to section 25a (1) sentence 3 number 3 letters (a) to (c); as a minimum, the management board shall ensure that

(a) in the context of the organisational and operational structure, lines of responsibility are clearly segregated, whereby material processes and related tasks, competencies, responsibilities, controls and reporting channels shall be clearly defined and it shall be ensured that employees do not perform activities which are incompatible with one another;

(b) there is a general segregation between the unit which initiates credit transactions and has a vote in credit decisions (front office) as well as the trading unit, on the one hand, and the unit which has an additional vote in credit decisions (back office), and the risk control functions and functions serving to settle and monitor trading, on the other hand;

(c) the internal control system encompasses risk management and risk control processes to identify, assess, manage, monitor and report the material risks and associated risk concentrations as well as a risk control function and a compliance function;

(d) the management board is informed of the risk situation, including a risk assessment, at appropriate intervals and at least once a quarter;

(e) the management board informs the supervisory board of the risk situation, including a risk assessment, at appropriate intervals and at least once a quarter;

(f) appropriate stress tests are regularly performed for the material risks and the overall risk profile of the institution, and a possible need for action is considered on the basis of the results;

(g) the internal audit function reports to the management board and the supervisory board at appropriate intervals and at least once a quarter;

4 adequate staffing and technical and organisational resources at the institution pursuant to section 25a (1) sentence 3 number 4; as a minimum, the management board shall ensure that the quantity and quality of the institution's staffing and the scope and quality of its technical and organisational resources are commensurate with its internal operational needs, business activities and risk situation;

5 adequate contingency plans pursuant to section 25a (1) sentence 3 number 5 for contingencies affecting time-critical activities and processes; as a minimum, the management board shall ensure that regular contingency tests are carried out in order to verify the suitability and effectiveness of the contingency plan and the results are communicated to the respective responsible staff;

6 as a minimum, where activities and processes are outsourced to another undertaking pursuant to section 25b (1) sentence 1, appropriate processes and frameworks to avoid incurring excessive additional risks or impairing either the proper execution of business and services or the business organisation within the meaning of section 25a (1).

(4b) [1]For groups of institutions, financial holding groups and mixed financial holding groups as well as institutions within the meaning of Article 4 of Regulation (EU) No 575/2013, the management board of the superordinated undertaking shall be responsible for compliance with

due diligence obligations within the group of institutions, financial holding group, mixed financial holding group or institutions within the meaning of Article 4 of Regulation (EU) No 575/2013 if the superordinated undertaking is the parent undertaking which exercises a dominant influence within the meaning of section 290 (2) of the Commercial Code over other undertakings in the group without this being dependent on the legal form of the parent undertaking. [2]As part of its overall responsibility to ensure a proper business organisation of the group pursuant to sentence 1, the management board of the superordinated undertaking shall ensure that the group has in place the following strategies, processes, procedures, functions and frameworks:

1 a group-wide business strategy geared to the group's sustainable development and a group-wide risk strategy that is consistent therewith, as well as processes for planning, implementing, assessing and adjusting the strategies pursuant to section 25a (1) sentence 3 number 1; as a minimum, the management board shall ensure that

   (a) the group's overall objective, the group's objectives for each material business activity and the measures to achieve these objectives are documented at all times;

   (b) the group's risk strategy includes at all times the risk management objectives for the material business activities and the measures to achieve these objectives;

   (c) the strategic orientation of the undertakings belonging to the group is aligned with the group-wide business and risk strategies;

2 processes for determining and safeguarding the group's internal capital adequacy pursuant to section 25a (1) sentence 3 number 2; as a minimum, the management board shall ensure that

   (a) the group's material risks, in particular counterparty and credit risk, market risk, liquidity risk and operational risk, are identified and defined regularly and on an *ad hoc* basis in the context of a risk inventory (overall risk profile of the group);

   (b) in the context of the risk inventory, risk concentrations within the group are taken into account and possible material impairments of the group's financial position, financial performance or liquidity position are monitored;

3 internal control mechanisms consisting of an internal control system and an internal audit function pursuant to section 25a (1) sentence 3 number 3 letters a to c; as a minimum, the management board shall ensure that

   (a) in the context of the group's organisational and operational structure, lines of responsibility are clearly segregated, whereby material processes and related tasks, competencies, responsibilities, controls and reporting channels within the group shall be clearly defined and it shall be ensured that employees do not perform activities which are incompatible with one another;

   (b) at the undertakings belonging to the group, there is a general segregation between the unit which initiates credit transactions and has a vote in credit decisions (front office) as well as the trading unit, on the one hand, and the unit which has an

additional vote in credit decisions (back office), and the risk control functions and functions serving to settle and monitor trading, on the other hand;

(c) the management board is informed of the risk situation, including a risk assessment, at appropriate intervals and at least once a quarter;

(d) at group level, the management board informs the supervisory board of the group's risk situation, including a risk assessment, at appropriate intervals and at least once a quarter;

(e) the group's internal control system encompasses a risk control function and a compliance function as well as risk management and risk control processes to identify, assess, manage, monitor and report the material risks and associated risk concentrations;

(f) appropriate stress tests are regularly performed for the material risks and the overall risk profile at group level, and a possible need for action is considered on the basis of the results;

(g) the group audit function reports to the management board and the supervisory board at appropriate intervals and at least once a quarter;

4 adequate staffing and technical and organisational resources at the group pursuant to section 25a (1) sentence 3 number 4; as a minimum, the management board shall ensure that the quantity and quality of the staffing and the scope and quality of the technical and organisational resources of the undertakings belonging to the group are commensurate with the respective internal operational needs, business activities and risk situation of the undertakings belonging to the group;

5 adequate contingency plans pursuant to section 25a (1) sentence 3 number 5 at group level for contingencies affecting time-critical activities and processes; as a minimum, the management board shall ensure that regular contingency tests are carried out in order to verify the suitability and effectiveness of the contingency plan at group level and the results are communicated to the respective responsible staff;

6 as a minimum, where activities and processes are outsourced to another undertaking pursuant to section 25b (1) sentence 1, appropriate processes and frameworks to avoid incurring excessive additional risks or impairing either the proper execution of business and services or the business organisation within the meaning of section 25a (1).

(4c) Should BaFin conclude that the institution or group does not have in place the strategies, processes, procedures, functions and frameworks pursuant to subsections (4a) and (4b), it may order, irrespective of other measures pursuant to this Act, that suitable measures be taken to rectify the identified deficiencies within an appropriate period of time.

(5) [1]In exceptional cases, BaFin may also revocably appoint as a management board member another person entrusted with the management of the business and empowered to represent it if that person is trustworthy and has the necessary professional qualifications; subsection (1) applies. [2]If the institution is operated by a sole proprietor, a person whom the proprietor has

entrusted with the management of the business and empowered to represent it may be revocably appointed as a management board member in exceptional cases under the conditions set out in sentence 1. [3]If a person is appointed as a management board member at the institution's request, the appointment may be revoked only at the request of the institution or the management board member.

(6) The management board members of a data provision service shall be trustworthy, have the necessary professional qualifications and dedicate sufficient time to performing their functions.

Section 25d
Supervisory board

(1) [1]The members of the supervisory board of an institution, a financial holding company or a mixed financial holding company must be trustworthy, have the necessary expertise to fulfil their control function as well as to assess and monitor the business of the undertaking, and devote sufficient time to performing their duties. [2]When assessing whether one of the persons specified in sentence 1 has the necessary expertise, BaFin takes account of the scope and complexity of the business conducted by the institution, group of institutions or financial holding group, financial holding company or mixed financial holding company.

(2) [1]The supervisory board as a whole shall have the necessary knowledge, skills and experience to fulfil its control function as well as to assess and monitor the management board of the institution, group of institutions or financial holding group, financial holding company or mixed financial holding company. [2]This shall be without prejudice to the provisions of the laws on co-determination regarding the selection and removal from office of staff representatives on the supervisory board.

(3) [1]The following persons may not be members of the supervisory board of a CRR institution which is significant within the meaning of sentence 8:

1. members of the management board of the same undertaking;
2. former management board members of the same undertaking if two former management board members of that undertaking are already members of the supervisory board;
3. members of the management board an undertaking who, at the same time, are members of the supervisory board of more than two undertakings or
4. persons who are supervisory board members of more than four undertakings.

[2]Sentence 1 also applies to members of the supervisory board of a financial holding company or mixed financial holding company if this has been designated as the superordinated undertaking pursuant to section 10a (2) sentence 2 or 3 or section 12 (2) of the Financial Conglomerates Supervision Act (*Finanzkonglomerate-Aufsichtsgesetz*) and a CRR institution

is subordinated to it. [3]Within the meaning of sentence 1 numbers 3 and 4, several directorships are considered to be one directorship if the directorships are carried out at undertakings

1 which belong to the same group of institutions, financial holding group, mixed financial holding group or mixed holding group,

2 which are members of the same institutional protection scheme or

3 in which the institution has a significant holding.

[4]Directorships at organisations and undertakings which do not pursue predominantly commercial objectives, in particular undertakings which provide public services, are not included in the maximum number of directorships pursuant to sentence 1 numbers 3 and 4. [5]Taking into account the specific circumstances and the nature, scope and complexity of the activities of the institution, group of institutions or financial holding group, financial holding company or mixed financial holding company, BaFin may permit a supervisory board member to hold an additional directorship on a supervisory board in excess of the maximum number of directorships permitted pursuant to sentence 1 numbers 3 and 4 provided that this does not prevent the member from devoting sufficient time to performing his/her functions in the undertaking in question. [6]Mandates as representatives of the Federal Government or the Länder shall not be taken into account for the maximum number of mandates permitted under sentence 1 numbers 3 and 4. [7]Sentence 1 number 4 shall not apply to heads of the administration of a local authority, a district or a city which is administrated as an independent district who are obliged to hold a directorship in a local government undertaking or local government special-purpose association. [8]An institution is significant within the meaning of sentence 1 if its total assets equal or exceed €15 billion on average over the reporting dates of the preceding three completed financial years; the following institutions are always deemed to be significant:

1 institutions which, pursuant to Article 6 (4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287/63 of 29 October 2013), are supervised by the European Central Bank,

2 institutions categorised as having the potential to pose a systemic threat within the meaning of section 20 (1) sentence 3 of the Reorganisation and Settlement Act (*Sanierungs- und Abwicklungsgesetz*), and

3 financial trading institutions within the meaning of section 25f (1).

(3a) The following persons may not be members of the supervisory board of an institution which is not a significant CRR institution within the meaning of subsection (3) sentence 8 or of a financial holding company:

1 management board members of the same undertaking,

2 former management board members of the same undertaking if two former management board members of that undertaking are already members of the supervisory board, or

3 supervisory board members of more than five undertakings supervised by BaFin unless these undertakings are members of the same institutional protection scheme.

(4) Institutions, financial holding companies and mixed financial holding companies shall devote adequate human and financial resources to easing the induction of supervisory board members and facilitating such training as is necessary to ensure that they maintain the necessary expertise for the position.

(5) [1]The structure of the remuneration systems for members of the supervisory board must not cause conflicts of interest with respect to the effective performance of the supervisory board's oversight function. [2]The members of the management or supervisory board may not receive variable remuneration components for their work on the management or supervisory board. [3]Article 450 of Regulation (EU) No 575/2013 shall also apply to the remuneration of the members of the management or supervisory board.

(6) [1]The supervisory board shall oversee the management board, also with regard to its adherence to the applicable prudential supervisory requirements. [2]It shall devote sufficient time to the discussion of strategies, risks and remuneration systems for management board members and employees.

(7) [1]Depending on the size, internal organisation and the nature, scope, complexity and riskiness of the activities of the undertaking, the supervisory board of an institution, a financial holding company or a mixed financial holding company should appoint from among its members committees pursuant to subsections (8) to (12) which advise and support it in its functions. [2]Each committee shall appoint one of its members as chair. [3]The members of the committees shall have the necessary knowledge, skills and experience to perform the respective committee functions. [4]To ensure cooperation and an exchange of expertise between the individual committees, at least one member of each committee shall belong to another committee. [5]BaFin may require the formation of one or more committees if this appears necessary, particularly in consideration of the criteria pursuant to sentence 1 or for the proper performance of the supervisory board's control function.

(8) [1]The supervisory board of an undertaking specified in subsection (3) sentences 1 and 2 shall appoint from among its members a risk committee. The risk committee shall advise the supervisory board on the undertaking’s current and future overall risk appetite and strategy and support the supervisory board in monitoring the implementation of this strategy by senior management. [3]The risk committee shall monitor whether conditions in customer business are in line with the undertaking's business model and risk structure. [4]Where this is not the case, the risk committee shall require from the management board proposals on how to bring the conditions in customer business into line with the business model and risk structure, and monitor their implementation. [5]The risk committee shall examine whether incentives provided by the remuneration system take into consideration the risk, capital and liquidity structure of the undertaking and the likelihood and timing of earnings. [6]This shall be without prejudice to the tasks of the remuneration committee pursuant to subsection (12). [7]The chair of the risk committee or, if a risk committee has not been established, the chair of the supervisory board

may make direct enquiries to both the head of the internal audit function and the head of the risk control unit. [8]The management board shall be informed thereof. [9]Where necessary, the risk committee may consult external experts. [10]The risk committee or, if a risk committee has not been established, the supervisory board shall determine the nature, amount, format and frequency of the information to be provided by the management board on the subjects of strategy and risk.

(9) [1]The supervisory board of an undertaking specified in subsection (3) sentences 1 and 2 shall appoint from among its members an audit committee. [2]The audit committee shall support the supervisory board, in particular, in monitoring

1 the accounting process;

2 the effectiveness of the risk management system and, in particular, of the internal control system and the internal audit function;

3 the implementation of statutory audits of accounts, particularly with regard to the independence of the auditor and of the services provided by the auditor (scope, frequency, reporting). The audit committee shall present the supervisory board with proposals for the appointment of an auditor as well as for the size of his/her remuneration and advise the supervisory board on whether to terminate or renew the audit mandate, and

4 that the management board swiftly rectifies by means of suitable measures the deficiencies identified by the auditor.

[3]The chair of the audit committee shall have expertise in the areas of accounting and statutory audits of accounts. [4]The chair of the audit committee or, if an audit committee has not been established, the chair of the supervisory board may make direct enquiries to both the head of the internal audit function and the head of the risk control unit. [5]The management board shall be informed thereof.

(10) [1]The supervisory board of an undertaking specified in subsection (3) sentences 1 and 2 may appoint a joint risk and audit committee if this is appropriate in consideration of the criteria pursuant to subsection (7) sentence 1. [2]BaFin shall be informed thereof. [3]Subsections (8) and (9) shall apply *mutatis mutandis* to the joint audit and risk committee.

(11) [1]The supervisory board of an undertaking specified in subsection (3) sentences 1 and 2 shall appoint from among its members a nomination committee. [2]The nomination committee shall support the supervisory board in

1 identifying candidates to fill management board vacancies and preparing proposals for the selection of members of the supervisory board; in so doing, the nomination committee shall take into account the balance and diversity of the knowledge, skills and experience of all members of the board in question, prepare a job description with a candidate profile, and state the time commitment associated with the task;

2 deciding on a target to encourage the representation of the underrepresented gender on the supervisory board and a policy on how to meet that target;

3 periodically, and at least annually, assessing the structure, size, composition and performance of the management board and the supervisory board and shall make recommendations to the supervisory board in this regard; in so doing, the nomination committee shall ensure that decision-making within the management board is not dominated by any individuals or groups in a manner that is detrimental to the undertaking.

4 periodically, and at least annually, assessing the knowledge, skills and experience of the individual members of the management board and the supervisory board as well as of the respective boards collectively, and

5 reviewing the policy of the management board for selection and appointment of senior management and making recommendations on this matter to the management board.

[3]In performing its functions, the nomination committee may use all resources that it considers to be appropriate, and may take external advice. [4]It shall receive appropriate funding from the undertaking to that effect.

(12) [1]The supervisory board of an undertaking specified in subsection (3) sentences 1 and 2 shall appoint from among its members a remuneration committee. [2]The remuneration committee

1 shall monitor the adequate structure of the remuneration systems for the management board and employees and, in particular, the adequate structure of remuneration for the heads of the risk control function and the compliance function and for those employees with a material impact on the overall risk profile of the institution, and shall support the supervisory board in monitoring the adequate structure of remuneration systems for the employees of the undertaking; the impact of the remuneration systems on the management of risk, capital and liquidity shall be assessed;

2 shall prepare the decisions of the supervisory board on the remuneration of the management board and, in so doing, take particular account of the impact of said decisions on the risks and risk management of the undertaking; the long-term interests of shareholders, investors, other stakeholders in the institution and the public interest shall be taken into account.

3 shall support the supervisory board in monitoring the proper inclusion of the internal control function and all other material functions in the structure of the remuneration systems.

[3]At least one member of the remuneration committee shall have sufficient expertise and professional experience in the area of risk management and risk control, in particular with respect to mechanisms for gearing the remuneration systems to the overall risk appetite and strategy and to the capital base of the undertaking. [4]If the supervisory board includes employee representatives pursuant to the laws on co-determination, the remuneration committee shall

include at least one employee representative. [5]The remuneration committee shall work together with the risk committee and shall take internal advice, for example, from the risk control unit and external advice from persons independent of the management board. [6]Members of the management board must not participate in remuneration committee meetings at which their remuneration is discussed. [7]The chair of the remuneration committee or, if a remuneration committee has not been established, the chair of the supervisory board may make direct enquiries to both the head of the internal audit function and the heads of the organisational units responsible for the structure of the remuneration systems. [8]The management board shall be informed thereof.

(13) Section 25d (1) and (2) shall apply accordingly to the members of the management or supervisory board of a data-provision service.

Section 25e
Requirements for tied agents

[1]If a CRR credit institution or a securities trading firm avails itself of a tied agent within the meaning of section 2 (10) sentence 1, it shall ensure that he/she is trustworthy and has the necessary professional qualifications, fulfils the statutory requirements when providing financial services, informs customers about his/her status pursuant to section 2 (10) sentences 1 and 2 prior to commencing business relationships and notifies customers about the termination of this status without delay. [2]The CRR credit institution or securities trading firm shall keep the necessary evidence of the fulfilment of its duties pursuant to sentence 1 until at least five years have elapsed after the termination of the tied agent's status. [3]More detailed provisions on the evidence required may be issued by way of a statutory order pursuant to section 24 (4).

Section 25f
Particular requirements for the proper business organisation of CRR credit institutions, groups of institutions, financial holding groups and mixed financial holding groups that include a CRR institution; authority to issue orders

(1) [1]All business within the meaning of section 3 (2) and (4) shall be performed at an economically, organisationally and legally independent undertaking (financial trading institution). [2]The financial trading institution shall be subject to the additional requirements pursuant to subsections (2) to (6) for a proper business organisation.

(2) Section 2a shall not apply to the financial trading institution.

(3) [1]The financial trading institution shall safeguard its own refinancing. [2]Business with the financial trading institution conducted by the CRR credit institution or by the undertakings which

belong to a group of institutions, a financial holding group or a mixed financial holding group that includes a CRR credit institution shall be treated in the same way as business with third parties.

(4) [1]In consultation with the Deutsche Bundesbank, the Federal Ministry of Finance may, by way of a statutory order for the purposes of monitoring compliance with the prohibition pursuant to section 3 (2) and (4) sentence 1 as well as for gauging the nature and scope of the business within the meaning of section 3 (2) sentence 2 and (4) sentence 1 for the CRR credit institution and the superordinated undertaking of a group of institutions, a financial holding group and a mixed financial holding group that includes a CRR institution, establish reporting requirements and more detailed provisions on the nature, scope, timing and form of the information and submission of documents and on the permissible data storage media, transmission channels and data formats insofar as this is necessary for the fulfilment of BaFin's tasks, in particular in order to receive all information that BaFin requires in the context of the prohibition pursuant to section 3 (2) and (4) sentence 1 as well as for gauging the nature and scope of the business within the meaning of section 3 (2) sentence 2 and (4) sentence 1. [2]It may delegate this authority to BaFin by way of a statutory order, provided that statutory orders by BaFin are issued in agreement with the Deutsche Bundesbank. [3]The central associations of the institutions shall be consulted before the statutory order is issued.

(5) The supervisory board of the financial trading institution, the CRR credit institution or the superordinated undertaking of the group of institutions, the financial holding group and the mixed financial holding group that includes a CRR institution shall keep itself informed regularly and on an *ad hoc* basis of the business of the financial trading institution as well as the associated risks and shall monitor, in particular, compliance with the aforementioned requirements.

(6) The financial trading institution shall not provide any payment services nor conduct e-money business within the meaning of the Payment Services Oversight Act.

(7) BaFin may issue to the CRR credit institution, the superordinated undertaking of a group of institutions, a financial holding group or a mixed financial holding group that includes a CRR credit institution as well as to the financial trading institution orders that are appropriate and necessary for ensuring a proper business organisation, also within the meaning of subsections (1) to (6).

Section 26
Submission of annual accounts, management report and audit reports

(1) [1]Institutions shall draw up their annual accounts for the previous financial year in the first three months of their financial year, and shall submit their annual accounts as drawn up, and subsequently also as approved, and their management report to BaFin and the Deutsche Bundesbank without delay pursuant to sentence 2. [2]The annual accounts shall bear an audit certificate (*Bestätigungsvermerk*) or a note accounting for the withholding of such a certificate.

[3]The auditor shall submit his/her report on the auditing of the annual accounts (audit report) to BaFin and the Deutsche Bundesbank without delay after the completion of the audit. [4]In the case of credit institutions which belong to a credit cooperative audit association or are audited by the audit office of a savings bank and giro association, the auditor shall submit the audit report only if requested to do so by BaFin.

(2) If an additional audit has taken place in connection with a deposit guarantee scheme, the auditor or audit association shall submit the report on this audit to BaFin and the Deutsche Bundesbank without delay.

(3) [1]An institution which draws up a set of consolidated accounts or a consolidated management report shall submit these documents to BaFin and the Deutsche Bundesbank without delay. [2]The superordinated undertaking of a financial holding group within the meaning of section 10a, of a mixed financial holding group within the meaning of section 10a or of a financial conglomerate shall submit a set of consolidated accounts or a consolidated management report without delay if the ultimate financial holding company in the financial holding group or the ultimate mixed financial holding company in the mixed financial holding group or in the financial conglomerate draws up a set of consolidated accounts or a consolidated management report. [3]The auditor of the consolidated accounts shall submit the audit reports on the consolidated accounts and consolidated management reports referred to in sentences 1 and 2 to BaFin and the Deutsche Bundesbank without delay after the completion of his/her audit. [4]In the case of credit institutions which belong to a credit cooperative audit association or are audited by the audit office of a savings bank and giro association, the auditor shall submit the audit report only if requested to do so by BaFin.

(4) The provisions of subsection (3) shall apply *mutatis mutandis* to single-entity annual accounts pursuant to section 325 (2a) of the Commercial Code.

Section 26a
Disclosure by institutions

(1) [1]In addition to the disclosures to be made pursuant to Articles 435 to 455 of Regulation (EU) No 575/2013 as last amended, the group's legal and organisational structure as well as its principles of proper management shall be disclosed. [2]CRR institutions shall additionally include in an annex to the annual accounts within the meaning of section 26 (1) sentence 2, specifying, by member state of the European Union and by third countries in which they have establishments, the following information on a consolidated basis, shall have it audited by an auditor pursuant to section 340k of the Commercial Code and shall disclose:

1 names, nature of activities and geographical location of the branches;

2 turnover;

3 number of employees on a full-time equivalent basis;

4 profit or loss before tax;

5 tax on profit or loss;

6 public subsidies received.

[3]If the CRR institution is included in the consolidated accounts of another parent undertaking with head offices in a member state of the European Union or in a signatory state to the Agreement on the European Economic Area, which is subject to the requirements of Directive 2013/36/EU, it shall not be required to make the disclosures pursuant to sentence 2. [4]CRR institutions shall disclose in their annual report their return on assets, calculated as their net profit divided by their total balance sheet. [5]By 1 July 2014, global systemically important institutions authorised within Germany shall be obligated to submit to the European Commission the information referred to in sentence 2 numbers 4 to 6 on a confidential basis. [6]Details on the requirements in sentences 2 to 5 shall be stipulated by the statutory order pursuant to section 10 (1) sentence 1 number 10.

(2) [1]If an institution fails to comply with its disclosure requirements, does not comply with them correctly, in full or in time in cases other than those referred to in Article 432 of Regulation (EU) No 575/2013 as last amended, BaFin may, in individual cases, issue orders that are appropriate and necessary for facilitating proper disclosure of the information. [2]BaFin may stipulate times and locations for publication that deviate from those referred to in Articles 433 and 434 of Regulation (EU) No 575/2013 as last amended or may require additional information to be disclosed.

Section 28
Appointment of the auditor in special cases

(1) [1]Institutions shall notify BaFin and the Deutsche Bundesbank of the auditor they have appointed without delay after making the appointment. [2]Within one month of receiving such notification, BaFin may request the appointment of a different auditor if this appears necessary to achieve the object of the audit. [3]If the institution has appointed an audit firm as the auditor, which was the institution's auditor in one of the two preceding financial years, BaFin may request that the responsible audit partner be changed if the previous audit including the audit report did not fulfil the object of the audit; section 319a (1) sentence 4 of the Commercial Code shall apply *mutatis mutandis*. [4]Objections to and appeals against measures pursuant to sentence 2 or 3 shall have no suspensory effect.

(2) [1]The court having jurisdiction at the domicile of the institution will appoint an auditor at the request of BaFin if

1 the notification pursuant to subsection (1) sentence 1 is not effected without delay after the end of the financial year;

2 the institution does not comply without delay with the request to appoint a different auditor pursuant to subsection (1) sentence 2;

3 the auditor chosen has declined to accept the auditing mandate, is no longer active, or is unable to conclude the audit in time, and the institution has not appointed a different auditor without delay.

[2]The appointment by the court shall be final. [3]Section 318 (5) of the Commercial Code shall apply *mutatis mutandis*. [4]The court, at the request of BaFin, may terminate the appointment of an auditor appointed pursuant to sentence 1.

(3) Subsections (1) and (2) shall not apply for credit institutions which belong to a credit cooperative audit association or are audited by the audit office of a savings bank and giro association.

Section 29
Special duties of the auditor

(1) [1]When auditing the annual accounts or interim accounts, the auditor shall also examine the institution's financial situation. [2]When auditing the annual accounts, he/she shall determine in particular whether the institution has fulfilled the following notification requirements and other requirements:

1 the notification requirements pursuant to sections 11, 12a, 14 (1) and pursuant to Regulation (EU) No 575/2013 as last amended, pursuant to sections 15, 24 and 24a in each case also in conjunction with a statutory order pursuant to section 24 (4) sentence 1, pursuant to section 24a also in conjunction with a statutory order pursuant to section 24a (5), and

2 the requirements

(a) pursuant to sections 10a, 10c to 10i in each case also in conjunction with a statutory order pursuant to section 10 (1) sentence 1 number 5, pursuant to sections 11, 13 to 13c, 18, 18a, 25 (1) and (2), section 25a (1) sentence 3 in each case also in conjunction with a statutory order pursuant to section 25 (3) and section 25a (5) also in conjunction with a statutory order pursuant to section 25a (6), pursuant to section 25a (1) sentence 6 number 1, subsection (3), pursuant to sections 25b, 25c (2) to (4b), section 25d (3) to (12), section 26a, pursuant to sections 13 and 14 (1), in each case also in conjunction with a statutory order pursuant to section 22, pursuant to section 51a (1) also in conjunction with a statutory order pursuant to section 51a (1), pursuant to section 51b (1) also in conjunction with a statutory order pursuant to section 51b (2) and pursuant to section 51c (1),

(b) pursuant to sections 17, 20, 23, 25 and 27 of the Supervision of Financial Conglomerates Act,

(c) pursuant to Article 4 (1), (2) and (3) subparagraph 2, Articles 4a and 9 (1) to (4) and Article 11 (1) to (10), (11) subparagraph 1 and (12) of Regulation (EU) No 648/2012,

(d) pursuant to Articles 92 to 386 of Regulation (EU) No 575/2013 also in conjunction with a statutory order pursuant to section 10 (1) sentence 1, pursuant to Articles 387 to 403 of Regulation (EU) No 575/2013 also in conjunction with a statutory order pursuant to section 13 (1) sentence 1,

(e) pursuant to Article 4 (1) subparagraph 1, Article 5a (1) and Articles 8b to 8d of Regulation (EC) No 1060/2009 as last amended, unless it is audited in accordance with section 29 (2) in conjunction with section 89 (1) sentence 1 of the German Securities Trading Act,

(f) pursuant to Article 9 of Regulation (EU) No 909/2014 and regulatory and implementing technical standards based thereon adopted by the European Commission,

(g) pursuant to Articles 4 (1) to (5) and 15 of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on the transparency of securities financing transactions and on re-use and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1),

(h) pursuant to Articles 16, 23 (3) sentence 1, (5), (6) and (10), Article 28 (2) and Article 29 of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as a benchmark for financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1),

(i) pursuant to Article 28 (1) to (3) of Regulation (EU) No 600/2014 and

(j) pursuant to Articles 5 to 9, 18 to 26, 27 (1) and (4) and Article 43 (5) and (6) of Regulation (EU) 2017/2402.

[3]If an institution is exempt pursuant to section 2a (1), the auditor shall check for the continued existence of the conditions referred to in Article 7 of Regulation (EU) No 575/2013 as last amended. [4]If an institution is exempt pursuant to section 2a (3), the auditor shall check for the continued existence of the conditions referred to in Article 8 of Regulation (EU) No 575/2013 as last amended. [5]If BaFin has issued provisions vis-à-vis the institution regarding the content of the audit pursuant to section 30, these provisions must be taken into consideration by the auditor. [6]If unrealised reserves are included in the institution's liable capital, the auditor, when auditing the annual accounts, shall likewise examine whether section 10 (4a) to (4c) in the version in force up to 31 December 2013 was complied with when ascertaining those reserves. [7]In the case of a credit institution that was requested to prepare a recovery plan pursuant to section 12 of the Recovery and Settlement Act, the auditor shall likewise examine whether the recovery plan meets the criteria pursuant to section 12 (1) and pursuant to section 13 (1) to (4) of the Recovery and Settlement Act. [8]The findings shall be included in the audit report.

(1a) [1]Subsection (1) shall apply with respect to the requirements pursuant to Article 4 (1), (2) and (3) subparagraph 2, Articles 4 and 9 (1) to (4) and Article 11 (1) to (10), (11) subparagraph 1 and (12) of Regulation (EU) No 648/2012 for the auditing of the annual accounts of central counterparties subject to the proviso that the auditor shall additionally have to examine whether the requirements pursuant to Article 7 (1) to (4), Article 8 (1) to (4) and Articles 26, 29, 33 to 54 of Regulation (EU) No 648/2012 and Article 29 (2), Articles 30 and 35 of Regulation (EU) No 600/2014 and the regulatory technical standards adopted in accordance with these articles are complied with. [2]Sentence 1 shall apply *mutatis mutandis* for the condensed set of accounts of a central counterparty if such accounts must be prepared pursuant to statutory requirements.

(1b) [1]The audit of the annual accounts of a Central Securities Depository shall also include an examination of compliance with the requirements set out in Articles 6, 7, 26 to 53, 54 (3) and 59 of Regulation (EU) No 909/2014 and with the regulatory and implementing technical standards adopted by the European Commission pursuant to those Articles. [2]An audit of the annual accounts of a credit institution that has been appointed by a central securities depository pursuant to Article 54 (4) of Regulation (EU) No 909/2014 to provide ancillary banking services shall also include an examination of compliance with the requirements of Articles 54 (4) and 59 of Regulation (EU) No 909/2014 and with the regulatory and implementing technical standards adopted by the European Commission pursuant to those Articles. [3]The first and second sentences shall apply *mutatis mutandis* to the condensed set of accounts of a central securities depository if such accounts are to be prepared in accordance with the statutory requirements.

(2) [1]The auditor shall also examine whether the institution has fulfilled its obligations pursuant to sections 24c and 25h to 25n, the Money Laundering Act and Regulation (EC) No 1781/2006; in the case of credit institutions, the auditor shall also examine whether the credit institution has fulfilled its obligations pursuant to Regulation (EC) No 924/2009, Regulation (EU) No 260/2012, Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information to be provided with transfers of funds and repealing Regulation (EU) No 1781/2006 (OJ L 141, 5.6.2015, p. 1) and the Payment Accounts Act. [2]Furthermore, he/she shall examine compliance with the notification and publication requirements and other requirements contained in Articles 5 to 10 and 12 to 14 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 regarding short selling and certain aspects of credit default swaps (OJ EU L 86/1 of 24 March 2012). [3]In the case of institutions, branches within the meaning of section 53b and branches within the meaning of section 53 which conduct safe custody business, he/she shall audit that business particularly carefully unless it is to be audited pursuant to section 89 (1) sentence 2 of the Securities Trading Act; this audit must also cover compliance with sections 67a (3), 67b, in each case also in conjunction with section 125 (1), (2) and (5) of the Companies Act on disclosure requirements and section 135 of the Companies Act on the exercising of voting rights. [4]In the case of central securities depositories, it shall also be specifically checked whether the provisions of the German Securities Deposit Act and of section 67a (3), section 67b, in each case also in conjunction with section 125 (1), (2) and (5) and section 135 of the Companies Act are complied with. [5]In the case of Pfandbrief banks within the meaning of section 1 (1) sentence 1 of the Pfandbrief Act, compliance with the organizational requirements for the procedures and systems under section 4 (4), sections 5, 16, 24, 26d, 27, 27a and 28 of the Pfandbrief Act shall

be examined. [6]The auditor shall report separately on the items mentioned in sentences 1 to 5, respectively; section 26 (1) sentence 3 shall apply *mutatis mutandis*.

(3) [1]If, in the course of his/her audit, the auditor becomes aware of facts which might warrant the qualification or withholding of the audit certificate, jeopardise the existence of the institution or fundamentally impair its development, which constitute a material infringement of the provisions on the institution's approval requirements or the pursuit of business under this Act, or which indicate that the senior managers have seriously infringed the law, the articles of association, articles of incorporation or the partnership agreement, he/she shall notify BaFin and the Deutsche Bundesbank without delay. [2]At the request of BaFin or the Deutsche Bundesbank, the auditor shall explain the audit report to them, and inform them of any other facts which have come to his/her attention in the course of the audit which suggest that the business of the institution is not being conducted properly. [3]The notification, explanatory and disclosure requirements pursuant to sentences 1 and 2 shall also apply in relation to an undertaking which is closely linked to the institution if the auditor becomes aware of the relevant facts while auditing the institution. [4]The auditor shall not be liable for the accuracy of facts which he/she reports in good faith pursuant to this subsection.

(4) [1]The Federal Ministry of Finance is authorised, in agreement with the Federal Ministry of Justice and after consulting the Deutsche Bundesbank, to issue by way of a statutory order more detailed provisions on

1 the object of the audit pursuant to subsections (1) and (2),

2 the time at which it is carried out and

3 the contents of the audit reports

insofar as this is necessary for the performance of BaFin's functions, and especially in order to enable it to identify irregularities which may jeopardise the safety of the assets entrusted to the institution or which may impair the proper conduct of banking business or provision of financial services, and to obtain consistent records for assessing the business conducted by institutions. [2]The statutory order may stipulate that the requirements set out in subsections (1) to (3) shall also be complied with when auditing the consolidated accounts of a group of institutions, financial holding group or mixed financial holding group or a financial conglomerate; more detailed provisions on the object of the audit, the time at which it is to be carried out and the contents of the audit report may be issued pursuant to sentence 1. [3]The Federal Ministry of Finance may delegate this authority to BaFin by way of a statutory order.

Section 30
Definition of audit content

[1]Without prejudice to the special duties of the auditor pursuant to section 29, BaFin can also issue provisions vis-à-vis the institution regarding the content of the audit, which must be taken

into consideration by the auditor when auditing the annual accounts. [2]In particular, BaFin can determine areas of emphasis for the audits.

Section 35
Expiry and revocation of authorisation

[...]

(2) BaFin may revoke authorisation pursuant to the provisions of the Act on Administrative Procedures, and also if

1 the business operations to which the authorisation relates have not been conducted for more than six months;

2 a credit institution is operated in the legal form of a sole proprietorship;

3 it becomes aware of facts which would warrant refusal of authorisation pursuant to section 33 (1) sentence 1 numbers 1 to 8, (1a) or (2) numbers 1 to 3;

4 the discharge of an institution's obligations to its creditors, and particularly the safety of the assets entrusted to it, is endangered, and the danger cannot be averted by taking other measures under this Act; the safety of the assets entrusted to the institution is endangered, inter alia, by

(a) a loss amounting to half of its liable capital pursuant to Article 72 of Regulation (EU) No 575/2013 as last amended, or

(b) a loss amounting to more than 10 per cent of its liable capital pursuant to Article 72 of Regulation (EU) No 575/2013 as last amended in each of at least three successive financial years;

5 (repealed)

6 the institution has persistently contravened provisions of this Act, the Money Laundering Act, the Securities Trading Act, Regulation (EU) 2015/847 or the regulations or orders issued to implement these Acts;

7 the institution has persistently contravened Articles 14, 15, 16 (1) or (2), Article 17 (1), (2), (4), (5) or (8), Article 18 (1) to (6), Article 19 (1) to (3), (5) to (7) or (11) or Article 20 (1) of Regulation (EU) No 596/2014 or orders of the Federal Institute relating to these provisions;

8 the prudential requirements in Articles 92 to 403 as well as 411 to 428 of Regulation (EU) No 575/2013 are no longer fulfilled;

9 the institution, as a counterparty to securities financing transactions, has persistently contravened the obligations and requirements of Articles 4 or 15 of Regulation (EU) 2015/2365 or orders of the Federal Financial Supervisory Authority relating to these provisions, or

10 the institution has persistently contravened Article 7 (1) sentence 3 or Article 11 (1) sentence 3 of Regulation (EU) No 600/2014 or orders of the Federal Institute relating to these provisions.

[...]

Section 36
Removal of senior managers or members of the supervisory body

(1) [1]In the cases specified in section 35 (2) numbers 3, 4, and 6, BaFin, instead of revoking authorisation, may demand the removal of the senior managers responsible and may also prohibit these senior managers from carrying out their activities at institutions organised in the form of a legal person. [2]For the purposes of sentence 1, section 35 (2) number 4 shall apply subject to the proviso that, when calculating the amount of the loss, accounting conveniences used to reduce or avoid a balance sheet loss are disregarded. [3]In the event of a violation of sections 25i, 25k or 25m or of Regulation (EU) 2015/847, BaFin may also prohibit the responsible managers from carrying out their activities with obligors pursuant to section 2 (1) of the Money Laundering Act.

[…]

(2) BaFin may also demand the removal of a senior manager and prohibit that senior manager from carrying out his/her activities at institutions organised in the form of a legal person if he/she has intentionally or recklessly contravened the provisions of this Act, Regulation (EU) No 575/2013, Regulation (EU) No 648/2012, Regulation (EU) No 596/2014, Regulation (EU) No 600/2014, Regulation (EU) No 909/2014, Regulation (EU) 2015/2365, Regulation (EU) 2016/1011, the Act on Building and Loan Associations, the Safe Custody Act (*Depotgesetz*), the Money Laundering Act, the Capital Investment Code, the Pfandbrief Act, the Payment Services Oversight Act or the Securities Trading Act, Articles 6, 7, 9, 18 to 26 or 27 (1) or (4) of Regulation (EU) 2017/2402,, the regulations issued to implement these laws, the legal acts adopted to implement Directive 2013/36/EU and Regulation (EU) No 575/2013, the legal acts adopted to implement Regulation (EU) No 648/2012, Regulation (EU) No 596/2014, Regulation (EU) No 600/2014, Regulation (EU) No 909/2014, Regulation (EU) 2015/2365, Regulation (EU) 2016/1011 or Regulation (EU) 2017/2402, or orders issued by BaFin and he/she persists in such behaviour despite having been duly warned by BaFin.

[...]

Section 44
Information from and inspections of institutions, ancillary service providers, financial

holding companies, mixed financial holding companies and undertakings included in supervision on a consolidated basis

(1) [1]An institution or a superordinated undertaking, the members of its governing bodies and its employees shall, upon request, provide BaFin, the persons and entities which BaFin uses in performing its functions and the Deutsche Bundesbank with information about all business activities, documentation and, if necessary, copies. [2]BaFin may perform inspections at the institutions and superordinated undertakings, with or without a special reason, and may entrust the Deutsche Bundesbank with the task of carrying out such inspections; this shall include undertakings to which an institution or superordinated undertaking has outsourced major areas within the meaning of section 25b (external service providers). [3]BaFin's staff, the staff of the Deutsche Bundesbank as well as any other persons whom BaFin uses to perform the inspections may enter and inspect the business premises of the institution, the external service provider and the superordinated undertaking for this purpose during ordinary office and business hours. [4]The parties affected shall acquiesce to the measures taken under sentences 2 and 3.

(1a) If a central counterparty outsources operational functions, services or activities to an undertaking in accordance with the requirements of Article 35 (1) of Regulation (EU) No 648/2012, BaFin's powers pursuant to subsection (1) sentences 2 and 3 shall apply *mutatis* mutandis to these undertakings; subsection (1) sentence 4 shall apply mutatis mutandis.

(1b) [1]Originators and original lenders, if they are not institutions, as well as securitisation special purpose vehicles and third parties authorised in accordance with Article 28 (1) of Regulation (EU) 2017/2402 shall provide information to BaFin in accordance with subsections (1) and (6). [2]BaFin shall be entitled to the audit powers specified in subsection (1) accordingly.

(2) [1]A subordinated undertaking within the meaning of section 10a, a financial holding company at the head of a financial holding group within the meaning of section 10a, a mixed financial holding company at the head of a mixed financial holding group within the meaning of section 10a or a mixed holding company and a member of a governing body of such an undertaking shall, upon request, provide information, documentation and, if necessary, copies to BaFin, the persons and agencies which BaFin uses in performing its functions and the Deutsche Bundesbank, in order to enable them to check the accuracy of the information or data supplied and which are required for supervision on a consolidated basis or which are to be supplied in connection with a statutory order pursuant to section 25 (3) sentence 1. [2]BaFin may perform inspections at the undertakings specified in sentence 1, with or without a special reason, and may entrust the Deutsche Bundesbank with the task of carrying out such inspections; subsection (1) sentence 2 clause 2 shall apply *mutatis mutandis*. [3]BaFin's staff, the staff of the Deutsche Bundesbank as well as any other persons whom BaFin uses to perform the inspections may enter and inspect the undertakings' business premises for this purpose during ordinary office and business hours. [4]The parties affected shall acquiesce to the measures taken under sentences 2 and 3. [5]Sentences 1 to 4 shall apply *mutatis mutandis* to a subsidiary not included in the consolidation and to a mixed holding company and its subsidiaries.

(2a) [1]If, in the supervision of a group of institutions, a financial holding group, a mixed financial holding group or a mixed holding group, BaFin requires information which has already been submitted to another competent agency, it will initially address its request for information to this competent agency. [2]When supervising institutions which are subordinated to an EU parent institution pursuant to section 10a, BaFin addresses, as a matter of routine, its initial requests for information on the implementation of the approaches and measures under Directive 2013/36/EU to the agency responsible for consolidated supervision.

(3) [1]Undertakings domiciled outside Germany which are included in the consolidation must, upon request, allow BaFin to carry out the inspections permitted under this Act, in particular checks of the accuracy of the data supplied for the consolidation pursuant to section 10a (4) to (7), section 25 (2) and (3) and Articles 11 to 17 of Regulation (EU) No 575/2013 as last amended, insofar as this is both necessary to enable BaFin to perform its functions and permissible under the laws of the other state. [2]This shall also apply to subsidiaries domiciled outside Germany which are not included in the consolidation.

(3a) (Repealed)

(4) [1]BaFin can send representatives to shareholders' meetings, general meetings or partners' meetings, as well as to meetings of the supervisory bodies of institutions, financial holding companies or mixed financial holding companies organised in the form of a legal person. [2]They may address these meetings. [3]The parties affected shall acquiesce to the measures taken under sentences 1 and 2.

(5) [1]Institutions, financial holding companies and mixed financial holding companies organised in the form of a legal person shall, at BaFin’s request, call the meetings specified in subsection (4) sentence 1, call meetings of the supervisory bodies and announce subjects on which decisions are to be taken. [2]BaFin can send representatives to a meeting called pursuant to sentence 1. [3]They may address the meeting. [4]The parties affected shall acquiesce to the measures taken under sentences 2 and 3. [5]This is without prejudice to section 4.

(5a) (Repealed)

(6) A person obliged to furnish information may refuse to do so in respect of any questions, the answers to which would place him/her or one of his/her relatives as designated in section 383 (1) numbers 1 to 3 of the Code of Civil Procedure at risk of criminal prosecution or proceedings under the Act on Breaches of Administrative Regulations (*Gesetz über Ordnungswidrigkeiten*).

Section 44a
Cross-border information and audits

(1) [1]Legislation that hinders the transmission of data shall not apply to the transmission of data between an institution, a German asset management company, a financial undertaking, a financial holding company, a mixed financial holding company, an ancillary service provider,

an e-money institution within the meaning of the Payment Services Oversight Act, a payment institution within the meaning of the Payment Services Oversight Act, or an undertaking domiciled outside Germany which directly or indirectly holds at least 20 per cent of the capital shares or voting rights in the undertaking, is a parent undertaking or can exercise a controlling influence, or between a mixed-activity holding company and its subsidiaries domiciled outside Germany, if such transmission of data is necessary to comply with the prudential provisions pursuant to Directive 2013/36/EU or Directive 2002/87/EC for the undertaking domiciled outside Germany. [2]BaFin can prohibit an institution from transmitting data to a non-EEA state.

(2) [1]At the request of an agency responsible for the supervision of an undertaking domiciled in another EEA state, BaFin will check the accuracy of the data transmitted by an undertaking within the meaning of subsection (1) sentence 1 for that supervisory body pursuant to Directive 2013/36/EU, Regulation (EU) No 575/2013 or Directive 2002/87/EC, or shall permit the agency making the request, an external auditor or an expert to check such data; BaFin may, at its own diligent discretion, adopt the same procedure vis-à-vis supervisory bodies in non-EEA states provided that reciprocity is assured. [2]Section 5 (2) of the Act on Administrative Procedures regarding the limits to administrative assistance shall apply *mutatis mutandis*. [3]The undertakings within the meaning of subsection (1) sentence 1 shall acquiesce to the checks.

(3) [1]BaFin can request from CRR credit institutions, securities trading firms, German asset management companies, financial holding companies or mixed financial holding companies domiciled in another EEA state that it be given information that facilitates the supervision of institutions which are subsidiaries of these undertakings and which are not included in supervision on a consolidated basis by the competent agencies of the other state for reasons corresponding to those specified in Article 19 (1) or (2) letter (b) of Regulation (EU) No 575/2013.

Section 45c
Special representative

(1) [1]BaFin may appoint a special representative, entrust him/her with the performance of activities at an institution and assign him/her the requisite powers. [2]The special representative must be independent, trustworthy and suited to carrying out the activities entrusted to him/her to ensure the sustainability of the institution's business policy and to safeguard financial stability; in cases where the special representative assumes tasks of a senior manager or governing body, he/she must guarantee the professional qualifications required. [3]As part of the appointment, he/she is authorised to request information and documentation from members of the governing bodies and employees of the institution, attend in an advisory role all meetings of the governing bodies and other bodies of the institution, enter the institution's business premises, inspect its books and papers and conduct enquiries. [4]The governing bodies and members thereof are obliged to help the special representative conduct his/her activities. [5]He/she is obliged to furnish BaFin with all information about any findings made in performing his/her tasks.

(2) In particular, BaFin may appoint the special representative to do the following:

1 to take over the activities and powers of one or more senior managers if facts are known which reveal that the senior manager(s) of the institution is/are not trustworthy or does/do not have the professional qualifications required to manage the institution.

2 to take over the activities and powers of one or more senior managers if the institution no longer has the requisite number of senior managers, in particular because BaFin has demanded the removal of a senior manager or prohibited that senior manager from carrying out his/her activities.

3 To take over the activities and powers of governing bodies of the institution entirely or in part if the conditions set out in section 36 (3) sentence 1 number 1 to 10 apply.

4 to take over the activities and powers of governing bodies of the institution entirely or in part if the supervision of the institution is hampered as a result of circumstances within the meaning of section 33 (2).

5 to take suitable measures to set up and safeguard proper business organisation including appropriate risk management if the institution has persistently contravened provisions of this Act, the Act on Building and Loan Associations, the Safe Custody Act, the Money Laundering Act, the Capital Investment Code, the Pfandbrief Act, the Payment Services Oversight Act, the Securities Trading Act, the regulations issued to implement these Acts or the orders issued by BaFin.

6 to monitor the institution's compliance with the orders issued by BaFin.

7 to draw up a restructuring plan for the institution if the conditions set out in section 45 (1) sentence 3 or (2) apply, to follow the execution of the restructuring plan and to take over the powers as defined in section 45 (2) sentences 4 and 5.

7a to draw up a plan pursuant to section 10 (4) sentence 6 for the institution if the requirements of section 10 (4) sentence 1 are met and the institution has not presented a suitable plan within a deadline set by BaFin, and to ensure the implementation of said plan;

8 to monitor measures taken by the institution to avert a danger within the meaning of section 35 (2) number 4 or of section 46 (1) sentence 1, to take measures him/herself to avert a danger or to monitor compliance with measures taken by BaFin pursuant to section 46.

9 to prepare a transfer order pursuant to section 77 of the Recovery and Settlement Act.

10 to check claims for damages against members of governing bodies or former members of governing bodies if there is evidence of grounds for damage to the institution through breach of duty by said members.

(3) [1]If the special representative takes over all activities and powers of a governing body or the member of a governing body of the institution, the tasks and powers of the governing body or member of the governing body in question shall be suspended. [2]The special representative may not carry out the role of one or more senior managers at the same time as that of one or

more members of an administrative or supervisory body. [3]If the special representative is granted only some of the powers of a governing body or a member of a governing body, this shall have no effect on the powers of the appointed governing body or member of a governing body of the institution. [4]The activities and powers of one or more senior managers may be transferred in their entirety to the special representative only in the cases cited in (2) numbers 1, 2 and 4. [5]His/her scope of powers of representation shall be determined by the scope of powers of representation of the senior manager to whose position he/she has been appointed. [6]In cases where BaFin has transferred the role of senior manager to a special representative, persons or governing bodies entitled under other legislation to appoint senior managers may do so only with BaFin's approval.

(4) If BaFin transfers the activities and powers of a senior manager as defined in (2) number 1 or number 2 to a special representative, the transfer, scope of powers of representation and revocation of the transfer shall be entered officially in the commercial register.

(5) The institution's governing body that is responsible for the debarment of partners from the management and representation or for the removal of persons with powers of management or representation may, if there is good cause, apply to have the transfer of a senior manager's role to the special representative revoked.

(6) [1]The costs incurred through the appointment of the special representative, including reasonable expenses and the remuneration which he/she is to be paid, shall be borne by the institution. [2]The amount of the remuneration will be determined by BaFin. [3]BaFin will advance such expenses and remuneration at the special representative's request.

(7) [1]The special representative shall be liable for wilful intent and negligence. [2]In the case of negligent conduct, the special representative's liability for damages shall be limited to €1 million. [3]If this institution is a public limited company whose shares are admitted to trading on the regulated market, liability for damages shall be limited to €50 million.

(8) Subsections (1) to (7) shall apply *mutatis mutandis* to financial holding companies or mixed financial holding companies which are deemed to be superordinated undertakings pursuant to section 10a and to persons who actually manage the business of such financial holding companies or mixed financial holding companies.

Section 60b
Publication of measures

(1) [1]BaFin will, if the publication is not already made in accordance with section 60c (1) sentence 1, without delay, publish on its website any measure which has been imposed and has become legally enforceable on an institution or undertaking subject to its supervision or on a senior manager of an institution or undertaking, which it has imposed for a breach of this Act, the statutory orders issued in connection with it or the provisions of Regulation (EU) No 575/2013 or Regulation (EU) 2015/847, and any decision on an administrative pecuniary

penalty that has become non-appealable pursuant to subsections (2) to (4), and in doing so will also provide information on the type and nature of the breach. [2]This shall be without prejudice to BaFin's rights pursuant to section 37 (1) sentence 3.

(2) Publication of a decision on an administrative pecuniary penalty that has become non-appealable pursuant to section 56 (4c) may not contain any personal data.

(3) A decision on an administrative pecuniary penalty that has become non-appealable pursuant to section 56 (4e) may not be published pursuant to subsection (1) if such publication would seriously jeopardise the stability of the financial markets of the Federal Republic of Germany or one or more signatory states to the Agreement on the European Economic Area or if such publication would cause disproportionate damage to the institutions or natural persons involved.

(4) [1]BaFin will publish on an anonymous basis a measure that has become legally enforceable or a decision on an administrative pecuniary penalty that has become non-appealable with the exception of decisions on administrative pecuniary penalties pursuant to section 56 (4e) where publication pursuant to subsection (1)

1 injures the personal rights of natural persons or publication of personal data would be disproportionate for other reasons,

2 would seriously jeopardise the stability of the financial markets of the Federal Republic of Germany or one or more EEA states or the continuation of a criminal investigation, or

3 would cause disproportionate damage to the institutions or natural persons involved.

[2]Notwithstanding sentence 1, BaFin may, in the cases referred to in sentence 1 numbers 2 and 3, postpone publication pursuant to subsection (1) until such time as the reasons for publication on an anonymous basis no longer exist.

(5) [1]The measures and decisions on administrative pecuniary penalties within the meaning of subsection (1) with the exception of decisions on administrative pecuniary penalties pursuant to section 56 (4e) shall remain published on BaFin's website for at least five years from when the measure becomes legally enforceable or when the decision on an administrative pecuniary penalty becomes non-appealable. [2]Notwithstanding sentence 1, personal data shall be deleted as soon as their disclosure is no longer required.

Circular 05/2018 (WA) – Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency – MaComp)

Version dated 19 April 2018, amended on 29 April 2020
Ref. no. WA 31 – Wp 2002 – 2017/0011

BT 5.2.1 Identification of the potential target market by the manufacturer; target market categories to be considered

BT 5.2.2 Identification of the potential target market: consideration of the nature of the product manufactured

BT 5.2.3 Interaction between the distribution strategy of the manufacturer and its definition of the target market

BT 5.3 Requirements for distributors

BT 5.3.1 Relationship between the target market identification and other product governance processes of the distributor

BT 5.3.2 Relationship between the target market identification and the assessment of suitability or appropriateness

BT 5.3.3 Identification of the actual target market by the distributor: basis of identifying the target market

BT 5.3.4 Identification of the actual target market by the distributor: interaction of target market identification with investment services; reconciliation of the target market

BT 5.3.5 Definition of the distribution strategy by distributors

BT 5.3.6 Distribution outside the target market; identification and reconciliation of the target market in the context of portfolio management, investment advice relating to portfolios, hedging and diversification

BT 5.3.7 Distribution of products manufactured by entities not subject to Directive 2014/65/EU

BT 5.4 Requirements for both manufacturers and distributors

BT 5.4.1 Identification of the negative target market

BT 5.4.2 Product review process in terms of the identification of the target market; exchange of information between the manufacturer and the distributor about reaching the target market

BT 5.5 Identifying the target market in the business with professional clients or eligible counterparties

BT 5.5.1 Professional clients or eligible counterparties as links in an intermediation chain

BT 5.5.2 Professional clients or eligible counterparties as end-clients

BT 5.5.2.1 Professional clients as end-clients

BT 5.5.2.2 Eligible counterparties as end-clients

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BT 7 Suitability assessment statement in accordance with section 64 (3) of the WpHG, Articles 54, 55 of the DR

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BT 15.3.3.5. Costs associated with the investment (section 4 (1) sentence 2 no. 5 of the WpDVerOV)

BT 15.3.4. Other disclosures

AT: General requirements for investment services enterprises

AT 1 Preliminary remarks

1. This Circular issued by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) expands on certain requirements of Part 11 of the WpHG and Article 21ff. of Delegated Regulation (EU) 2017/565 (in the following: DR). It provides a flexible and practical framework for structuring the organisation of the investment services business of enterprises that are covered by the requirements. The Circular is also designed to give guidance, in particular for smaller enterprises. At various points, it contains illustrative lists of possible measures to help enterprises comply with the requirements of the provisions mentioned.

2. The objective of the Circular is to promote investor confidence in the proper functioning of securities markets and to strengthen the protection of all investors and the ability of the capital markets to function as an institution, as well as to protect investment services enterprises and their employees. The Circular also aims to introduce appropriate measures to mitigate the risk of regulatory measures, claims for damages brought against enterprises and reputational damage for enterprises due to violations of the provisions contained in Part 11 of the WpHG and Article 21ff. of the DR.

3. This Circular serves as a compendium consolidating BaFin's administrative practice relating to individual requirements of the above-mentioned legislation. It provides enterprises with a compilation of all valid administrative practices relating to Part 11 of the WpHG and Article 21ff. of the DR that have been published by BaFin and that can be updated if necessary.

4. As the Circular only explains individual requirements of the above-mentioned legislative instruments in detail, it does not claim to be a comprehensive guide. BaFin will maintain an ongoing dialogue with the industry to meet the need for further detailed information.

5. The Circular has a modular structure so that any necessary adjustments to specific regulatory areas can be restricted to the immediate revision of individual modules. The General Part (AT module) sets out basic principles relating to the organisational requirements and rules of conduct laid down in Part 11 of the WpHG. Specific individual requirements and obligations are explained in detail in the Special Part (BT).

6. On the one hand, the Circular contains requirements that are considered by BaFin to be mandatory stipulations based on Part 11 of the WpHG (in most cases denoted by the use of the words "shall" or "required to"). These stipulations shall be complied with by all enterprises subject to the relevant requirements. The Circular also contains stipulations that are normally to be complied with, but from which enterprises may depart in certain circumstances. Such stipulations are denoted by the use of the words "should", "as a matter of principle" or "generally". In some of these cases, the Circular requires any departures to be justified in writing.

   In addition to the requirements that must normally be complied with in accordance with BaFin's administrative practice, the Circular also contains recommendations that are either expressly worded as a recommendation or are denoted by the use of the words "may" or "can". A recommendation illustrates non-binding suggestions or alternative courses of action.

   The Circular also contains numerous examples that illustrate the requirements as well as uncomplicated guidance on non-binding, informative objectives, which are also denoted as such.

7. The requirements contained in BT 1 of this Circular are aimed at the compliance function of investment services enterprises. The General Part as well as BT 2 to BT 15 of this Circular are aimed at investment services enterprises as such. Investment services enterprises themselves determine the business unit responsible for these areas.

AT 2 Sources

AT 2.1 International/European sources and guidance

The legal requirements defined in detail in this Circular are based on the following supranational legal sources, agreements and publications:

1. International Organisation of Securities Commissions (IOSCO): *Objectives and Principles of Securities Regulation*
2. EU Directive 2014/65/EU and Delegated Directive (EU) 2017/593
3. Delegated Regulation (EU) 2017/565
4. PublicationsPublications by the European Securities and Markets Authority (ESMA) or its predecessor, the Committee of European Securities Regulators (CESR):

    - Guidelines on knowledge and competence dated 17 December 2015 (ESMA/2015/1886)
    - Guidelines on MiFID II product governance requirements dated 2 June 2017 (ESMA35-43-620)
    - Joint guidelines for complaints-handling for the securities (ESMA) and banking (EBA) sectors dated 13 June 2014 (JC 2014/43)
    - Guidelines on complex debt instruments and structured deposits dated 26 November 2015 (ESMA/2015/1783)
    - Guidelines on cross-selling practices under MiFID II dated 22 December 2015 (ESMA/2015/1861)
    - Guidelines on certain aspects of the MiFID compliance function dated 6 July 2012 (ESMA/2012/388)
    - Guidelines and Recommendations on remuneration policies and practices dated 11 June 2013 (ESMA/2013/606)
    - *Guidelines on certain aspects of the MiFID II suitability requirements*
    - ESMA Q&As on MIFID II and MiFIR investor protection topics (ESMA35-43-349)

AT 2.2 National legal sources

This Circular is based on the following national legal sources:

2. German Securities Trading Act (*Gesetz über den Wertpapierhandel – Wertpapierhandelsgesetz* – WpHG)
3. German Banking Act (*Gesetz über das Kreditwesen – Kreditwesengesetz* – KWG)
4. German Regulation specifying rules of conduct and organisational requirements for investment services enterprises (*Wertpapierdienstleistungs-Verhaltens- und*

Organisationsverordnung – WpDVerOV)

5. German Regulation relating to the use of employees in the provision of investment advice, as distribution officers or as compliance officers and to the reporting requirements under section 87 of the Securities Trading Act (*Verordnung über den Einsatz von Mitarbeitern in der Anlageberatung, als Vertriebsbeauftragte oder als Compliance-Beauftragte und über die Anzeigepflichten nach § 87 des Wertpapierhandelsgesetzes – WpHG-Mitarbeiteranzeige-Verordnung* – WpHGMaAnzV).

AT 3 Scope

AT 3.1 Affected enterprises

The requirements of this Circular apply to all investment services enterprises within the meaning of section 2 (10) of the WpHG. These are all credit institutions and financial services institutions as defined by section 1 (1) and (1a) of the KWG and all enterprises operating under section 53 (1) sentence 1 of the KWG that, in accordance with section 2 (8) of the WpHG, provide investment services on a commercial basis or on a scale that requires commercially organised business operations. The requirements do not apply to enterprises that meet the exemption criteria defined in section 3 of the WpHG.

The requirements of this Circular apply to branches whose registered office is in Germany and tied agents who are ordinarily resident in Germany within the meaning of section 53b of the KWG and who provide investment services, with the exception of AT 4 to AT 7, AT 9, BT 1, BT 2, BT 5 (to the extent that it relates to the requirements under section 80 (9) to (13) of the WpHG), BT 8 (to the extent that it does not relate either to the requirements to act in the best interests of the client or the recommendation of certain financial instruments and structured deposits), BT 9, BT 11 (to the extent that it relates to requirements governing portfolio managers, distribution officers and compliance officers) and BT 12. The provisions of the AT as well as BT 1, BT 2, BT 5, BT 8 and BT 9 of this Circular apply to branches and tied agents of German investment services enterprises resident in the EEA.

Credit and financial services institutions that are not investment services enterprises within the meaning of section 2 (10) of the WpHG are subject to the general organisational requirements under section 25a (1) of the KWG, but not the requirements under sections 63ff. of the WpHG and in this Circular.

The requirements of this Circular apply to asset management companies to the extent that they provide services and ancillary services within the meaning of section 20 (2) nos. 1, 2 and 3 of the German Investment Code (*Kapitalanlagegesetzbuch* – KAGB) and subsection (3) nos. 2, 3, 4 and 5 of the KAGB, subject to the condition that the requirements of the AT and BT 1 do not apply (see also Part 2, paragraph 3 of Circular 1/2017 Minimum requirements for the risk management of asset management companies (*Mindestanforderungen an das Risikomanagement von Kapitalverwaltungsgesellschaften* – KAMaRisk) dated 10 January 2017) and the requirements of BT 2 to BT 10, BT 12 and BT 14 apply, to the extent that the corresponding provisions of sections 63ff. of the WpHG apply via section 5 (2) of the KAGB.

AT 3.2 Principle of proportionality

This Circular reflects the heterogeneous corporate structure and the variety of business activities of investment services enterprises. It contains numerous opening clauses that simplify implementation, depending in particular on the size of the enterprises, their

business focuses and risk situation. In this respect, the Circular can also be implemented flexibly by smaller enterprises. The nature, scale, complexity and risks of the relevant business, as well as the type and range of the investment services offered, shall be taken into account when determining the appropriate arrangements.

AT 4 Overall responsibility of management board members

The management board members are responsible for complying with the obligations laid down in the WpHG. All management board members within the meaning of section 1 (2) of the KWG are responsible for ensuring an orderly business organisation and for the further development of this organisation, regardless of the internal division of responsibilities within the enterprise or the group. Irrespective of this, investment services enterprises shall, in accordance with the second subparagraph of Article 25 (1) of the DR, define which members of the management board are responsible for overseeing and maintaining the relevant organisational requirements in the enterprise. This responsibility also extends to outsourced activities and processes. It also continues to apply if duties are delegated.

AT 5 Cooperation between several investment services enterprises

If investment services are provided for a client by two or more investment services enterprises domiciled in the EEA, for example where an investment services enterprise transmits a client order from one investment services enterprise to another for execution, the enterprises involved are entitled to expect that the other enterprises involved will meet their regulatory obligations. This also applies to the regulatory obligations to the client, insofar as the enterprise that must fulfil them is legally or contractually defined. Section 71 of the WpHG contains such a statutory definition.

This shall not apply if one of the investment services enterprises has clear evidence that one of the other enterprises is not meeting its regulatory obligations.

AT 6 General requirements for investment services enterprises under section 80 (1) of the WpHG

1. An investment services enterprise shall establish adequate policies, maintain resources and put in place procedures designed to ensure that the investment services enterprise itself and its employees comply with the obligations of the WpHG. In particular, this requires the establishment of a permanent and effective compliance function that supports processes and acts preventively, and that can perform its duties independently.

2. The policies established and procedures put in place shall ensure effective implementation of the necessary control activities. The operating areas are responsible for complying with the provisions and implementing controls (internal controls). In addition, the enterprise shall ensure – at least on a random sampling basis – that monitoring activities are performed by other areas, such as monitoring of trading by the back office and/or the compliance function.

3. The compliance function monitors the arrangements implemented to comply with the provisions of the WpHG, in particular Part 11, and the measures taken under the DR. The specific requirements for the compliance function are presented under BT 1 of this Circular.

AT 6.1 Organisational and operational structure of the investment services enterprise

The arrangements described under AT 6 paragraph 1 shall consider the extent to which investment services enterprises and their employees could be subject to conflicts of interest or whether they regularly have access to compliance-relevant information.

Access to compliance-relevant information is particularly given where persons have access to inside or other confidential information. Inside information in accordance with Article 7 (1) of Regulation (EU) No. 2014/596 means in particular knowledge of the issues listed in chapter IV 2.2.4., pp. 56–57 of the Issuer Guideline where this knowledge could materially affect the quoted/market price of a financial instrument if disclosed to the public.

The designated ability to obtain knowledge of client orders shall also be regarded as compliance-relevant information if this knowledge can be used to the detriment of the client through proprietary trading by the enterprise or personal transactions of employees (in particular for front or parallel running or scalping).

AT 6.2 Resources and procedures of the investment services enterprise

1. The necessary resources and procedures of an investment services enterprise include in particular

a. effective arrangements allowing appropriate measures to be taken to identify conflicts of interest that arise during the provision of investment services or ancillary investment services between the enterprise itself, including its employees, and any persons and enterprises directly or indirectly linked to it by control as defined by Article 4(1) no. 37 of Regulation (EU) No. 575/2013, and its clients or between its clients, and to prevent such conflicts of interest adversely affecting the interests of its clients,

b. arrangements to minimise delays in order execution or transmission in the event of system failures and malfunctions,

c. effective and transparent policies and procedures for the appropriate and immediate handling of complaints by clients,

d. effective procedures for developing and monitoring product approval procedures,

e. arrangements to ensure that the appropriateness and effectiveness of the organisational measures taken are regularly monitored and assessed, and that the measures required to remedy deficiencies are taken.

2. Investment services enterprises that do not usually have access to compliance-relevant information within the meaning of AT 6.1 of this Circular and whose employees are not usually subject to conflicts of interest shall develop general measures as part of their organisational requirements in the event that they receive such information in individual cases.

   The relevant requirements for the compliance function are explained in module BT 1 of this Circular.

   Investment services enterprises that usually have access to such information shall make sufficient arrangements and take measures to record the information to which the enterprise has access and to monitor whether the information is being disclosed in accordance with compliance rules.

3. The following illustrative list of measures and tools shall be regarded as suitable for recording and monitoring the disclosure of compliance-relevant information within the

meaning of AT 6.1 of this Circular.

a. Chinese walls

The goal of Chinese walls is to ensure that information within the meaning of AT 6.1 of this Circular that is disclosed in a particular area of an investment services enterprise only leaves the area in which it originated in accordance with the requirements of 3.b. below. The following organisational measures may be taken:

- the functional or physical separation of confidential areas (e.g. between client trading and proprietary trading),
- the creation of access restrictions,
- the development of rules governing access rights to data.

Chinese walls serve to minimise the effects of conflicts of interest between the investment services enterprise and its clients or between its various clients. They therefore aim to ensure the continuous and unrestricted ability of the individual areas of the investment services enterprise to act without conflicts of interest by confining compliance-relevant information to the area in which it has arisen. In agreement with the compliance function, the relevant area is therefore individually responsible for taking all precautions to ensure the confidentiality of compliance-relevant information. If such measures cannot be taken, other comparable organisational measures shall be implemented to minimise conflicts of interest.

b. Flow of information across areas (wall crossing)

The flow of information across areas is permitted if this is required to fulfil the tasks of the investment services enterprise. It may be necessary for an investment services enterprise that operates in many business areas but has a division of responsibilities to involve staff members from other areas or to disclose information across different areas, in particular in the case of complex transactions entailing a high degree of complexity and/or risk, or to fully utilise the investment services enterprise's product range.

The disclosure of information across areas within the meaning of AT 6.1 of this Circular and the involvement of staff members from other areas is therefore permitted if the disclosure of information is restricted to the extent necessary (need-to-know principle).

c. Monitoring tools

Transactions involving financial instruments may be monitored in particular using a watch list and/or a restricted list.

- Watch list

A watch list is a non-public list of financial instruments updated on an ongoing basis about which an investment services enterprise has compliance-relevant information within the meaning of AT 6.1 of this Circular. The watch list shall be maintained in strict confidence by the compliance function. The securities recorded in the watch list are not generally subject to any restrictions on trading and/or advice. The watch list is used by the compliance function to monitor proprietary trading or personal transactions of employees involving the relevant securities. It also serves to monitor compliance with Chinese walls between the different compliance-relevant areas of the enterprise. The watch list shall include all financial instruments of an enterprise about which compliance-relevant information exists (reportable securities). Employees of the investment services enterprise who receive compliance-relevant information in the course of their duties (parties subject to reporting requirements) are obliged to submit a watch

list report without undue delay.

- Restricted list

An investment services enterprise may also maintain one or more restricted lists as a compliance tool in addition to the watch list. The restricted list is also a list of reportable securities that is updated on an ongoing basis. In contrast to the watch list, however, it need not be kept confidential within the enterprise and serves to inform the relevant employees and areas of the investment services enterprise of any restrictions on personal transactions and proprietary trading as well as on client and advisory transactions – with the exception of client transactions that are entered into at the client's initiative without prior advice. The reasons for including securities in the restricted list can only be provided to the extent that the relevant information is already known to the public.

AT 7 Relationship between sections 63ff. of the WpHG and sections 25a and 25e of the KWG

1. The reference in section 80 (1) sentence 1 of the WpHG to sections 25a (1) and 25e of the KWG clarifies that the requirements also apply to the provision of investment services. In addition to the requirements set out in sections 25a (1) and 25e of the KWG, including the more detailed requirements contained in the MaRisk , the requirements set out in section 80 (1) of the WpHG and Article 22 of the DR shall apply to investment services.
2. The compliance function is part of the internal control system defined in section 25a (1) sentence 3 no. 3 of the KWG. The required policies, resources and procedures listed in AT 6 of this Circular are therefore part of the investment services enterprise's internal control system.

AT 8 Record-keeping obligations

The minimum scope of documentation required by law is described in particular by the List of minimum record-keeping obligations in accordance with section 83 (11) of the WpHG (*Verzeichnis der Mindestaufzeichnungspflichten gemäß § 83 Abs. 11 WpHG*) issued by BaFin.

AT 9 Requirements for outsourcing under Article 32 of the DR

In addition to the requirements under sections 25b of the KWG and (80) 6 of the WpHG, Articles 30 and 31 of the DR and AT 9 of the MaRisk, the requirements set out in Article 32 shall complied with, if relevant.

1. Under Article 32(1) of the DR, portfolio management may only be outsourced to an enterprise located in a third country subject to the additional condition that the external service provider is authorised or registered to provide the service in the country in question and is supervised by an authority that is included in the List of supervisory authorities in a third country with which BaFin has entered into an appropriate cooperation agreement in accordance with Article 32(3) of the DR.
2. Specific explanations on the partial or full outsourcing of the compliance function can be found in module BT 1.3.4.

BT: Special requirements under sections 63ff. of the WpHG

BT 1 Organisational requirements and tasks of the compliance function under section 80 (1) of the WpHG and Article 22 of the DR

This module explains the requirements relating to the organisation and activities of the compliance function under section 80 (1) of the WpHG and Articles 22 and 26(7) of the DR. In accordance with Article 22(1) of the DR, investment services enterprises shall apply the principle of proportionality when implementing these requirements.

BT 1.1 Status of the compliance function

1. The management board of an investment services enterprise shall establish and provide the resources for a permanent and effective compliance function that can perform its duties independently. The management board shall bear overall responsibility for the compliance function and shall monitor its effectiveness.

2. The compliance function is a management tool. It may also report to a member of the management board. Irrespective of this, the enterprise shall ensure that the chair of the supervisory body can obtain information directly from the compliance officer in consultation with the management board[1].

3. The investment services enterprise shall appoint a compliance officer who is responsible for the compliance function and the reports provided to the management board and the supervisory body, without prejudice to the management board's overall responsibility. The compliance officer is appointed and removed by the management board.

4. The significance of the compliance function is expected to be reflected by its position within the enterprise's organisational structure.

5. The investment services enterprise shall encourage and reinforce an enterprise-wide compliance culture to create the conditions for promoting investor protection by the employees and appropriate awareness of compliance issues.

BT 1.2 Tasks of the compliance function

BT 1.2.1 Monitoring tasks of the compliance function

1. The compliance function monitors and assesses the policies and procedures established by the enterprise as well as the measures taken to remedy deficiencies, including the operations of the complaints-handling process.

2. The compliance function shall perform regular risk-based monitoring activities to ensure that the established policies and procedures, and hence the investment services enterprise's organisational and working instructions, are being complied with, and that the employees of the business units that provide investment services have the necessary awareness of compliance risk.

3. The compliance function shall ensure that conflicts of interest are prevented or that unavoidable conflicts of interest are adequately taken into account. This applies in

[1] Alternatively, if the investment services enterprise has established an audit committee, the enterprise may ensure that the chair of the audit committee can obtain the information.

particular to the protection of client interests. The goal of the compliance function is also to ensure that organisational measures are taken within the enterprise to prevent the prohibited disclosure of compliance-relevant information within the meaning of AT 6.1 of this Circular.

BT 1.2.1.1 Risk analysis

1. The scope and focus of the compliance function's activities shall be defined on the basis of a risk analysis. The compliance function shall perform such a risk analysis at regular intervals in order to assess the relevance and appropriateness of the definition. In addition to the regular review of identified risks, an ad hoc assessment shall be made if necessary in order to include emerging risks in the analysis. Examples of emerging risks include risks from the development of new business areas and risks attributable to changes in the structure of the investment services enterprise.

2. As part of its regular risk analysis, the compliance function shall determine the risk profile of the investment services enterprise in relation to compliance risk. The risk profile shall be based on the nature, scale and complexity of the investment services and ancillary investment services offered, as well as the types of financial instruments traded and distributed, taking into account the information resulting from the monitoring of complaints-handling. This shall take into account the obligations under the WpHG to be complied with by the investment services enterprise and its employees, the existing organisation and working instructions and workflows, as well as all monitoring and control systems in the area of investment services. In addition, the results of previous monitoring activities by the compliance function and internal audit, the findings of audits by external auditors and all other relevant sources information, such as aggregated risk measurements, shall be included. Priorities shall be established in order to ensure the comprehensive monitoring of compliance risk.

BT 1.2.1.2 Monitoring activities

1. The compliance function shall assess whether the control activities stipulated in the organisational and working instructions are performed regularly and properly by the specialist departments.

2. In addition, the compliance function shall conduct its own on-site inspections or other own reviews. The compliance officer shall use risk-based criteria to determine which on-site inspections his or her organisational unit will perform itself (core compliance area)[2]. This shall be justified in an auditable form. The number of random samples shall be recorded.

3. The monitoring activities to be performed may not be based exclusively on audit findings of the internal audit function.

4. Appropriate sources, methodologies and tools shall be used for the necessary monitoring activities. For example,

    - there should be an assessment of reports warranting the attention of the management board to material deviations between expected and actual processes (exceptions report) or to situations requiring action (issues log);

    - workflows should be observed, files reviewed and/or interviews held with responsible staff;

[2] Note, for example, that churning control is typically performed directly by compliance staff.

- trading surveillance is recommended.

5. The compliance function monitors the operations of the complaints-handling process and includes complaints as a source of information in the context of its general monitoring responsibilities. The investment services enterprise shall grant the compliance function unrestricted access to all complaints. However, the compliance function may not be involved in the operational handling of complaints.

6. The monitoring activities performed shall take into account the controls conducted by the business units, the supervisory requirements to be complied with by the investment services enterprise and the review procedures of the risk management function, internal audit, financial control or other control functions in the area of investment services.

7. It is recommended that other control functions should coordinate their review procedures with the monitoring activities performed by the compliance function, while taking into account the different functions' mandate and independence. In contrast to the audits and reviews by the internal audit function, the compliance function monitors the policies and procedures established for investment services and ancillary investment services on a continuous basis, if possible in parallel with the processes, or at least in a timely manner.

8. If deficiencies in the policies and measures are identified, the compliance function shall determine the measures necessary to remedy the deficiencies in existing organisational measures and shall inform the management board about this, and shall monitor and regularly assess the implementation of measures. In turn, corresponding monitoring activities are also necessary to review this.

BT 1.2.2 Reporting obligations of the compliance function

1. The investment services enterprise shall ensure that the regular written compliance reports are sent to the management board. The reports shall contain a description of the implementation and effectiveness of the overall control environment relating to investment services, as well as a summary of risks that have been identified and the measures undertaken or to be undertaken to remedy or rectify deficits or deficiencies, and to reduce risk. The reports shall be prepared at appropriate intervals, and at least once a year.

2. In addition to disclosures in the regular reports, the compliance officer shall report significant findings, such as serious breaches of the provisions of the WpHG, promptly to the management board by means of an ad hoc report. The report shall contain a proposal for the remedial steps to be taken.

3. The reports shall also be sent to the supervisory body, if any. However, the management board is generally responsible for forwarding the report to the supervisory body. There is no obligation to submit compliance reports directly to the supervisory body without informing the management board in advance.

4. Amendments to the content of the report that have been made by the management board shall be documented separately. The chair of the supervisory body shall be informed of such amendments.

5. The compliance reports shall cover all business units involved in the provision of investment services and ancillary investment services and information about complaints-handling. If a report does not contain all of this information, this shall be justified in detail.

6. As a minimum, the compliance reports shall contain the following information, where relevant:

- a summary of the major findings of the review of the policies and procedures of the investment services enterprise;

- a summary of the reviews and inspections conducted by the compliance function (in particular on-site inspections and desk-based reviews), including information about breaches and deficiencies identified in the organisation and compliance processes, as well as the appropriate measures taken as a result;

- a description of the risks identified in the area monitored by the compliance function;

- if the management board has not been previously made aware through other channels: a description of the relevant changes and developments in regulatory requirements over the period covered by the report and the measures taken or to be taken to ensure compliance with the changed requirements;

- significant compliance issues that have occurred in the period covered by the report or other necessary measures and strategies resulting from knowledge gained in the reporting period;

- if the management board has not been previously made aware through other channels: information about material correspondence with the competent authorities;

- information about the appropriateness of the human and other resources allocated
  to the compliance function;

- information about the review of the implementation of and compliance with requirements governing the expertise and reliability of employees;

- information about the financial instruments manufactured and recommended by the investment services enterprise, in particular about the distribution strategy.

7. At the time of preparation of each compliance report, the compliance function shall examine whether it is also necessary to report to the superordinate compliance function within the group of companies.

BT 1.2.3 Advisory tasks of the compliance function

1. The investment services enterprise shall ensure that the compliance function discharges its advisory responsibilities. These include providing support for staff training, providing day-to-day assistance for staff and participating in the establishment of new policies and procedures within the investment services enterprise.

2. The investment services enterprise shall ensure that its employees are adequately trained. The compliance function shall support the operating units (i.e. all employees involved directly or indirectly in the provision of investment services) in performing any training or shall provide that training itself. The compliance function shall focus in particular on the following areas:

   - the internal policies and procedures of the investment services enterprise and its
     organisational structure in the area of investment services;

   - changes in the WpHG, the DR, the WpDVerOV and the WpHGMaAnzV, relevant publications by ESMA (especially guidelines), publications by BaFin and other relevant supervisory requirements, as well as any changes to these.

3. Training should be performed at regular intervals and on an as-needed basis where necessary. Depending on requirements, training should be delivered to all staff, individual business units or individual employees.

4. The content of the training shall be updated promptly to reflect relevant changes, such as legislative changes, new publications by ESMA (especially guidelines), publications by BaFin and changes in the investment service enterprise's organisation and its organisational and working instructions.

5. The compliance staff shall advise and support the enterprise's business areas and employees with regard to compliance with statutory requirements and the organisational and working instructions. They shall be available in particular to answer questions arising out of daily business activity.

BT 1.2.4 Involvement of the compliance function in processes

1. The investment services enterprise shall ensure that the compliance function is involved in the development of the relevant policies and procedures in the area of investment services and ancillary investment services, in particular in the development of internal organisational and working instructions and their continuous updating, to the extent that they are relevant for compliance.

2. Without prejudice to the operating areas' responsibility, the compliance function shall be involved in this as early as possible, to ensure that the organisational and working instructions are appropriate for preventing violations of the statutory provisions.

3. The compliance function shall be integrated so that it is able to advise the operating areas in particular with regard to all strategic decisions, material organisational changes – for example as part of the decision-making process for developing new business lines, services, markets and trading venues, or developing new financial products and launching new advertising strategies in the area of investment services – and to contribute its expertise. The compliance function shall have the right to participate at an early stage in the product approval processes for financial instruments to be taken up in the distribution process – for example through a right of intervention. This shall not entail the transfer of responsibility from the operating areas to the compliance function.

4. In other respects, the management board shall encourage the business units to involve the compliance function in their activities. If material recommendations provided by the compliance function are not followed, the compliance function shall document this accordingly and present it in its compliance reports.

5. The investment services enterprise shall ensure that the compliance function is involved in all material, non-routine correspondence with the competent authorities in the area of investment services and ancillary investment services, and with the trading surveillance units at stock exchanges.

6. The compliance function shall also be involved in the following tasks in particular:

    - defining the criteria for determining whether staff positions are compliance-relevant;

    - determining the principles governing sales targets when designing the remuneration system for relevant persons within the meaning of BT 8; if the investment services enterprise is a subsidiary of an enterprise whose registered office is outside Germany and receives requirements from the parent company relating to these issues, the compliance function shall examine whether the parent company's requirements are consistent with German supervisory requirements;

- establishing Chinese walls;
- designing processes to monitor personal transactions in the enterprise;
- determining best execution policies and, if appropriate, policies for transmitting orders executed by a third party;
- designing the product governance process.

BT 1.3 Organisational requirements relating to the compliance function

BT 1.3.1 Effectiveness

Investment services enterprise shall consider which measures, in particular with regard to the organisation and resources of the compliance function, are best suited to ensuring its effectiveness, taking into account the individual circumstances of the enterprise. The following criteria in particular shall be factored into this analysis:

- the type of investment services, ancillary investment services and other activities offered (including those that are entirely unrelated to investment services and ancillary investment services);
- the interaction between investment services, ancillary investment services and the other business activities;
- the scope and volume of the investment services and ancillary investment services carried out (absolute and relative to the other business activities), the total assets and the income of the investment services enterprise from commissions, fees and other sources of income in connection with the investment services and ancillary investment services offering;
- the type of financial instruments offered;
- the type of clients targeted by the investment services enterprise (professional, retail, eligible counterparties);
- the number of employees;
- whether the investment services enterprise is part of a group of companies within the meaning of Article 2(11) of Directive (EU) No. 2013/34;
- services provided through a commercial network, such as tied agents or branches;
- cross-border activities provided by the investment services enterprise;
- organisation and sophistication of the IT systems.

BT 1.3.1.1 Resources and budget

1. The compliance function shall have the appropriate resources to fulfil its tasks. When allocating human, material and other resources to the compliance function, the investment services enterprise shall take into account the business model, the scope and type of investment services, ancillary investment services and other services provided, and the resulting tasks of the compliance function. In particular, the investment services enterprise shall ensure that sufficient IT resources are allocated to the compliance function.
2. Where the investment services enterprise establishes budgets for specific activities or units, the compliance function shall generally be allocated a budget that is consistent with the level of compliance risk to which the enterprise is exposed. The compliance

officer shall be consulted when the budget is being determined. An integrated budget may be determined for investment services enterprises that are part of a group. Significant cuts in the budget shall be justified in writing. The supervisory body shall be informed of all significant cuts.

3. If the activities of business units are significantly expanded, the resources and activities of the compliance function shall be adapted to reflect the changed compliance risk. The management board shall regularly review whether the number of staff in the compliance function is still sufficient to perform its tasks.

BT 1.3.1.2 Authority of the compliance staff

1. The staff of the compliance function shall have the authority required to perform their tasks. They shall be granted access to all relevant information for their work and they shall be involved in all relevant information flows that may be significant for the compliance function's tasks. They shall be granted unrestricted rights to information and rights of inspection and access with regard to all premises and documents, records, tape recordings, databases and IT systems, and other information that is required to investigate relevant issues. Employees may not refuse to hand over documents or provide compliance-relevant information. It must be possible to exercise the rights to information and of inspection and access on the compliance staff's own initiative.

2. To ensure that the compliance officer has a permanent overview of the areas of the investment services enterprise where confidential information or information that is necessary for the compliance function to perform its tasks may arise, the compliance officer shall additionally have access to internal and external audit reports or other reports to the management board or supervisory body (if any) to the extent relevant for the compliance officer's tasks. To the extent necessary for the performance of the compliance function's tasks and permitted by law, the compliance officer should also be granted the right to attend meetings of the management board or the supervisory body (if any). Where this right is not granted, this should be documented and explained in writing. In order to be able to identify which meetings the compliance officer should attend, the compliance officer shall have in-depth knowledge of the investment services enterprise's organisation, corporate culture and decision-making processes.

3. In order to ensure that the compliance staff have the authority required to perform their tasks, the management board shall support them in the exercise of their duties. The ability to exercise their authority requires the compliance staff to possess the necessary expertise and the relevant skills.

BT 1.3.1.3 Expertise of the compliance staff

1. The persons entrusted with the compliance function shall have the necessary specialist knowledge for the tasks assigned to them. This requires – at the latest after an induction period – knowledge in the following areas, to the extent that it is relevant for them to perform their tasks:

    - knowledge of the statutory requirements to be complied with by the investment services enterprise in the provision of investment services and ancillary investment services, including directly applicable European legislation; knowledge of the European legislative basis of the requirements to be complied with is recommended;

    - knowledge of the administrative provisions and publications issued by BaFin to expand on the requirements of the WpHG, as well as knowledge of the relevant ESMA guidelines and standards;

- knowledge about the key elements of BaFin's organisation and responsibilities;
- knowledge of the requirements for and the structure of appropriate processes used by investment services enterprises to identify violations of regulatory provisions;
- knowledge of the compliance function's tasks and responsibilities;
- knowledge of alternative structures for sales targets and the organisational and operational structure of the investment services enterprise and of investment services enterprises in general;
- knowledge of the functioning and risks of the types of financial instrument in which the investment services enterprise provides investment services or ancillary investment services;
- to the extent that the investment services enterprise provides investment services with an international element: knowledge of the specific legal requirements to be complied with in this case;
- to the extent that there are algorithmic trading systems and trading algorithms in the investment services enterprise: an understanding of at least the fundamentals of algorithmic trading systems and trading algorithms.

2. Compliance staff shall be regularly trained in order to maintain their specialist knowledge.

BT 1.3.2 Permanence

1. The compliance function shall be established permanently.
2. The compliance officer shall be assigned a deputy who shall be sufficiently qualified to perform the compliance officer's duties during any absence of the compliance officer. In other respects, the organisational and working instructions shall ensure the adequate performance of duties during the absence of the compliance offer by means of corresponding stand-in arrangements.
3. The tasks and competences of the compliance function shall be laid down in the organisational and working instructions of the investment services enterprise. The competences comprise responsibilities and powers. They also include information on the monitoring programme and the reporting duties of the compliance function as well as a description of the risk-based monitoring approach, in particular of risk analysis. Relevant amendments to regulatory requirements shall be reflected promptly.

BT 1.3.2.1 Monitoring programme

1. Monitoring activities shall not only be performed as needed, but also regularly and on the basis of a monitoring programme (recurring or continuous). The monitoring programme shall regularly cover all key areas of investment services and ancillary investment services, taking into account the risks associated with the business units, as well as the area of complaints-handling. The compliance function shall respond promptly to unforeseen events, adapting the focus of its monitoring activities accordingly if necessary.
2. The monitoring programme shall provide for a review of whether the activities of the investment services enterprise comply with the requirements of the WpHG. It must also be geared to the review of whether the organisation, the established policies and procedures, and the control mechanisms of the investment services enterprise are

still effective and appropriate.

3. The monitoring programme shall be designed to ensure that compliance risks are comprehensively monitored. It describes the priorities for the monitoring activities on the basis of the risk analysis.

4. The scope, scale and frequency of the monitoring activities established in the monitoring programme, as well as the choice of the appropriate tools and methodologies, are determined by the compliance function based on the risk analysis. The compliance function ensures that its monitoring activities are not only desk- or IT-based, but also use on-site inspections or other own reviews.

5. The monitoring programme shall be adapted continuously to reflect changes to the investment service enterprise's risk profile (for example due to significant events such as corporate acquisitions, IT system changes, or reorganisations). The monitoring programme shall also extend to the implementation and effectiveness of remedial measures taken by the investment services enterprise in response to breaches of the WpHG.

BT 1.3.2.2 The compliance function in a group of companies

Even if an investment services enterprise is affiliated with other enterprises, responsibility for the compliance function remains with the investment services enterprise itself. The investment services enterprise therefore ensures that its compliance function remains responsible for monitoring its own compliance risk. This also applies if an investment services enterprise has outsourced the compliance function to affiliated enterprises. When performing its tasks, however, the compliance function should take into account any affiliation of the investment services enterprise to a group of entities, for example by working closely with the staff responsible for internal audit, regulatory affairs and compliance, and the legal department, in other parts of the group. Attention is drawn in this context to the fact that the shared use of an office building by the affiliated enterprises may lead to a better supply of information to the compliance officer and improved efficiency in the compliance function.

BT 1.3.3 Independence

1. The compliance function performs its tasks independently of the other business units of the investment services enterprise and performs its monitoring tasks independently of the management board. The investment services enterprise shall ensure that other business units cannot issue instructions to compliance staff and cannot otherwise influence their activities.

2. Significant assessments and recommendations by the compliance officer that are overruled by the management board shall be documented and included in the report defined in Article 22(2)(c) of the DR. A recommendation by the compliance officer not to permit a particular financial instrument to be included in distribution activities is an example of a significant recommendation.

3. If an investment services enterprise wishes to depart from the requirements of Article 22(3)(d) and (e) of the DR as described in the following on the basis of the principle of proportionality, it shall assess, in particular taking into account the criteria set out in paragraph 1.3.1, whether this compromises the effectiveness of the compliance function. The assessment shall be repeated at regular intervals.

BT 1.3.3.1 Involvement of compliance staff in processes to be monitored

1. To enable compliance duties to be performed effectively, compliance staff, including the compliance officer, may not be involved in the investment services that they

monitor.

2. Exemptions are only permitted if it would be unreasonable to entrust the compliance function to a separate person who is not involved in the investment services due to the size of the enterprise or the nature, scale, complexity or risks of the enterprise's business activities, or the nature and scope of the services offered. Conflicts of interest within the enterprise, the classification of the enterprise's clients in accordance with section 67 of the WpHG and the financial instruments distributed or traded must be taken into account here in particular.

3. An investment services enterprises can make use of this exemption, for example, if the performance of the compliance function – including in combination with financial control functions – does not require a full-time position due to the nature, scale and complexity of the enterprise's business activities or the nature and scope of the investment services or ancillary investment services.

4. In this case, the position of compliance officer can be held by a member of the management board, for example, even if that person is involved in the enterprise's operations. However, the enterprise must still appoint a compliance officer if it makes use of the exemption. If a member of the management board is not involved in the enterprise's operations, he or she can act as compliance officer without the exemption criteria being met within the meaning of this paragraph.

5. For example, appointing a dedicated compliance officer may be unreasonable for smaller enterprises that only employ auxiliary administrative staff in addition to member(s) of the management board. However, if an enterprise employs at least two people, they are required to monitor each other to comply with the principle of effective monitoring activities defined in AT 6 of this Circular. In the case of sole proprietorships, control activities may be conducted as part of the annual audit in accordance with section 89 (1) of the WpHG after consultation with BaFin. All monitoring activities and their results shall be documented even if the enterprise does not establish an independent organisational unit.

6. Instead of exercising the exemption, outsourcing the compliance function to a third party may also be an appropriate solution in individual cases, provided that the criteria for outsourcing under sections 25a (2) of the KWG and 80 (6) of the WpHG are observed.

7. The involvement of compliance staff in investment services that they monitor is generally prohibited to the extent that employees of the enterprise regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular. Enterprises are individually responsible for determining whether the criteria in sentence 1 have been met and shall document this in an auditable form.

8. Exceptionally, after considering the conflicts of interest existing due to the compliance-relevant information within the meaning of AT 6.1 of this Circular, compliance staff may be involved in investment services they monitor even if employees regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular if such a separation would be unreasonable due to the size of the enterprise or the nature, scale, complexity or risks of the enterprise's business activities, or the nature and scope of the services offered.

9. To the extent that the enterprise makes use of an exemption on the basis of the principle of proportionality, it shall justify why the criteria for making use of the exemption have been met. Information on the additional activities that are performed by compliance staff and an assessment whether the effectiveness of the compliance function has been compromised shall be documented in an auditable form. In all cases, conflicts of interest arising from the different tasks performed by compliance staff shall be kept to an absolute minimum. The assessment of whether the

compliance function has been compromised shall be performed regularly.

BT 1.3.3.2 Combining the compliance function with other control functions

1. The compliance function may be combined with other control units at the same level (also termed "compliance in the broader sense"), such as money laundering prevention or risk control, if this does not compromise the effectiveness and independence of the compliance function. Any such combination shall be documented in an auditable form, giving the reasons for the combination.

2. However, combination with the internal audit function is generally not permitted because the internal audit function is charged with the oversight of the compliance function and combining the two functions is likely to undermine the independence of the compliance function.

3. In certain circumstances, however, it may be appropriate to designate one person for both functions in consultation with BaFin. If the investment services enterprise makes use of this exemption, it shall ensure that both functions are performed properly, in particular soundly, honestly and professionally.

BT 1.3.3.3 Combining the compliance function with the legal department

1. Investment services enterprises may combine the compliance function with the legal department if they could make use of the exemption under Article 22(3)(d) and (e) due to the size of the enterprise or the nature, scale, complexity or risks of the enterprise's business activities, or the nature and scope of the services offered.

2. However, such a combination is not generally permitted for larger investment services enterprises or those with more complex activities if this will undermine the independence of the compliance function. This is regularly the case if an investment services enterprise performs a not insubstantial volume of investment services in the form of proprietary trading as defined in section 2 (8) no. 2c) of the WpHG, underwriting business as defined in section 2 (8) no. 5 or ancillary investment services as defined in section 2 (9a) no. 3, no. 5 or no. 6 of the WpHG.

3. If the compliance function is combined with the legal department, this must be documented in an auditable form, explaining the reasons.

BT 1.3.3.4 Other measures for ensuring the independence of the compliance function

1. As a rule, it is generally necessary to establish the compliance function as an independent organisational unit if employees of the enterprise regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular. Enterprises are individually responsible for determining whether the criteria in sentence 1 have been met and shall document this in an auditable form.

2. Exceptionally, after considering the conflicts of interest existing due to the compliance-relevant information within the meaning of AT 6.1 of this Circular, an enterprise shall not be required to establish an independent organisational unit even

   if its employees regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular if it would be unreasonable to establish an independent organisational unit due to the size of the enterprise or the nature, scale, complexity or risks of the enterprise's business activities, or the nature and scope of the services offered.

3. As a minimum, if an investment services enterprise performs a not insubstantial

volume of investment services in the form of proprietary trading as defined in section 2 (8) no. 2c) of the WpHG, underwriting business as defined in section 2 (8) no. 5, or ancillary investment services as defined in section 2 (9) no. 3, no. 5 or no. 6 of the WpHG, the compliance officer shall report directly to the member of the management board responsible for the compliance function with regard to organisational and disciplinary matters.

4. To ensure independence, it is recommended that the compliance officer be appointed for at least 24 months. Additionally, an appropriate measure for strengthening the compliance officer's position is to agree a 12-month notice period for the employer.

5. It is recommended that the position, powers and remuneration of the compliance officer is aligned to the position, powers and remuneration of the managers of internal audit, risk control and the legal department of the investment services enterprise. The differences relating to personnel and other responsibilities of the relevant position may be taken into account when determining the remuneration.

6. The remuneration of compliance staff (who are normally "relevant persons" within the meaning of BT 8) may not depend on the activities of the employees they monitor. However, performance-related remuneration may be permitted in individual cases if it does not give rise to conflicts of interest. In the case of performance-related remuneration that exceeds this in accordance with the exemption under Article 22(4) in conjunction with (3)(e) of the DR, for example where the remuneration of the compliance officer who has sole responsibility for monitoring all business areas is based on the enterprise's performance, effective precautions are required to counter the resulting conflicts of interest. This shall be documented in an auditable form.

7. In other respects, the requirements of the Regulation on the Supervisory Requirements for Institutions' Remuneration Systems (*Verordnung über die aufsichtsrechtlichen Anforderungen an Vergütungssysteme von Instituten (Instituts-Vergütungsverordnung)* – InstitutsVergV) shall apply.

BT 1.3.4 Outsourcing of the compliance function or of individual compliance activities

1. In the event of the partial or full outsourcing of the compliance function, all relevant supervisory requirements shall be complied with, regardless of whether it has been outsourced partially or fully. Civil law arrangements or agreements do not change or modify the relevant supervisory requirements; in particular they may not exclude the existence of outsourcing subject to supervisory law. The management board is responsible for compliance with the requirements, in particular for the specific, clear and transparent establishment of the fully or partially outsourced compliance function.

   a. The management board of an investment services enterprise can either appoint one of its own employees or an employee of an external service provider or an independent/self-employed person as the compliance officer.

   – The responsibility of the compliance officer for performing the entire compliance function of the investment services enterprise in accordance with the WpHG may not be assigned to more than one person, including in the event of outsourcing.

   – The compliance officer can require both the outsourcing investment services enterprise and the external service provider to provide him or her with the human, material and other resources that could reasonably be considered to be necessary for proper performance of his or her function and the discharge of his or her responsibilities.

   – The compliance officer performs his or her activity independently, including if the compliance function is outsourced; in his or her function as compliance officer, he

or she is also not subject to the instructions of the external service provider. The same shall apply to compliance staff of the investment services enterprise and/or the external service provider who report to him or her.

b. An investment services enterprise may combine its own staff, staff of the external service provider, staff of third-party enterprises and/or independent/self-employed specialists to form a specific, uniform compliance organisation under the responsibility and leadership of the compliance officer.

– The question of whether and in what form the outsourced activities of the compliance function are to interact organisationally under the responsibility and leadership of the compliance officer shall be addressed clearly and transparently with the compliance officer and the external service provider before outsourcing begins, especially in an institution-specific policy or a service level agreement.

– Even if individual compliance activities are performed by an external service provider, the service provider's employees performing those activities are directly subject to the functional instructions of the compliance officer appointed by the management board of the investment services enterprise.

– The fragmentation of the compliance function through outsourcing and/or sub-outsourcing to more than one external service provider and/or through other supplementary external procurement should only be permitted if this is necessary for functional and/or technical reasons. This shall not affect the requirements of BT 1.3.2.2.

2. The requirements of sections 25b of the KWG, 80 (6) of the WpHG, Articles 30 and 31 of the DR, and of this Circular shall apply to and in the case of the partial or full outsourcing of the compliance function. Organisational, functional and operational areas outsourced by the investment services enterprise are subject to the same supervisory requirements at the external service provider as at the outsourcing investment services enterprise itself.

3. Before an investment services enterprise chooses a service provider for outsourcing, it shall assess with the necessary due diligence whether the relevant requirements of sections 25b of the KWG, 80 (1) and (6), and Articles 30 and 31 of the DR are also met in the case of outsourcing. The scope of the assessment shall be guided by the nature, scale, complexity and risk of the tasks and processes to be outsourced. The investment services enterprise is responsible for ensuring that the service provider has the necessary organisation and specialist expertise, and the human, material and other resources required in the specific circumstances, and that the employees of the service provider have the necessary expertise and access to all information necessary for the effective, and in particular the preventive, performance of the outsourced compliance functions, including IT systems and IT access.

4. If the compliance function is outsourced partially or fully, the investment services enterprise shall ensure its permanence in particular. Compliance with the requirements of this Circular governing the rights and obligations and the legal position of the compliance officer and his or her compliance staff shall also be ensured in the external service provider. The selected service provider shall be in a position to ensure the adequate exercise of the compliance activities of the compliance officer and the compliance staff continuously and not merely as needed, and in the necessary quality, including on-site at the investment services enterprise and its relevant branches.

5. Investment services enterprises shall effectively supervise the adequate performance of tasks by the service provider, in particular the quality and quantity of its services, based on appropriate material criteria to be defined on a case-by-case basis. The management board is responsible for continuously supervising and monitoring the outsourced compliance function and/or compliance activities and it shall have the

necessary resources and expertise to be able to do this. The management board may appoint a specific person employed by the enterprise to supervise and monitor the outsourced function on its behalf.

BT 2 Monitoring of personal transactions in accordance with Articles 28, 29 and 37 of the DR and section 25a of the KWG

This module expands on the requirements of Articles 28, 29 and 37 of the DR. It also explains the requirements relating to the monitoring of personal transactions that are outside the scope of Article 28, 29 and 37 of the DR.

BT 2.1 Definition of relevant persons

1. Articles 28 und 29 of the DR govern the handling of personal transactions by relevant persons. Relevant persons are legally defined in Article 2(1) of the DR. Article 2(1)(c) of the DR covers persons who directly provide investment services themselves, as well as all persons who are involved in providing investment services, both by performing support activities and by performing subsequent control activities. Support functions are regularly performed in particular by research department, compliance department, back office or IT support staff, assistants, or members of other support areas in an investment services enterprise. Staff members are considered to be employees and self-employed contractors, as well as agency workers, temporary staff and interns/trainees at an enterprise.

2. Persons who perform these activities without being employees of an investment services enterprise but who work for an enterprise to which activities or processes have been outsourced in accordance with section 25a (1) of the KWG and Articles 30 to 32 of the DR are also covered by way of Article 2(1)(d) of the DR.

3. Those relevant persons whose activities may give rise to conflicts of interest or who have access to inside information or other confidential information and to whom the requirements under Article 29 of the DR apply shall be selected from the group of persons listed in Article 2(1) of the DR.

BT 2.2 Definition of personal transactions

1. Article 28(a) of the DR covers all transactions that are outside the scope of activities of relevant persons that they enter into for their own or for third-party account. Transactions for third-party account are in particular all transactions that relevant persons enter into using a privately issued power of attorney. It therefore not only covers transactions for related parties of relevant persons.

   Own account transactions are all transactions in which relevant persons may have a beneficial interest. Own account transactions of a relevant person are also considered to be transactions by a third party in the name of or for the account of the relevant person insofar as the relevant person has knowledge of this or has arranged the transaction.

2. The majority of the personal transactions defined in Article of the 28 DR are subject to Article 28(a) of the DR. Article 28(b) of the DR broadens the scope to include transactions by relevant persons within the scope of their activities, and hence transactions that relevant persons enter into to perform their duties at the investment services enterprise. They comprise transactions by relevant persons for their own account and for the account of related parties within the meaning of Article 2(3a) of the DR. These are transactions that, if entered into, could expose relevant persons to conflicts of interest, such as the risk of preferring a close relative when assigning an

order or when managing a portfolio.

3. Whether or not a transaction falls within the scope of the activities of a relevant person shall be assessed on the basis of the relevant person's function, for example his or her job description. It is irrelevant whether the relevant person should have entered into the specific transaction in accordance with the instructions issued to him or her.

BT 2.3 Organisational requirements under Article 29 of the DR

1. Investment services enterprise shall implement adequate arrangements aimed at preventing relevant persons whose activities may give rise to a conflict of interest or who have access to inside information from entering into the transactions set out in Article 29(2), (3) and (4) of the DR. Enterprises are individually responsible for determining which of the relevant persons covered by Article 2(1) of the DR perform activities that could give rise to conflicts of interest or have access to compliance-relevant information within the meaning of AT 6.1 of this Circular by virtue of their activities. The requirements under Article 29(1) of the DR apply to these persons.

2. The management board shall designate a unit or units in the enterprise that is or are tasked with identifying and regularly reviewing the employees covered by Article 29(1) of the DR. Enterprises are also obliged to maintain an organisational structure that ensures that this unit is regularly informed of the existence of conflicts of interest and of inside and other confidential information within the enterprise.

   Enterprises shall use risk criteria to assess which areas and persons to include; for example, the volume of information available to investment advisers or tied agents may determine whether they are included.

3. Conflicts of interest within the meaning of Article 29(1) of the DR are not only conflicts of interest that arise in a personal transaction. Such conflicts occur if the interests of a relevant person in entering into a personal transaction within the meaning of Article 29(1) of the DR could conflict with the interests of a client or of the investment services enterprise. Other conflicts of interest are covered by section 80 (1) sentence 2 no. 2 of the WpHG.

4. Appropriate measures shall be taken to prevent prohibited personal transactions. This may require different measures for different relevant persons. It is therefore possible to prepare different lists of requirements applying to different relevant persons. Potential appropriate measures are in particular the measures specified in AT 6.2. paragraph 3 of this Circular.

BT 2.4 Organisational requirements under Article 29(5)(b) of the DR

1. In accordance with Article 29(5)(b) of the DR, the arrangements to be implemented by investment services enterprises under Article 29(1) of the DR shall be designed to ensure that they can be informed promptly of any personal transaction entered into by a relevant person in accordance with Article 29 of the DR. This can be assured using a variety of procedures, including the following:

   - an appropriate and proven procedure is for the enterprise maintaining the account or securities account to send duplicate copies of personal transactions entered into by relevant persons within the meaning of Article 29 of the DR to the investment services enterprise.

   - another appropriate procedure is the voluntary and prompt notification of personal transactions together with a declaration of completeness sent by an enterprise's relevant persons to the management board or to a unit specified by

the management board.

- the introduction of approval requirements for relevant persons before personal transactions are entered into shall also be considered to be an appropriate measure.

In each case, the activities shall be performed by a unit that is independent of the operations departments, front office and back office, unless this is unreasonable due to the size of the enterprise.

2. Under Article 29(5) of the DR, personal transactions by relevant persons of an external service provider shall be documented by the external service provider if the activities of the relevant persons may give rise to conflicts of interest or if they have access to inside information or other confidential information by virtue of their activities. In line with BaFin's current administrative practice, it is not necessary to monitor the external service provider's compliance with these documentation requirements if the external service provider is itself an investment services enterprise within the meaning of section 2 (10) of the WpHG. If the outsourcing enterprise and the external service provider are part of a group, all personal transactions of relevant persons in the group may be documented at one of those enterprises.

   In the case of outsourcing to a multi-client service provider, this provider may be monitored by one or more of the outsourcing entities on behalf of the outsourcing enterprise.

3. The documentation of personal transactions required by Article 29(5)(c) of the DR and of which the investment services enterprise becomes aware in accordance with Article 29(5)(b) and the second subparagraph of Article 29(5) of the DR, as well as the documentation of all authorisations and prohibitions that the enterprise issues in connection with this, must be performed in such a way that compliance with the statutory provisions can be verified in an examination as defined by section 89 of the WpHG.

BT 2.5 Organisational requirements under Article 37(2) of the DR

Market makers as defined in Article 27(2)(a) of the DR are equivalent to order book brokers.

BT 2.6 Exemptions

Under Article 29(6) of the DR, certain personal transactions are exempted from the requirements set out in Article 29(1) to (5) of the DR. In addition, investments in accordance with the German Capital Accumulation Act (*Vermögensbildungsgesetz*) and other contractually agreed savings plans are exempted.

BT 2.7 Requirements under section 25a of the KWG

Employees of investment services enterprises who are not involved in the provision of investment services may not enter into any transactions that violate Article 14 of Regulation (EU) No. 596/2014 or a provision of Part 11 of the WpHG. Credit and financial services institutions that are not investment services enterprises within the meaning of section 2 (10) of the WpHG shall also comply with Article 14 of Regulation (EU) No. 596/2014. Appropriate measures for personal transactions shall be taken to comply with this statutory provision as part of the general organisational requirements under section

25a (1) of the KWG[3]. The precautions taken shall ensure that employees who could have access to inside information and other confidential information do not enter into any transactions that violate the above-mentioned provisions. For example, this could affect staff in M&A departments, legal departments, the lending business or management board assistants.

BT 3 Requirements for fair, clear and not misleading information under section 63 (6) of the WpHG

This module expands on the requirements of section 63 (6) of the WpHG and Article 44 of the DR.

BT 3.1 Scope

BT 3.1.1 Scope/Scope of requirements

1. The requirements of section 63 (6) of the WpHG and Article 44 of the DR generally apply without distinction to all information relating to financial instruments or (ancillary) investment services that investment services enterprises address to clients, regardless of whether or not it is marketing information; by contrast, information addressed solely to eligible counterparties is exempted from the scope of section 68 (1) of the WpHG. In addition, section 63 (6) sentence 2 of the WpHG specifically stipulates that marketing communications shall be clearly identifiable as such. A marketing communication is information intended to induce the addressees to acquire a financial instrument or commission an investment service (goal of sales promotion). Information that is merely used in an advisory situation does not necessarily have the goal of sales promotion. Neutral product information made available to meet obligations to provide advice appropriate to the investment and the client does not fall under the definition of marketing. There is only a statutory obligation to expressly identify the information when the marketing nature of the information is not otherwise clearly recognisable. Such recognisability may result from the manner and form in which the information is presented or from the content of the information. As a rule, the assessment shall be made on a case-by-case basis. Pure image marketing is not covered by the provisions.

2. Possible examples of marketing information that may be required to be indicated as such are:

    - articles in client magazines of an investment services enterprise that appear to be objective but that primarily have the goal of sales promotion;

    - letters to clients (especially when addressed to them personally) suggesting the purchase of certain securities, provided that this does not constitute investment advice[4].

    Such information shall be distinguished from the information required to be identified as marketing communication in accordance with section 63 (6) of the WpHG.

3. Clients within the meaning of section 63 (6) of the WpHG and Article 44 of the DR are persons for whom investment services enterprises provide or arrange investment services or ancillary investment services (see section 67 (1) of the WpHG). The concept of a client thus encompasses not only existing clients but also all persons with whom no client relationship yet exists, but to whom an investment services enterprise

[3] Under section 25a (1) sentence 1 of the KWG, this requirement applies to all institutions defined in section 1 (1b) of the KWG, but not to branches in accordance with section 53b (1) of the KWG.

[4] This requires the individual financial situation of the addressee to be taken into account (see Joint information document on the new definition of investment advice issued by BaFin and the Deutsche Bundesbank dated 12 November 2007, version dated July 2013).

addresses information with a view to acquiring them as clients.

The requirements apply equally to information addressed to retain clients and to professional clients. They are only not relevant for information addressed by investment services enterprises to eligible counterparties.

BT 3.1.2 Relationship with other legal requirements

Section 302 of the KAGB, section 15 of the WpPG and the requirements of Regulation (EU) No. 2017/1129 governing advertisements shall apply in addition to the provisions of section 63 (6) of the WpHG and Article 44 of the DR.

The distribution of financial instruments is also governed by various statutory requirements for information documents to be provided to clients. Preparation of the relevant information documents is governed by separate rules in order to do justice to the specific characteristics of the individual financial instruments. The relevant statutory requirements, such as the provisions on key investor information documents in accordance with section 166 of the KAGB, the provisions on packaged retail investment products in accordance with Regulation (EU) No. 1286/2014 in conjunction with Article 1ff. of Delegated Regulation (EU) 2017/653, as well as the rules governing capital investment information documents in accordance with section 13 of the VermAnlG shall apply, in addition to the provisions of section 63 (6) of the WpHG and Article 44 of the DR.

BT 3.2 Availability of information

1. Under section 63 (6) sentence 1 of the WpHG and Article 44 of the DR, all information made available by investment services enterprises to retail and professional clients falls under the scope of the requirements. Because of the broad interpretation of the term "client" (it also includes potential clients; see BT 3.1.1 paragraph 3 above), all marketing information of an investment services enterprise is also covered.

2. Information that is disseminated in such a way that it is likely to be received by private and professional clients is also covered. Since the legal requirements presume that the information is made available to the client by the investment services enterprise, it does not matter whether the information originates from the investment services enterprise. For this reason, information that is initially provided to the investment services enterprise by a third party and that is then made available to the clients by the investment services enterprise also falls under the scope of the requirements.

   Example:
   Marketing materials of an asset management company or an issuer

   If an investment services enterprise makes information from third-party sources available to clients (for example by handing out information in print form or by making available information from third-party sources on its own website and/or by links to the websites of other providers), as a general rule it is itself fully responsible in the first instance for ensuring compliance with the requirements of section 63 (6) of the WpHG and Article 44 of the DR. If the third party itself is an investment services enterprise, the requirements of section 63 (6) of the WpHG and Article 44 of the DR shall also apply to the third-party enterprise, regardless of whether it makes the information available to its clients directly or – for example as issuer – provides the information to other investment services enterprises for marketing purposes.

   Example:
   X bank issues a bond, which will (also) be distributed through Y bank. For this

purpose, X bank provides Y bank with marketing materials. In this case, X bank must ensure that this information satisfies section 63 (6) of the WpHG and Article 44 of the DR. Apart from obvious cases, Y bank does not itself have any obligation to check the information.

3. If the third-party source is also an investment services enterprise in the EEA and the information is addressed to clients to whom identical requirements apply, the investment services enterprise that receives the information and then makes it available to clients may as a rule (except in the case of manifest violations) rely on the information supplied being in compliance with the law because the supplying investment services enterprise is itself under an obligation to comply with the corresponding requirements under section 63 (6) of the WpHG and Article 44 of the DR. However, this applies only to the extent the information is communicated unchanged and is clearly identifiable as information from the third-party investment services enterprise.

   Other specific issues may arise in such third-party scenarios. If the third-party source is not itself an investment services enterprise, the overall circumstances shall be assessed in order to decide whether this information is considered to have been made available to clients by the investment services enterprise. In such cases, attributability depends on whether the client considers the information to have come from the investment services enterprise or whether the third party itself has a sales interest and may therefore have to be attributed to the investment services enterprise. This is normally assumed to be the case not only for marketing materials, but also particularly for product-specific information of issuers.

   Example:
   X bank makes product information of Y asset management company (Y AMC) available to its clients. Since, in the context of product distribution, Y-AMC is attributed to X bank in this case, X bank must ensure that the information made available by it to its clients satisfies the requirements of section 63 (6) of the WpHG and Article 44 of the DR.

   If, on the other hand, X bank makes daily newspapers containing information on the performance of financial instruments available in its sales premises, X bank is not responsible for ensuring that this information satisfies the requirements of Article 44 of the DR, since daily newspapers do not typically have any marketing interest in respect of the financial instruments to which the price information they publish relates, and are therefore not attributable to X bank in this respect.

4. Particularly in connection with information on websites, investment services enterprises have an obligation to ensure that information exclusively intended for eligible counterparties and that therefore does not meet all the requirements of Article 44 of the DR is not additionally made available to retail and professional clients. With regard to information provided over the internet, investment services enterprises are encouraged to post only information suitable for retail or professional clients on freely accessible web pages, or to post information that describes the information offering for eligible counterparties but only satisfies the requirements of Article 44 of the DR. The latter may be made available to eligible counterparties either in an restricted access area after access has been granted (e.g. using a password), or separated from the other information by a clearly visible notice, to be confirmed by the user, that the information was not posted for retail or professional clients.

5. By contrast, when making available other sales documents that are subject to a special statutory regime, such as offering prospectuses, key investor information documents, key information documents and capital investment information documents that are provided to the investment services enterprise by the issuer and whose content satisfies the statutory requirements, the provisions of section 63 (6) WpHG and Article 44 of the DR do not give rise to any additional disclosure obligations on the

part of the investment services enterprise.

6. If an investment services enterprise forwards third-party information to its securities account holders on the basis of its obligation under No. 16 of the Standard Terms and Conditions for Securities Transactions (*Sonderbedingungen für Wertpapiergeschäfte*) and thus makes it available to them, the investment services enterprise shall not generally be responsible for compliance of the content of this information with the requirements of section 63 (6) of the WpHG and Article 44 of the DR. However, when it forwards the information, the investment services enterprise shall take suitable measures, such as using bold type, to indicate prominently that it is merely forwarding information from a third party and has not verified the information. When forwarding statutory compensation or exchange offers, as well as voluntary purchase or exchange offers, the investment services enterprise shall also draw attention to the fact that investors must themselves assess the intrinsic value of the offer and decide whether or not to accept the offer.

BT 3.3 Requirements relating to the presentation of information addressed to retail and professional clients

For information addressed to retail and professional clients, Article 44 of the DR contains various requirements relating to the manner in which it is presented.

BT 3.3.1 Sufficient and comprehensible presentation

1. As a general principle, information that investment services enterprises make available to professional and retail clients shall generally be fair, clear and not misleading (see section 63 (6) sentence 1 of the WpHG). Among other things, this means that material statements may not be expressed ambiguously and that material information may not be omitted.

   Example: Product names such as "guarantee certificate" or similar, as well as references, for example to "100% capital protection" or similar, do not indicate sufficiently clearly, without further explanation, who provides the guarantee (the issuer, a group affiliate or a third party) or the source of the capital protection. To ensure the clarity of the information, a clarifying reference to the identity of the guarantor is therefore generally required (for example: "100% capital guarantee by X bank") or, for references to capital protection, an additional statement clarifying the source of the capital protection.
   In this connection, further reference shall be made, where applicable, to the risk of a capital or repayment guarantee lapsing as a result of extraordinary rights of termination being exercised, as well as to any conditions or (especially quantitative) restrictions existing in respect of a guarantee.

   Likewise, the product description shall clearly set out whether, for example, a capital guarantee applies only at the maturity date or whether a deduction of charges for hedging transactions should be expected (e.g. in the case of early sale of capital guarantee products).

2. Additionally, information shall be sufficient for, and presented in a way that is likely to be understood by, the group of clients to whom it is made available or by whom it is likely to be received:

   The information shall be sufficient, based on the expected level of understanding of the average member of the group of clients to whom it is directed. The necessary scope and depth of product descriptions shall therefore be geared to the average knowledge of the target group. The more complicated a product or service (including its risks) is, the more explanations the related product information shall, as a rule,

contain. If information is addressed expressly and in a clearly identifiable way to only a single clearly defined group of clients who can be expected to possess an advanced level of expertise, this may be taken into consideration when determining the scope and depth of the product description.

3. Furthermore, the information that is sufficient in scope for the average member of the client group addressed must be presented in a way that is comprehensible to such member. That means, among other things, that the way in which the information is worded must be all the more straightforward and generally comprehensible the less knowledgeable and experienced the addressed clients can be assumed to be.

   Example: Although a reference to the "credit risk of X bank" in marketing material for a certificate is sufficiently comprehensible for a client group with prior knowledge in financial matters, it may be more appropriate to use less specialised terms in marketing material addressed to retail clients in general (e.g.: "Risk of financial loss due to the default or insolvency of X bank").

4. In particular, it shall be ensured that the way in which the information is presented does not disguise, diminish or obscure important items, statements or warnings.

   Negative example: Although readers will find the opportunities offered by a product expressly described in a section entitled "Advantages of the product", they are forced to deduce the associated risks of the product from the features described in the section entitled "Who is the product suitable for?".

   In the first place, it is not clear from the heading "Who is the product suitable for?" that this section contains information on risks that is of particular importance for the investor. Secondly, the risks must be clearly identified: it is not sufficient that the risks can be deduced from the product description.

5. Where information relating to the yield on the capital invested is provided, the question of whether the promised yield is subject to conditions shall be considered. Although it is not normally necessary to mention issuer default risk specifically (e.g. for a corporate or government bond; unlike certificates, see above) provided that the risk premium and/or default risk of the issuer is not unusually high, it is in all cases necessary to provide a clarifying reference when the promised yield is subject to further conditions.

   Example: A certificate pays the specified interest only if there is no default of a reference company.

   In such cases, formulations such as "Opportunity for a return of x% p.a." or "Return of up to x% p.a." should be used instead of absolute statements such as "Return: x% p.a.".

BT 3.3.2 Up-to-date presentation

1. The requirement for the information distributed to be up-to-date is generally governed by the principle that the information shall be fair and not misleading in accordance with section 63 (6) sentence 1 of the WpHG and by the general principle of proportionality. Although information distributed via online databases shall generally be up-to-date and shall in some circumstances be made available in real time, prospectus material made available for downloading is subject to lower requirements regarding how up to date the data are, and printed marketing materials intended to be made accessible at branches to still lower requirements. The decision will always depend on the specific information as well as the product or service and its specific features. In individual cases, however, the aforementioned principle that information shall be presented in a way that is fair and not misleading may make it necessary,

including in the case of materials for which the time between the editorial and publication dates would normally be sufficient, either to not to distribute such materials or to update them if significant changes occur shortly after the editorial deadline.

Example: Although it may have been acceptable before the 2008 financial crisis to regard the risk of default of an issuer of certificates as being so negligible as to justify not mentioning that risk in the description of a product's risks (see 3.3), the situation is now different. After such changes become known, it may therefore be necessary to adapt the information materials accordingly or to withdraw them from circulation. The same applies, for example, to performance data (see 3.4) after significant changes in value that have taken place within a short time.

In light of the requirement to present information in a way that is clear, fair and not misleading, it is advisable and sensible in any case to provide an easily identifiable reference to the preparation date of the information.

2. An exception to the general requirement for information made available online to be up-to-date is possible in cases where, for example, marketing materials relating to certificates are kept available on the website of the issuer or the distributing investment services enterprise after expiry of the subscription period. This satisfies an interest of the investors in having access to the information. At the same time it is not reasonable to continue requiring companies to keep such marketing materials up-to-date. In particular in this case, it is vital to provide a clear and easily identifiable reference to the preparation date of the information.

BT 3.3.3 Presentation of benefits and risks

1. Under Article 44(2)(b) of the DR, any potential benefits of an investment service or financial instrument may be referred to if the information always gives a fair and prominent indication of any relevant risks.

2. In contrast to securities offering prospectuses, risks need only be referred to if the information also refers to potential benefits of the presented product. As a minimum, the presentation is fair and clear if the principle of proportionality is applied, i.e. the scope and accuracy of the presentation of benefits and risks shall be balanced. The more extensively benefits are highlighted, the more extensively any risks shall also be addressed. That does not mean that the number of benefits and risks always has to be the same. Where a product has more benefits than risks, these may outnumber the risks in the presentation and vice versa. Also, benefits and risks do not always have to correspond to each other in substance, i.e. like "the two sides of a coin". What is decisive is that, where all material benefits of a product are specified, reference is also made to all material risks, and that where only particularly important benefits are mentioned, reference is also made to the particularly important risks.

3. There are different ways of referring to a benefit (e.g. through the language used or typographically). The reference to a benefit does not have to refer to a specific financial instrument (e.g. using a specific securities identification number). The rules governing the presentation of benefits and risks also apply if the information refers to a specific group of financial instruments with a similar structure.

Example:
In the marketing material for a certain type of certificate (for example, leveraged certificates) emphasising their benefits (e.g. prospect of disproportionate gains versus the underlying), reference would also have to be made to their risks (e.g. disproportionate risks of losses being incurred versus the underlying; issuer risk).

As already mentioned above, it is particularly important when presenting the risks and rewards to ensure that the way in which such information is presented may not

disguise, diminish or obscure important items, statements or warnings. In addition, Article 44(2)(c) of the DR clarifies that the relevant risks shall be presented in a font size that is at least equal to the predominant font size used throughout the information. Moreover, the layout shall ensure that the relevant risks are easy to identify.

4. For information in print form, the references to risks shall be contained in the same document as the benefits. It is not sufficient to make reference to other locations (in particular a website or other information materials) or the possibility of having an advisory meeting.

   Example:
   It is not possible to mention the risks only in a footnote, although the benefits are presented outside the footnotes. Nor is it possible to describe only the benefits in a letter to clients, while referring clients to other documents, e.g. a product information sheet, for information on the risks. This also applies if the document presenting the risks is directly attached to or sent together with the letter.

5. The above principles apply regardless of the type of information medium used.

   Examples of possible risks include:

   - issuer default risk in the case of certificates
   - guarantor default risk
   - exchange rate risk (retail clients only)
   - market-induced price or rate fluctuations
   - possibility of tradability being restricted or absent
   - possible obligation to make additional contributions
   - extraordinary termination rights of issuer

BT 3.3.4 Presentation of performance

Where information contains statements on the performance of a financial instrument, a financial index or an investment service, the period to which the information refers shall be clearly stated and the fact that past performance, simulations or forecasts are not a reliable indicator of future performance shall be clearly indicated (Article 44(4)(c) and (d) of the DR). A specific requirement applies to information on performance presented in a currency other than the euro. In this case, information addressed to retail clients shall contain a prominent warning that the return may increase or decrease as a result of currency fluctuations. This warning is not necessary for information addressed to professional clients (see Article 44(4)(e) of the DR).

The requirements relating to performance information distinguish in some cases between information on past (Article 44(4) and (5) of the DR) and future (Article 44(6) of the DR) performance.

BT 3.3.4.1 Information on past performance

As a rule, information on past performance may not constitute the most prominent feature of the information (Article 44(4)(a) of the DR). That means that statements relating to past performance may not be given any special prominence, either typographically or in respect of the order they are presented, the depth in which they are described or in any other way.

BT 3.3.4.1.1 Appropriate information

1. Under Article 44(4)(b) of the DR, information on performance must be "appropriate". Information that appears to be appropriate as a rule is any absolute or relative percentage information such as:

   - "50% increase in value between 10 January 2008 and 10 January 2009" or
   - "Between 10 January 2008 and 10 January 2009, 50% greater increase in value compared with [comparison object]".

2. Within the meaning of Article 4(4)(b) of the DR, absolute or relative performance statements may also be suitable in certain circumstances, such as:

   - "Price on 10 January 2008: €40.00/Price on 10 January 2009: €50.00" or
   - "€1,000.00 increase between 10 January 2008 and 10 January 2009" or
   - "Increase in value €50.00 higher than [comparison object] between 10 January 2008 and 10 January 2009".

3. The performance data shall always reflect actual performance over a twelve-month period. That means that cumulative performance data relating to the entire reference period (e.g. "500% in 10 years") is not appropriate because this data does not allow for any conclusions to be made with regard to the volatility and risk of the investment. For the same reason, annualised average values for multi-year periods (e.g. "5% p.a. on average over the past 5 years") are also inappropriate. Exceptionally, annualised data may be appropriate if the actual performance was nearly constant over the reference period.

BT 3.3.4.1.2 Minimum period: generally the immediately preceding five years

1. The DR contains detailed requirements regarding the period to which the performance data refers:

   As a rule, the performance data shall refer to the immediately preceding five years (Article 44(4)(b) of the DR), with "years" in this context meaning twelve-month periods and not calendar years.

2. The requirements governing what is meant by "immediately", i.e. the length of the period permitted between the most recent performance information and the date the information is disseminated, are determined by the principle of proportionality and the principle of fair presentation of information in accordance with section 63 (6) of the WpHG. As a result, the information must be as up-to-date as is possible with reasonable effort.

3. In individual cases, however, the requirement to present information fairly and the prohibition on providing misleading information (section 63 (2) sentence 6 of WpHG) may mean that materials that would normally be sufficiently up-to-date may either no longer be disseminated or may have to be updated if significant changes in value occur shortly after the editorial deadline (see also 3.2).

BT 3.3.4.1.3 Exception: data is only available for a shorter period

If performance data is only available for a period shorter than five years for the relevant financial instrument, financial index or investment service, information shall in all cases be stated for the entire period for which it is available.

BT 3.3.4.1.4 Limit to the exception: general principle of no information for periods of less than one year

1. As a general principle, under Article 44(4)(b) of the DR, no performance information may be given in cases where performance could only be presented over a period of less than twelve months (for example because trading in the financial instrument only started less than twelve months ago).

2. It should be noted in this context that the prohibition only relates to the presentation of the performance of the financial instrument, the financial index or the investment service over a period of less than one year. By contrast, statements relating to the current value only are certainly permitted.

BT 3.3.4.1.5 Exception to prohibition on information for periods of less than one year

However, in light of the purpose of the requirement and the legitimate interest of the clients in receiving information, however, it appears possible to allow an exception from the general prohibition on performance information for a period of less than one year for non-marketing, unbiased information requested by clients (for example, information in automated online share price databases or in the case of product information necessary for advisory services in accordance with the WpHG) (see also 3.3.4.1.7).

BT 3.3.4.1.6 Supplementary information

Supplementary performance information may also be given in addition to the statutory requirements. However, this information may not be given greater importance than the legally required information in terms of substance and form. In other words, as a minimum, equal prominence shall be given to the legally required information.

BT 3.3.4.1.7 Effect of commissions, fees and other charges

1. If gross performance information is presented, the effect of commissions, charges and other fees shall be disclosed (see Article 44(4)(f) and Article 44(5)(b) of the DR).

   In this connection, commissions, fees and other charges are understood to mean all financial expenditures necessarily arising for the client from the purchase, holding or sale of a financial instrument, or the use of an investment service, such as

   - front-end loads in the case of fund units
   - transaction costs such as order fees and brokerage fees
   - any securities account fees and other custody fees.

2. Article 44(4)(f) and Article 44(5)(b) of the DR require quantified information on the effect of commissions, fees and other charges. It is by no means sufficient in this respect to provide an unquantified, general indication that commissions, fees and other charges reduce performance, since this is already immediately clear from such terms by definition. However, it is very difficult to provide an accurate presentation of adjusted performance that takes into account the performance reducing factors specified by law, because the relevant parameters to be considered vary significantly depending on the individual case. The reason for this is that the amount of the values to be applied depends either on the institution that performs the service in question (example: transaction and custody costs) or on the investor (example: the total amount invested, which in turn influences the transaction and custody costs). As a result, it is practically impossible, at least in the case of general information, to

present values that apply to all clients. The following approach is recommended to nevertheless satisfy the statutory requirements in Article 44(4)(f) and (5)(b) of the DR:

When calculating adjusted performance, investment services enterprises present the performance required by Article 44(4)(f) and (5)(b) of the DR reflecting the effect of commissions, fees and other charges by applying the aforementioned charges in the amounts typically incurred, either in the amount of their own fee schedule or using average standard market values. It is irrelevant whether the investment services enterprise determines the average values itself or uses data provided by associations or by other third parties. Precise market analyses employing empirical mathematical methodologies are not prescribed for the determination of "average standard market values". Rather, the use of values that are assumed to be close to reality is sufficient, provided that these do not appear to be arbitrarily distorted. An amount of €1,000.00 or an average investment amount typically encountered in practice for the financial instrument in question is applied by the investment services enterprise as a standardised model value, and a period of five years or a shorter period typically encountered in practice is used as the investment period. The inclusion of securities account costs may be replaced by a reference to the fact that securities account costs that could additionally reduce performance may be incurred. In addition to this standardised model calculation, the investment services enterprise may give clients an opportunity to calculate individual adjusted performance using an online performance calculator available on the institution's website. In this case, clients would have to enter the values applicable to them for the individual variable parameters, including the investment amount.

If an institution offers investment services as part of online offerings, it may give its clients an opportunity to calculate individual adjusted performance for these offerings using an online performance calculator available on the institution's website, instead of the standardised model calculation. In this case, clients would have to enter the values applicable to them for the individual variable parameters, including the investment amount.

The investment services enterprise may also use the online performance calculator as an alternative to the standardised model calculation to calculate individual adjusted performance, for example if the investment advice is provided at a branch office. In this case, the investment adviser must determine the individual variable parameters, including the investment amount, individually for each client. A printout of the online performance calculator shall be made available to the client. In both of the cases described above, the online performance calculator can replace the standardised model calculation.

BT 3.3.4.1.8 Simulated performance information

1. Simulations of past performance or references to such a simulation may relate only to a financial instrument, the underlying of a financial instrument or a financial index (see Article 44(5(a) of the DR). This list of items that a simulation might contain is exhaustive. This means, for example, that client information may not contain simulations of the performance of a mere trading or investment strategy.

2. Moreover, simulations of past performance must be based on the actual past performance of one or more financial instruments, underlyings or financial indices that are the same as, or substantially the same as, or underlie, the financial instrument concerned, as well as satisfying all conditions stated under 3.3.4 above (see Article 44(5(a) of the DR).

3. Moreover, the financial instrument, the underlying or the financial index to be used in the simulation must have a clearly defined composition for a simulation to be possible

at all. For this reason it is not permitted to simulate in client information the past performance of a financial instrument or a financial index whose respective composition depends on discretionary decisions.

Example:
For a newly launched fund, a certain investment strategy including certain weighting provisions is defined for the fund's management. However, the actual choice of securities and the decision on specific transactions is left to the discretion of the fund's management. In this case it is not possible to determine what the fund's exact composition would have been in the past because it is impossible to know what discretionary decisions the fund's management would have taken in the past.

4. For the same reason, it is not generally permitted to simulate the past performance of such structured products in client information for which, beyond the pure costs of the individual components, margins of the issuer that vary over the entire term are used in pricing, unless it is clearly prominently stated that the margins of the issuer assumed in the calculation of performance are notional and variable and therefore do not provide any reliable indication of the future effect of issuer margins on the performance of the product.

   Example:
   The structure of a guarantee certificate is made up of several components (e.g. securities and forward transactions). The issue price is calculated by adding the prices of the individual components as well as a profit margin of the issuer. However, the amount of this margin changes constantly over the term as a result of the issuer's pricing. In this case it is not possible to know how high the issuer would have calculated its margin at individual points in time in the past. It is therefore equally not possible to determine what the price of the certificate would have been at dates before the issue.

5. As a rule, it is permissible to present a combination of actual and simulated performance data. In this case, however, it must be clear and unambiguous from the presentation which information is actual nature and which information is simulated.

   Example:
   A certificate launched six months ago tracks the performance of share A "1:1". Although it would not be permitted to present performance information for the certificate only for the past six months in light of the prohibition of presenting performance information for periods of less than one year (see point 3.4.1.4), a reference to the actual performance of share A during the preceding four and a half years nevertheless makes it possible to present the performance of the certificate for the period of the past five years.

   Lastly, as a general principle the effect of commissions, fees and other charges shall also be given in the case of simulated performance data in the same way as for the disclosure of actual performance information.

   Example:
   A newly launched fund continuously tracks a certain index "1:1" as stated in the fund's terms and conditions. As there is insufficient actual historical price data, a simulation of its past performance will be presented. In this case, the simulation has to take account of any front-end load and/or redemption fees as well as transaction costs in the same way as for the presentation of actual performance.

BT 3.3.4.2 Information on future performance

Data provided on future performance may not be based on simulated past performance or refer to such a simulation. The information must be based on reasonable assumptions supported by objective data and, if based on gross performance, clearly state the effect

of commissions, fees and other charges. The information shall be based on both negative and positive scenarios performance scenarios in different market conditions and reflect the nature and risks of the specific types of instruments included in the analysis, and it shall contain a prominent warning that such forecasts are not a reliable indicator of future performance.

BT 3.4 Tax information

Information referring to a particular tax treatment shall state prominently that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future (see Article 44(7) of the DR).

BT 3.5 Consistency of marketing and product information

Information provided in marketing communication may not contradict information that the investment services enterprise makes available to the client when performing investment services and ancillary investment services (see Article 44(2)(b) of the DR). This means in particular that information provided in offering prospectuses or other information materials must be consistent with information provided for marketing purposes.

BT 3.6 Information referring to the competent authority

The name of any competent authority may not be mentioned in such a way that could indicate or suggest endorsement or approval by that authority of the products or services of the investment services enterprise (Article 44(8) of the DR).

Consequently, advertising for a financial instrument may not provide information that BaFin has approved the prospectus published in the course of the issue in such a way as to give clients the impression that BaFin has explicitly endorsed or approved the financial instrument as such. Nor is it permitted to refer to the fact of existing supervision by BaFin in such a way as to give rise to the impression that the services or products offered by the investment services enterprise are explicitly endorsed or approved by BaFin.

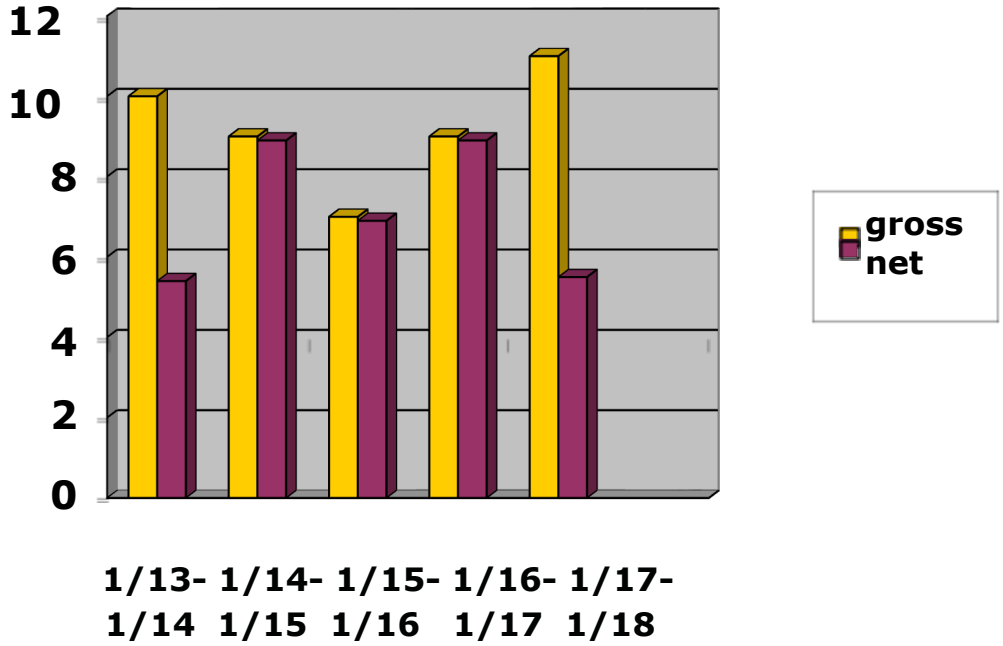
BT 3.7 Documentation of marketing communications

Besides the requirement to keep one copy of the marketing communication, no further record-keeping obligations apply to marketing communications provided that it is clear from the marketing communication to which client group the communication is addressed (see Article 72 of the DR). To the extent that the marketing communication is issued periodically using a particular standard template, retention of one sample copy of such standardised information is sufficient if the creation of the individual documents can be reconstructed from the additional documentation.

Annex:

Some non-binding illustrative examples suggesting possible ways of presenting performance for the past 5 years are presented in the following:

A. Bar chart (return expressed as a percentage)



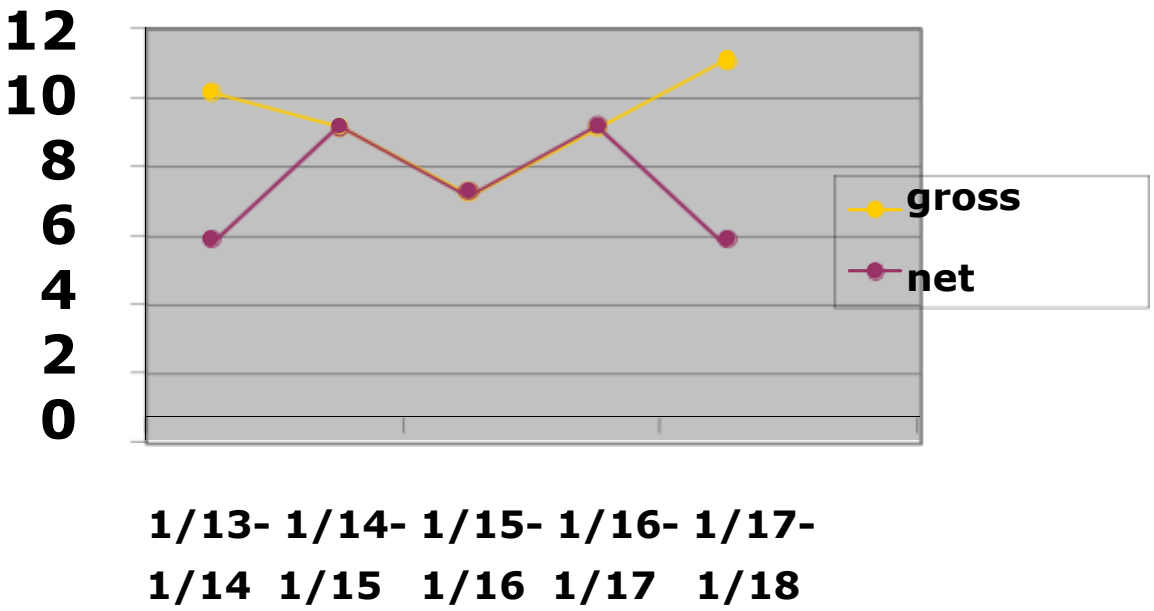
Front-end load/order fee/brokerage fee/securities account fee for investment amount of [1/4 average securities account]

1/05–1/07: gross minus securities account fee for investment amount of [1/4 average account]

1/08–1/09: net = minus redemption fee/order fee/brokerage fee/securities account fee for investment amount of [1/4 average securities account]

Note: The specific return for your planned investment amount can be calculated using a return calculator available on our website (www.a-bank.de/renditerechner).

B. Line chart (return expressed as a percentage)



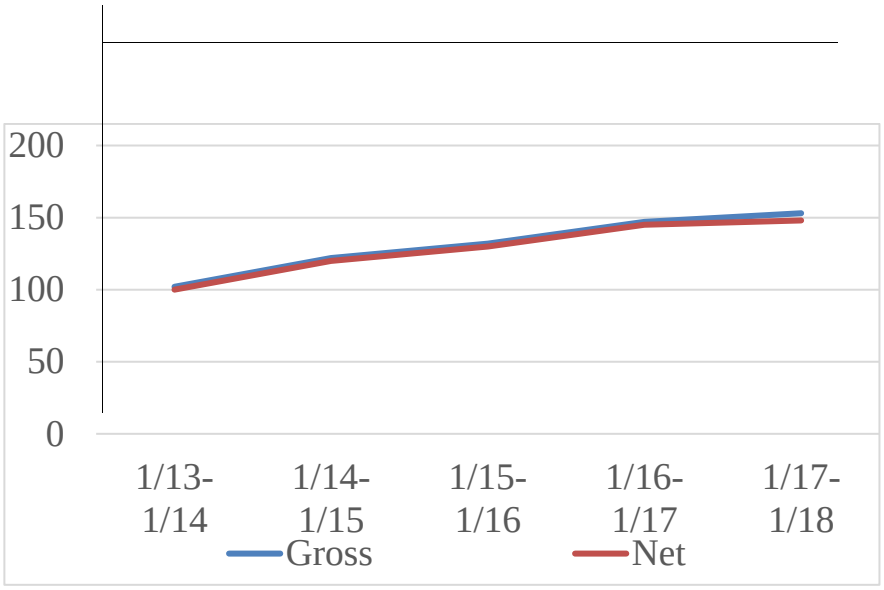
1/04–1/05: net = minus front-end fee/order fee/brokerage fee/securities account fee for investment amount of [1/4 average securities account]

1/05–1/07: gross minus securities account fee for investment amount of [1/4 average account]

1/08–1/09: net = minus redemption fee/order fee/brokerage fee/securities account fee for investment amount of [1/4 average securities account]

Note: The specific return for your planned investment amount can be calculated using a return calculator available on our website (www.a-bank.de/renditerechner).

Curve chart (performance of EUR 100 investment expressed in euros)



BT 4 Best execution of client orders in accordance with section 82 of the WpHG This module expands on the requirements of section 82 of the WpHG and Articles 66–66 of the DR.

BT 4.1. Exercise of discretion in selecting execution venues and in developing the execution policy

1. The investment services enterprise shall select execution venues at its discretion. The investment services enterprise is obliged to use the discretion granted to it and, when exercising this discretion, to consider all relevant execution venues and all factors that are significant for determining the best possible result. The different execution venues shall be compared and assessed using uniform and non-discriminatory criteria.

2. In addition to the criteria listed in section 82 (2) and (3) of the WpHG and Article 64 of the DR, the selection process may take other factors into account in the exercise of discretion, provided that these factors do not conflict with the obligation to obtain the best possible result for the client. In doing so, the investment services enterprise takes into account in particular the reports published by the execution venues on the quality of execution in accordance with section 82 (10) and (11) of the WpHG in conjunction with Delegated Regulation (EU) 2017/575 (RTS 27). In light of this requirement, the investment services enterprise may also consider qualitative factors relating to the execution venues (such as the monitoring of trading by a trading surveillance unit, complaints management and processing, the trading hours of the individual execution venues, the reliability of performance promises made, the reliability of quotes and other price information, the selection of order supplements and execution types, the service and information offering for investors, the type of order book, the counterparty risk of trading partners, the reliability of settlement, etc.).

3. In the retail client business, best execution shall be based on the total fees paid. The total cfees paid are an extremely important criterion when exercising discretion. Minor differences in the total consideration paid may be disregarded provided that this is clearly justified. The costs to be taken into account when calculating the total fees paid also include implicit trading costs. Fees and remuneration charged by execution venues as well as clearing and settlement costs may only be included when calculating

the total fees paid if they are passed on to the client.

BT 4.2 Content of the execution policy

1. The execution policy shall be based on the nature and extent of the investment services business, securities orders and client structure. This applies in particular to the degree of detail and the depth of regulation in the execution policy.

2. In accordance with Article 66(3)(b) and (c) of the DR, the execution policy shall specify the key factors that determined the selection of the relevant execution venue and the execution venues to which securities orders will be transmitted for execution.

3. The information on the execution policy shall explain clearly, in sufficient detail and understandably how client orders are executed by the investment services enterprise.

BT 4.3 Assessment procedure and review of the execution policy

1. The requirements for the methodology used to determine the execution venues that provide the best possible results (assessment procedure) are determined by the nature and extent of the investment services business conducted by the investment services enterprise.

2. The assessment procedure should be implemented using current and meaningful market data. The information published in accordance with section 82 (9) to (11) of the WpHG shall be taken into account. The same applies to the regular, and at least annual, review of the enterprise's own execution policy. Investment services enterprises are also encouraged to examine, using meaningful random samples (back testing), whether the execution of securities orders at another trading venue would have led to better execution. If the assessment procedure or the random sampling examination allows the use of non-binding price information in the review of the execution policy, the investment services enterprise shall also examine whether orders are regularly executed at the bid and offer prices prevailing at the time the orders were placed.

3. If there are significant changes during the year in the aspects relevant for best execution within the meaning of Article 66(1) sentence 2 and Article 65(7) of the DR, the investment services enterprise shall promptly review its execution policy and adapt it if necessary.

BT 4.4 Transmission of securities orders for execution by another investment services enterprise

1. The minimum requirements for investment services enterprises that transmit client orders to another investment services enterprise for execution or that provide portfolio management services without executing the orders or decisions themselves are contained in Article 65 of the DR. In its execution policy, the investment services enterprise shall determine and select the investment services enterprises that will be instructed to execute securities orders for each group of financial instruments (selection policy) (see Article 65(5) of the DR) in accordance with the criteria specified in section 82 (2) and (3) of the WpHG. The investment services enterprises that are instructed to execute securities orders shall be named in the selection policy.

2. The investment services enterprise that is instructed to execute securities orders shall be selected in particular on the basis of its execution policy. The instructing enterprise shall examine whether the execution policy of the instructed investment services enterprise ensures best execution of securities orders and adequately reflects client interests.

3. As part of the regular monitoring of best order execution, the investment services enterprise shall examine whether the investment services enterprise instructed to execute securities orders is executing the orders in accordance with the execution policy of the instructed investment services enterprise, and whether execution via this investment services enterprise permanently ensures the best execution of securities orders. As part of the monitoring activities, the actual execution of securities orders shall be compared with the execution policy of the instructed investment services enterprise on a random sampling basis.

4. If the investment services enterprise concludes as a result of its review that the execution policy of the instructed investment services enterprise no longer ensures best execution, the investment services enterprise shall either transmit the orders to another investment services enterprise for best execution or issue an instruction to the current investment services enterprise with regard to the execution venue.

5. The investment services enterprise is not obliged to select another investment services enterprise to execute the securities orders if the selection was made by the client itself, for example if the client selects the enterprise maintaining the securities account via which the securities transactions will be executed as part of the investment services provided by an asset manager for the client. In this case, too, the investment services enterprise shall explicitly warn its clients that the obligation to ensure best execution does not apply (Article 66(3)(f) of the DR) and that best execution of the securities orders cannot be assured.

6. The investment services enterprise is obliged to draw up its own execution policy in accordance with the requirements specified in BT 4.1 to BT 4.3 of this Circular if the instructed investment services enterprise has no execution policy or only executes securities orders on the instructions of the transmitting investment services enterprise.

BT 4.5 Publication requirements

The investment services enterprise shall publish the top five execution venues in terms of trading volumes for all executed client orders per class of financial instruments at least once a year and a summary of the quality of execution obtained in accordance with the requirements of Delegated Regulation (EU) 2017/576 (RTS 28) for the annual publication of information by investment services enterprises of information on the identity of execution venues and on the quality of execution.

The publication obligations of investment services enterprises that transmit client orders to other investment services enterprises for execution are set out in section 82 (13) no. 4 of the WpHG in conjunction with Article 65(6) of the DR.

BT 5 Product governance requirements in connection with the provision of investment services and ancillary investment services

This module expands on the requirements of sections 63 (4) and (5), 80 (9) – (13), 81 (4) and (5) of the WpHG, and sections 11 and 12 of the WpDVerOV.

BT 5.1 Preliminary remarks and definitions

1. Products within the meaning of this BT mean financial instruments within the meaning of section 2 (4) of the WpHG and structured deposits within the meaning of section 2 (19) of the WpHG.

   In accordance with section 11 (1) sentences 1 and 2 of the WpDVerOV, manufacturers within the meaning of this BT 5 mean investment services enterprises that create, develop, issue or design new products. Distributors within the meaning of this BT 5 are

investment services enterprises that
sell, distribute, offer, recommend or market products.

2. In implementing and complying with the requirements of this BT 5, an investment services enterprise shall consider the type of product, the relevant product characteristics, such as complexity (including the costs and charges structure of the product), risk-reward profile, liquidity or innovative character, as well as the nature and scope of the investment services it offers.

   The product governance requirements in accordance with sections 63 (4) and (5), 80 (9) – (13), 81 (4) and (5) of the WpHG, and sections 11 and 12 of the WpDVerOV and the requirements of this BT 5 shall apply regardless of whether primary or secondary market products are concerned.

   Investment services enterprises that are both the manufacturer and the distributor of a financial instrument are only required to consider all of the requirements of this BT 5 once, to the extent that they are the same.

3. There is generally no requirement to identify a target market for products manufactured and distributed before 3 January 2018.

   For products that were manufactured before 3 January 2018 but that are distributed after that date, the requirements for distributors under BT 5.3 shall apply to the extent that they are to be treated as products that were manufactured by enterprises that do not fall within the scope of Directive 2014/65/EU. Example: Distributors shall generally identify their own target market for these products.

   For products manufactured before 3 January 2018 and distributed after that date, manufacturers shall identify an actual target market as part of the product review process after 3 January 2018. Distributors shall consider this actual target market in their own subsequent product review process.

BT 5.2 Requirements for manufacturers

BT 5.2.1 Identification of the potential target market by the manufacturer; target market categories to be considered

1. In accordance with section 11 (8) of the WpDVerOV, manufacturers may determine the financial markets and the needs, characteristics and objectives of potential end-clients on the basis of theoretical knowledge of and experience with the product (or a comparable product) ("potential target market").

2. The identification of the potential target market by the manufacturer may not be conducted solely on the basis of quantitative criteria, but shall also be based on sufficient qualitative considerations. This applies in particular in the mass market with a high degree of process automation.
   Examples of quantitative criteria include: criteria based on arithmetic operations or algorithms that process quantitative data about clients and products or are generated by scoring systems that assign values for certain characteristics or convert factual data into numerical systems (e.g. using issuer ratings or product volatility).

3. Manufactures shall identify the potential target market based on the following five categories. Statements on each category shall be made for each financial instrument. The statements on the individual categories may not be made in isolation, but shall consider interactions between the categories.

4. In exceptional cases in which the five categories are not sufficient to identify a meaningful target market, manufacturers may decide to use additional categories. In deciding to use additional categories, manufacturers shall take into account an exchange of information about target markets with distributors that is as effective as possible, the characteristics of the communication channels designated for this

purpose and possible effects on an open product architecture of the distributors concerned.

5. The level of detail of the statements to be made regarding the individual categories shall be based on the type of product and the relevant product characteristics, such as complexity (including the costs and charges structure of the product), risk-reward profile, liquidity or innovative character; the principles set out in BT 5.2.2 shall be taken into account.

6. The five target market categories are:

    1. Category of client: The investment services enterprise shall describe the type of client within the meaning of section 67 of the WpHG (retail clients, professional clients, eligible counterparties) to which the product is targeted.

    2. Knowledge and experience: The investment services enterprise shall describe the knowledge that the target clients are required to have about the product, such as the type of product, its features or knowledge in thematically related areas that help to understand the product.
    Example: For structured products with complicated return profiles, manufacturers could specify that target clients should have knowledge of how this type of product works and the likely outcomes from the product.

    It shall also describe how much practical experience target clients should have with elements such as the type of product, its features or experience in thematically related areas that help to understand the product..
    Example: Manufacturers could specify a minimum time period for which target clients should have been active in the financial markets.

    In certain cases, knowledge and experience could be dependent on each other.

    Example:
    A client with limited or no experience can compensate this with correspondingly extensive knowledge.

    3. Financial situation with a focus on the ability to bear losses: The investment services enterprise shall specify the amount of losses that target clients should be able and willing to afford (for example "minor losses" or "total loss") and whether there are potential losses that exceed the amount invested (e.g. additional payment obligations). The investment services enterprise could also describe the maximum proportion of a target client's assets that should be invested in the relevant product.

    4. Risk tolerance and compatibility of the product's risk/reward profile with the target client: The investment services enterprise shall describe the attitude that target clients should have in relation to the risks from the product. To satisfy the requirements of this target market category, manufacturers can use the risk indicator stipulated by the legislative requirements applicable to the product, such as Regulation (EU) No. 1286/2014 or Directive 2009/65/EC. If it uses its own risk categories for the description (example: "conservative", "balanced", "risk-oriented", "speculative"), they shall be described in greater detail.

    5. Objectives and needs: The investment services enterprise shall specify the investment objectives and needs of the target clients that the product is designed to meet. The investment objectives comprise the general purpose of the investment or the overall strategy that target clients can follow with the investment (e.g. "retirement planning," "capital accumulation", "education planning," "regular wealth consumption"). Additionally, the target client's investment horizon can be specified as the number of years in which the product is to be held. The investment objectives can be fine-tuned by specifying other aspects, such as specific product features or certain expectations of target clients (for example: products that are designed to meet the needs of a target clients in a specific age demographic; products

designed to achieve tax efficiency based on the target client's specific tax regime; currency protection products, sustainable investment products).

7. When identifying the target market using the above categories, a manufacturer is not required to expressly identify target client groups that are already covered by another target client group within the same category.
   Example: For a product that is compatible with all levels of knowledge and experience of potential target clients, it is enough only to identify those target clients who have the lowest level, e.g. "basic knowledge and experience", as this means that the product is also compatible with clients who have more extensive knowledge and experience.

8. When describing the above five target market categories, manufacturers shall endeavour to use clear and understandable concepts and terminology in order to prevent misunderstandings and misinterpretations. The terms and concepts used to define the target market categories (e.g. risk classes defined by the manufacturer itself) shall be described clearly and explained.

BT 5.2.2 Identification of the potential target market: consideration of the nature of the product manufactured

1. The potential target market shall be described in an appropriate and proportionate manner, considering the nature of the product, and shall consider in particular product characteristics such as complexity (including the costs and charges structure of the product), risk/reward profile, liquidity or the product's innovative character.

2. Consequently, for more complicated products, such as structured products with complicated return profiles, the target market shall be identified in greater detail. For simple, more common products, by contrast, the target market shall be identified in less detail. For simple, more common products, in particular

   - the target market categories can be identified for all products in a product type with sufficiently comparable product features (e.g. inclusion in an external benchmark or membership of a specific stock exchange segment with certain requirements) following a common approach, or

   - the description of the target market categories can be more generic, whereby the simpler a product is, the lower the requirements placed on the description.

3. In all cases, however, the target market shall be identified at a sufficiently granular level to avoid the inclusion of any groups of target clients for whose needs, characteristics and objectives a product is not compatible.

4. For tailor-made products, the target client can generally be considered to be the client who ordered the product, unless the distribution of the product to other clients is planned or this results from the circumstances.

BT 5.2.3 Interaction between the distribution strategy of the manufacturer and its definition of the target market

1. The distribution strategy to be defined by the manufacturer for each product in accordance with section 80 (9) sentence 4 of the WpHG shall encourage the distribution of the product to the target market. If a manufacturer is able to influence which distributors will distribute its products, it shall make its best efforts to select distributors whose client base and services offering are compatible with the target market of the product.

2. In defining the distribution strategy, the manufacturer shall determine which information about the clients is necessary to enable a distributor to properly identify and reconcile the actual target market. Depending on this, a manufacturer shall specify the investment services through which target clients can acquire the product. If the product is designed to be distributed without advice, the manufacturer could, as a minimum, designated a preferred distribution channel.

BT 5.3 Requirements for distributors

BT 5.3.1 Relationship between the target market identification and other product governance processes of the distributor

1. Target market identification by distributors (i.e. identifying the "actual" target market) shall be conducted for each product as part of a decision-making process in accordance with section 12 (1) of the WpDVerOV about which products and services will be offered by the distributor. This process shall occur at the earliest possible time in the distributor's business organisation in order to ensure from the very beginning that the products and related services are compatible with the needs, characteristics and objectives of the target clients. Accordingly, it is necessary to complete the process of target market identification before the product goes into distribution.

2. The question of which products and services will be offered by the distributor, how the target market for the product concerned and how the relevant distribution strategy are defined, is a business policy decision for which the management board bears responsibility. The decision shall be given a key role in planning the daily business; in addition, it shall be taken into account in all other relevant processes in connection with the distributor's product and services offering (for example budget planning or staff remuneration).

3. As part of target market identification and of the process of deciding which products and services will be offered by the distributor, the consistency of the product concerned with the services through it is to be offered shall be ensured. In this context, the distributor shall decide which products it wishes to recommend (without advice) to which clients (investment advice or portfolio management), actively distribute (e.g. by selecting clients based on common features in terms of knowledge, experience, financial situation, etc.) or make available passively without active marketing (for example as execution-only business). Particular care shall be paid to considering the following:

    - situations in which no comprehensive target market identification is made or no complete overview of reaching the target market can be obtained due to the nature of the service provided or the resulting information(in particular in non-advised business with or without an assessment of appropriateness)

    - decisions about complex, risky, illiquid or innovative products or products with similar features

    - situations in which there is a particular conflict of interest (e.g. in the case of products that are issued by the distributor itself or the group of which it is a member).

    Example 1:
    In light of the detailed information about clients that the distributor has gained from investment advice, it decides not to offer these clients products with a particular risk/reward profile without investment advice.

    Example 2:
    Although certain simple products could be offered without investment advice in execution-only business, the distributor decides to offer them only after an assessment of appropriateness or suitability in the interests of better investor protection.

    Example 3:
    For a certificate, the potential target market of a manufacturer imposes requirements about the financial situation that a target client for the product should have. The distributor normally distributes certificates in non-advised business with an assessment of appropriateness. Because of the fact, however, that the client assessment in the non-advised business does not provide any information about the client's financial situation, and hence the target market for the client cannot be reconciled with the "financial situation" category, the distributor decides to distribute the certificate only through the provision of investment advice.

4. A product that the distributor can see will never be compatible with the needs, characteristics and objectives of its clients may not be added to the product range.

BT 5.3.2 Relationship between the target market identification and the assessment of suitability or appropriateness

The obligation of the distributor to identify the actual target market and to ensure that distribution of a product is consistent with the actual target market shall be conducted in addition to the assessment of suitability or appropriateness in accordance with section 64 (3) and section 63 (1) of the WpHG and shall not be substituted by it.

BT 5.3.3 Identification of the actual target market by the distributor: basis of identifying the target market

1. Regardless of the identification of the potential target market by the manufacturer, distributors shall identify their own target market for a product at a more concrete level in order to identify the group of clients to which the product will actually be marketed ("actual target market"). The actual target market shall be identified on the basis of the following:

    - The distributor's information about its own clients

    This requires distributors to conduct a thorough analysis of their client base. The client base consists of existing and potential clients (e.g. clients of the deposit business to whom a bank wishes to offer investment services). To do this, all information available from investment services and ancillary investment services and that could be considered useful for identifying the target market shall be used. In addition, distributors can also use for this purpose all information available from other sources and deemed useful for identifying the target market.

    If the service will be provided to clients who are not natural persons (e.g. investment advice to an asset management company with regard to a fund), comparable (and additional, if appropriate) relevant information for identifying the needs, characteristics and objectives of the client shall be used (e.g. the fund's investment policy).

    - information about the product communicated by the manufacturer or obtained by the distributor itself

    - the investment service or ancillary investment service with which the product will be distributed.

2. In other respects, the requirements in BT 5.2.1 and BT 5.2.2 apply to distributors, with the necessary modifications. If the manufacturer identifies a potential market, the distributor is not required itself to identify all aspects of the target market again. To identify the actual target market in such cases, it is sufficient to assess the manufacturer's potential target market in accordance with BT 5.2.1 and BT 5.2.2 and this BT 5.3.3 and BT 5.3.4. and to refine it if necessary.

3. Distributors shall implement a dedicated process to assess whether and, if applicable, how the manufacturer's target market fits the distributor's own client base. The depth of the assessment shall be determined by the type of product and its features, such as complexity, risk, illiquidity or innovative character. Example: The assessment will be more intensive for more complex products, while it will be less intensive for simple, more common products. If, as a result of the assessment, the distributor comes to the conclusion that the target market of the manufacturer does not need to be refined or adapted, the manufacturer's target market may be used as it is. The assessment in accordance with sentence 1 above shall also be conducted in all cases for simple, more common products (i.e. it cannot be reduced to "zero" even for very simple products); for such products, however, it will normally be possible to use the potential target market.

4. If the distributor comes to the conclusion that the potential target market of the

manufacturer has to be adapted or refined, distributors should not deviate from the fundamental decisions made therein. For example, all decisions associated with a lower level of investor protection than provided for by the manufacturer (e.g. making a product for professional clients accessible to retail clients as well) may only be taken on the basis of a thorough analysis of the target clients and the characteristics of the product. As a general principle, the manufacturer shall be informed about such decisions.

5. Usually, the actual target market is defined by the distributor after the manufacturer has communicated its target market for the product to the distributor. However, it is also possible for the manufacturer and the distributor together to define both the potential and the actual target market in accordance with the requirements of this BT 5. In such cases, the manufacturer and the distributor remain responsible for identifying their own target market.
   Example: The manufacturer and the distributor develop a target market standard for the products on which their business relationship is based.

BT 5.3.4 Identification of the actual target market by the distributor: interaction of target market identification with investment services; reconciliation of the target market

1. In addition to the obligation to identify the actual target market, distributors shall ensure that distribution of a product is consistent with the target market (section 12 (4) sentence 1 no. 1 and (5) sentence 1 of the WpDVerOV). To do this, the distributor shall in each and every case, in addition to any assessment of appropriateness or suitability to be performed depending on the investment service, reconcile the needs, characteristics and features of the relevant investment services client with the corresponding requirements from the target market categories ("reconciliation of the actual target market").

2. A distributor may take into account the fact that the scope of both the identification of the actual target market and the subsequent reconciliation of the actual target market depend on the level of information gained about the client concerned from the relevant investment service as follows:

   - Investment advice

     - For products that will, as a minimum, also be distributed through investment advice, a comprehensive actual target market shall be identified, since the client analysis to be conducted in order to perform the suitability assessment continuously provides an insight into all information necessary for defining, assessing or refining the target market categories. The distributor shall obtain corresponding information in advance from other sources the first time a product is offered or when operations commence.

     - All aspects of the reconciliation of the actual target market shall be conducted in each case.

   - Non-advised business with assessment of appropriateness

     - For products that will, as a minimum, also be distributed in the non-advised business with an assessment of appropriateness, and not also through investment advice or portfolio management, it is sufficient to identify the actual target market only in terms of the target market categories of "client category" and "knowledge and experience", as the client analysis to be conducted in order to perform the assessment of appropriateness only provides a continuous insight into this information. The distributor shall obtain corresponding information in advance from other sources the first time a product is offered or when operations commence.

     - It is sufficient to conduct the reconciliation of the actual target market in terms of the target market categories of "client category" and "knowledge and experience". The client shall be informed about the limited reconciliation. This information can be provided in a standardised format (e.g. in the basic

information). Target market categories from the manufacturer's potential target market that have not been reconciled may be communicated to the client if they have been made available to the distributor.

- Non-advised business without assessment of appropriateness (execution-only business)

  - For products that will only be distributed in the non-advised business without an assessment of appropriateness (execution-only business), it is sufficient to identify the actual target market only in terms of the target market category of "client category".

  - It is sufficient to conduct the reconciliation of the actual target market only in terms of the target market category of "client category". The client shall be informed about the limited reconciliation. This information can be provided in a standardised format (e.g. in the basic information). Target market categories from the manufacturer's potential target market that have not been reconciled may be communicated to the client if they have been made available to the distributor.

3. If a product is distributed through a range of different services, the identification of the actual target market for this product shall generally be conducted in accordance with the principles for the service with the most comprehensive client analysis obligations. In such cases, the reconciliation of the actual target market is performed in accordance with the principles described above applicable to the actual service provided.

   Example 1:
   A distributor distributes a simple, more common product that is issued by a manufacturer who is not a "manufacturer" within the meaning of section 11 (1) of the WpDVerOV (see also BT 5.3.7 for more details) in the execution-only business. When identifying the actual target market, the distributor cannot use information provided by the manufacturer and defines the target market category of "client category" to be identified in this scenario as "retail clients". In the actual distribution scenario to the client, only its client category will therefore be reconciled, i.e. assessed whether the client really is a retail client.

   Example 2:
   A distributor offers a certificate both in the non-advised business with an assessment of appropriateness and through investment advice. To identify the actual target market, the distributor is required to identify all target market categories for the product. In the investment advice scenario, the distributor reconciles all of the target market categories with the needs, characteristics and features of the actual client. By contrast, in the case of a sale in the non-advised business with an assessment of appropriateness, the seller only reconciles the categories of "client category" and "knowledge and experience" with the information about the client gained from the client analysis and informs the client about the limited reconciliation.

4. If, before or during the provision of an investment service, a distributor uses information about clients that would actually not apply to the identification and reconciliation of the target market in accordance with the principles described above, the distributor shall nevertheless take it into account.

   Example:
   A distributor offers certificates issued by another investment services enterprise exclusively in the non-advised business with an assessment of appropriateness. To identify and subsequently reconcile the actual target market, the target market categories of "client category" and "knowledge and experience" would therefore have to be taken into account, and the client would also have to be informed about the limited reconciliation. In a mailing campaign to distribute the certificates, however, the enterprise only targets those clients about whom it knows from other sources that they have assets available for investment of more than €100,000. By using this information to address clients, the distributor is required to additionally reconcile the target market category of "financial situation" and to use it to identify the target

market.

5. If a distributor provides portfolio management, it shall take into account the specific characteristics of this service as follows:

    - The distributor shall identify an actual target market in accordance with BT 5.3.3 for the investment strategies that are to be used for portfolio management. If a tailored investment strategy is developed, BT 5.2.2 no. 4 shall apply, with the necessary modifications.

    - The actual target market of the relevant investment strategy shall be reconciled with the client concerned. Tailored investment strategies to which BT 5.2.2 no. 4 applies, with the necessary modifications, do not require any reconciliation.

    - The distributor shall implement the process under section 12 (1) of the WpDVerOV expanded on in BT 5.3.1 to decide which products and services will be offered by distributors on condition that, in addition to applying to products that are to be used in the clients' portfolios, the process will also be applied to investment strategies that are to be used in the context of portfolio management.

    - Refinement of the potential target market or distribution strategy for products of manufacturers who are subject to Directive 2014/65/EU or the separate identification of an actual target market or distribution strategy for products of manufacturers who are not subject to Directive 2014/65/EU is not necessary for portfolio management.

    - A product related target market reconciliation is not necessary at the level of the individual transaction executed for the client, provided that it is covered by the agreed investment strategy.

BT 5.3.5 Definition of the distribution strategy by distributors

1. The distributor shall review the manufacturer's distribution strategy with a critical look and shall take it into account when it defines its own distribution strategy in accordance with section 80 (10) sentence 2 of the WpHG. The principles set out in BT 5.3.3 shall apply to the definition of the distributor's distribution strategy, with the necessary modifications.

    Example 1:
    In the case of a product for which the distribution strategy of a manufacturer provides for distribution in non-advised business with an assessment of appropriateness, the distributor decides to offer it only through investment advice in the interests of better investor protection because its client base consists largely of retail clients with limited knowledge and experience, a short investment horizon and an uncertain financial situation.

2. In cases in which the distributor decides to adopt a distribution strategy with a lower level of investor protection than provided for by the manufacturer, this should only be done on the basis of a thorough analysis of the target clients and the characteristics of the product. This decision shall be reported to the manufacturer to allow it to incorporate this situation into its product governance processes, in particular the process of selecting distributors.

    Example 2:
    The distributor decides to distribute a particular product for which the manufacturer provided for investment advice in its distribution strategy as a non-advised service.

BT 5.3.6 Distribution outside the target market; identification and reconciliation of the target market in the context of portfolio management, investment advice relating to portfolios, hedging and diversification

1. As a rule, a product should not be distributed to clients outside the positive target

market. Any departures from this principle shall be justified by the circumstances applicable to the particular case. They shall be documented, justified, included in any suitability statement to be issued and notified to the manufacturer in the course of the exchange of information in accordance with BT 5.4.2.

2. Except in rare exceptions, a product should not be distributed to clients inside the negative target market. Any departures from this principle must be justified by particularly serious circumstances applicable to the particular case. They shall be documented, justified in detail, included in any suitability statement to be issued and notified to the manufacturer in the course of the exchange of information in accordance with BT 5.4.2.

3. If a distributor offers portfolio management or investment advice relating to portfolios, products may be distributed outside the positive target market for diversification or hedging purposes without requiring a report to the manufacturer on the sale outside the target market, provided that the client's total portfolio or the combination of a product with its hedging transaction is suitable for the client. The departure shall be included in any suitability statement to be issued. If the distribution in sentence 1 above is into the negative target market, the manufacturer shall be informed of this situation. As a general principle, any distribution into the negative target market should be an exception.

4. If distributors establish, for example because of corresponding client complaints or other sources of information, that a product is being distributed – subject to the exceptions set out above – regularly outside the positive target market (e.g. to a large number of clients), this shall be taken into account appropriately in the review process for products and services.

   Example:
   The distributor examines whether the actual target market has been correctly identified or comes to the conclusion that the distribution strategy for the product must be modified.

BT 5.3.7 Distribution of products manufactured by entities not subject to Directive 2014/65/EU

1. Distributors that distribute products manufactured by entities that are not subject to Directive 2014/65/EU are required to examine these products to the extent necessary to ensure a legal of investor protection and service to their clients that is comparable with that which would exist if the product had been designed in accordance with the requirements of sections 63 (4) and (5), 80 (9) – (13), and 81 (4) and (5) of the WpHG. In particular, there is a requirement for

   - the separate identification of an actual target market for the product in accordance with BT 5.3.3;
   - an appropriate information gathering process to obtain adequate, reliable information in order to identify an actual target market and distribute the product in accordance with that market.

2. Corresponding information may be obtained from publicly available sources if it is clear, reliable and produced to meet regulatory requirements (e.g. publications in accordance with Directives 2011/61/EU, 2003/71/EC, 2013/50/EU or 2009/65/EC, or Regulation (EU) No. 1286/2014, such as the PRIIPS KID, a securities offering prospectus or publications in accordance with equivalent third country regulatory requirements). If necessary information is not publicly available, the distributor should obtain the information from the manufacturer under a corresponding agreement.

3. Among other factors, the appropriateness of the information gathering process is determined by the availability of information about the product and the type and complexity or other relevant features of the product. Information about simple, more common products, such as shares, can normally be obtained from the regulatory publications necessary for such products, and do not generally need an agreement with the manufacturer.

4. If a distributor is unable to obtain sufficient information about a product that was manufactured by an entity not subject to Directive 2014/65/EU, the product may not generally be included in its product range.

5. If entities that are not subject to Directive 2014/65/EU identify a potential target market or distribution strategy (e.g. voluntarily or on the basis of a contractual arrangement), the distributor may treat this information in the same way as information that has been identified by a manufacturer who is subject to Directive 2014/65/EU, provided that it is evident to the distributor that the identification complies with the requirements of this BT 5.

BT 5.4 Requirements for both manufacturers and distributors

BT 5.4.1 Identification of the negative target market

1. Manufacturers and distributors are required to examine whether., in addition to the description of those target clients with whom the product is compatible ("positive target market"), the potential or actual target market should be described by those target clients with whom the product is incompatible ("negative target market"). The principles for identifying the positive target market generally apply to this examination, in particular

    - the examination shall be performed for the five target market categories described
      in BT 5.2.1;

    - the volume and level of detail of any information to be given about the negative target market categories in accordance with BT 5.2.2 depend on the type of product and its features, such as complexity, liquidity, innovative character or risk/reward profile. Simple, more common products normally have a smaller number of target clients with whom the product is incompatible compared with more complex products.

2. If features of the positive target market already imply a clear indication of the corresponding negative target market in this category, it is enough for the manufacturer or the distributor to identify the negative target market globally in this respect, for example by using information such as "clients outside this positive target market feature".

BT 5.4.2 Product review process in terms of the identification of the target market; exchange of information between the manufacturer and the distributor about reaching the target market

1. In the course of the regular review of a product in accordance with section 11 (13) of the WpDVerOV, manufacturers are required to define which information they need in order to determine whether a product is still consistent with the target market and the distribution strategy is appropriate, and how they obtain or collect this information. The information can, for example, consist of the following:

    - the number and type of distribution channels employed by distributors for the product;
    - the proportion of sales of the product inside and outside the target market;
    - a summary description of the typical client groups who buy the product;
    - a summary of complaints received by distributors about the product;
    - answers to questionnaires that the manufacturer has provided to the distributor for a particular group of clients.

    The distributors should be able to help design the information to be exchanged if required. For this reason, the information required by the manufacturers should therefore incorporate a free text field that allows distributors to add their own comments on the product concerned.

2. The definition of the manufacturers' information request cycle should therefore be risk-based or in line with the principle of proportionality. In the case of simple products, for example, an annual cycle may be adequate. In the case of more complex, more risky, more illiquid or more innovative products, for instance, the information should be requested more frequently.

3. The distributor shall support the manufacturer in its regular review of a product in accordance with section 11 (13) of the WpDVerOV by providing the manufacturer on request with corresponding sales information and other relevant information resulting from the
distributor's own regular review of the product in accordance with section 12 (9) of the WpDVerOV. Information on distribution should be provided proactively in individual cases if the information is particularly important or urgent. Distributors shall consider the following in particular:

    - information that may give an indication that the target market for the product was wrongly identified;
    - information that a product is no longer consistent with the currently identified target market, for example because it is illiquid or market conditions are very volatile;
    - information about decisions to distribute products outside the target market or inside the negative target market or to modify the distribution strategy recommended by the manufacturer (see BT 5.3.6 above).

4. The corresponding information does not have to be transmitted on a case-by-case or product-by-product basis, but may also be transmitted in aggregated form, unless certain information is particularly relevant for an individual product (e.g. if the distributor comes to the conclusion that the potential target market was wrongly determined for a product, or that there are frequent deviations from the target market for a product).

BT 5.5 Identifying the target market in the business with professional clients or eligible counterparties

BT 5.5.1 Professional clients or eligible counterparties as links in an intermediation chain

The requirement to identify the potential or actual target market is product-related and thus independent of the distribution of the product to retail or wholesale markets. In accordance with section 80 (9) sentence 2 of the WpHG, the target market shall relate to "end-clients", i.e. those clients who are at the end of an intermediation chain. It is therefore not necessary for the manufacturer and the distributor to identify the target market for clients who are links in an intermediation chain and not end-clients. Professional clients or eligible counterparties who buy a product in order to redistribute it are not "end-clients" in this sense but rather "distributors", who are in turn required to comply with the product governance requirements applicable to them.

Example:
If an eligible counterparty buys a product from an investment services enterprise in order to distribute it to professional and retail clients as end-clients, it is required, for example, to identify an actual target market for the product. If the eligible counterparty makes changes to the product prior to distributing it, it is also required to comply with the product governance requirements applicable to manufacturers.

BT 5.5.2 Professional clients or eligible counterparties as end-clients

As a general principle, the manufacturer is required to identify all aspects of the potential market, regardless of whether a product is to be distributed fully or partly to eligible counterparties or professional clients as end-clients.

BT 5.5.2.1 Professional clients as end-clients

When identifying the actual target market, distributors may take account of section

67 (2) of the WpHG and the second subparagraph of Article 54(3) of the DR as follows:

- If a product is distributed solely to per se professional clients (and, possibly, to eligible counterparties as well), the distributor is not required to identify the categories of "knowledge and experience" and "financial situation" of the actual target market.

- If a product is distributed solely to elective professional clients as an investment service for which they were classified as professional (and, possibly, to eligible counterparties or per se professional clients as well), the distributor is not required to identify the category of "knowledge and experience" of the actual target market.

- In the specific case, a distributor is not required to reconcile the target market categories of "knowledge and experience" and "financial situation" for a per se professional client (even if this category was identified in the actual target market, for example because the product is distributed to both retail and professional clients). The target market category of "knowledge and experience" does not have to be reconciled for elective professional clients if their classification as a professional client applies for the investment service provided with relation to the product.

BT 5.5.2.2 Eligible counterparties as end-clients

1. If a product is manufactured exclusively for the client category of "eligible counterparty", the manufacturer may take into consideration the fact that eligible counterparties generally have a detailed understanding of and a high level of information about capital markets when identifying the other target market categories: the level of detail in which the target market is identified can be modified accordingly.

2. To identify the actual target market, distributors may take account of section 68 (1) sentence 1 of the WpHG as follows:

    - If a product is distributed solely to eligible counterparties (and, possibly, to per se professional clients as well), the distributor is not required to identify the categories of "knowledge and experience" and "financial situation" of the actual target market.

    - A distributor is not required to identify an actual target market if a product is distributed exclusively to eligible counterparties.

    - In the specific case, a distributor is not required to reconcile a target market for an eligible counterparty (even if an actual target market has been identified, for example because the product is also distributed to retail and professional clients).

BT 6 Provision of the suitability statement in accordance with section 64 (4) of the WpHG

1. The requirements for the preparation of a suitability statement are set out in section 64 (4) of the WpHG and Article 54(12) of the DR. These provisions require a suitability statement to be prepared whenever investment advice as defined in section 2 (8) sentence 1 no. 10 of the WpHG is provided to a retail client. Under section 64 (4) sentence 1 of the WpHG, the suitability statement shall be provided to the client in a durable medium before the contract is concluded. It can also be sent to the client's e-mail address. The wording "before the contract is concluded" refers – regardless of the actual contractual arrangement – to the contractual agreement governed by the law of

obligations (e.g. brokerage agreement, including a conditional brokerage agreement, fixed price transaction, agency agreement in the case of investment or contract broking) between the investment services enterprise providing investment advice and the client.

2. The wording "before the contract is concluded" in section 64 (4) sentence 1 of the WpHG clarifies that any contract that is based on investment advice may only be concluded after the suitability statement has been provided to the client so that the client has had an opportunity to take note of it. An exception to this principle is permitted under the conditions[5] set out in section 64 (4) sentence 3 of the WpHG, for example if telecommunication media are used to provide the investment advice and the prior provision of the suitability statement is therefore not possible. In such cases, the suitability statement shall be provided to the client immediately after conclusion of the contract. "Immediately" in this case means transmission after no later than five working days.

3. The wording "before the contract is concluded" in section 64 (4) sentence 1 of the WpHG does not restrict the requirement to provide the suitability statement to cases in which acontract is concluded. Rather, it defines the timing of providing the suitability statement in cases where the advice is followed by the conclusion of a contract. If the investment advice is not followed by the conclusion of agreement contract, for example in the case of a hold recommendation or a recommendation not to buy a financial instrument[6], the suitability statement shall be provided to the client promptly, and in any event no later than five working days after the investment advice. This also applies to persons who are not yet clients of the investment services enterprise.

4. If the investment advice is provided to an authorised representative, the suitability statement shall be provided to that authorised representative, i.e. to the person who participated in the meeting.

BT 7 Suitability assessment statement in accordance with section 64 (3) of the WpHG, Articles 54, 55 of the DR

This module expands on the requirements of section 64 (3) of the WpHG and Articles 54 and 55 of the DR.

Products within the meaning of this BT 7 mean financial instruments within the meaning of section 2 (4) of the WpHG and structured deposits within the meaning of section 2 (19) of the WpHG.

<u>BT 7.1 Information to clients about the suitability assessment</u>

1. Investment services enterprises must inform clients clearly about the purpose of the suitability assessment undertaken to enable the investment services enterprise to act in a client's best interest. In doing so, investment services enterprises must explain clearly that they are responsible for assessing suitability.

2. This information should enable clients to undertake the purpose of the requirements governing the suitability assessment and why they are being asked to provide information within the meaning of section 64 (3) of the WpHG. They should also be able to understand that it is important for this information to be up-to-date, accurate and complete, encouraging them to provide accurate and sufficient information for

[5] The consent of the client to provision of the suitability statement after conclusion of the contract if telecommunication media are used required by section 64 (4) sentence 4 of the WpHG must be express. For this reason, aa contract through the use of general terms and conditions, for example, is not permitted.

[6] The wording "recommendation not to buy a financial instrument" shall be interpreted narrowly. For example, the presentation of several financial instruments to the client without issuing a recommendation does not trigger a requirement to prepare a suitability statement. This also applies to cases in which the client is recommended to buy one of several financial instruments and no recommendation is issued for the other financial instruments. No suitability statement has to be prepared for the other financial instruments that were not recommended.

the suitability assessment about their knowledge and experience, their financial situation (including their ability to bear losses) and their investment objectives (including their risk tolerance). Enterprises must highlight to their clients that it is important to provide complete and accurate information so that the financial services enterprise can recommend suitable products. Without this information, investment services enterprises will not be able to provide investment advice or portfolio management for clients.

3. It is up to the financial services enterprises to decide how they will inform their clients about the suitability assessment. This information can also be provided in a standardised format. However, the format used shall enable a posteriori controls to check if the information was provided.

4. Investment services enterprises may not give the impression that it is the client who decides on the suitability of the investment, or that it is the client who establishes which products fit their own risk profile. For example, enterprises may not indicate to the client that a certain product is the one that the client chose as being suitable, or require the client to confirm that a particular product or service is suitable.

5. Any disclaimers or similar statements (for example, "This offer does not constitute investment advice") designed to limit the responsibility of the investment services enterprise for the suitability assessment do not affect either the classification (e.g. as investment advice) of the service actually provided to the client or the assessment of compliance with the corresponding requirements by the investment services enterprise. If client information necessary to undertake the suitability assessment (such as holding period or information about client risk tolerance) is collected and the recommendation is based on this information, or the client gains that impression, investment services enterprises may not claim that they do not assess suitability.

6. In order to ensure that clients understand investment advice and portfolio management services provided as "robo-advice"[7], investment services enterprises must provide clients with the following information in addition to the other prescribed information:

   - a clear explanation of the extent and scope to which humans are involved and whether (and if so, how) the client can contact a human;
   - an explanation that the answers given by clients may directly affect the assessment of the suitability of the recommended investment decisions or decisions made on their behalf;
   - a description of the information sources used for the investment advice or portfolio management (for example, if an online questionnaire is used, the enterprises must state whether the answers given to the questions are the sole basis for the robo-advice, or if they have access to additional client information or accounts);
   - an explanation of how and when the information about client characteristics and the client's personal circumstances is updated.

7. Investment services enterprises must carefully consider whether their written communications are designed in such a way as to serve their purpose (e.g. the communications are made available directly to the clients and are not concealed or incomprehensible). The following points in particular must be considered by investment services enterprises that offer robo-advice:

   - emphasis given to key information such as risk factors (e.g. by using interactive fields such as pop-ups);

[7] For an explanation of the term "robo-advice", see also "Robo-advice – Automated investment advice in supervisory practice" dated 16 August 2017, available at https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2017/fa_bj_1708_RoboAdvice_en.html

- a review of whether interactive text (for instance, using interactive elements such as tooltips) should be added for certain information, or whether additional information (e.g. by means of a "Frequently asked questions" section) could be provided to otherwise help clients looking for in-depth information.

BT 7.2 Arrangements necessary to understand clients

1. Investment services enterprises shall have in place adequate policies and procedures to enable them to understand the essential facts and characteristics relating to their clients. Regardless of the means used to collect the information, investment services enterprises must ensure that the client information collected is assessed consistently.

2. Investment services enterprises' policies and procedures must enable them to collect and assess all information necessary to conduct a suitability assessment for each client, taking into account the policies described in section 7.3.

3. For example, investment services enterprises can use questionnaires such as the "WpHG questionnaire" (also in digital form), that are filled out by the clients themselves, or use information collected in the course of conversations with clients. Investment services enterprises must word the questions in such a way that they are likely to be correctly understood by clients and that any other methods used to collect information are designed in such a way that they ensure the collection of the information necessary for the suitability assessment.

4. If enterprises use questionnaires to collect client information for the suitability assessment, the design of the questionnaires must consider the most common reasons why investors might not answer questions correctly.
   In particular:

- enterprises are required to pay particular attention to ensuring that the questionnaire is complete and understandable, avoiding misleading and imprecise language; as far as possible, they should also avoid technical vocabulary.
- enterprises must create the layout carefully in order to avoid influencing the investor's decisions (typeface, line spacing, etc.);
- the questions may not be presented in condensed form (information being collected on a range of points by a single question, especially when assessing knowledge and experience, as well as risk tolerance);
- enterprises must carefully consider the sequence in which they ask the questions;
- as a rule, there may not be any option not to respond to any of the questions in the questionnaire, to ensure that the necessary information is also collected (especially where information about the investor's financial situation is being collected).

5. Investment services enterprises must also take suitable steps to allow them to assess the extent to which the client understands the notion of investment risk and the relationship between risk and reward on investments, as this is crucial for the question of whether investment services enterprises are in a position to act in the best interests of the client when undertaking the suitability assessment. When presenting the corresponding questions, the investment services enterprise must tell the client unequivocally that the purpose of its response is to assess the client's risk appetite (risk profile) and hence identify the types of products (and the corresponding risks) that are suitable for the client.

6. Information necessary to conduct a suitability assessment includes the elements referred to in section 64 (3) of the WpHG that may impact, for example, the analysis of the client's financial situation (including the client's ability to bear losses) or its investment objectives (including the client's risk tolerance).

This may comprise the following aspects:

a. marital status (especially the client's legal capacity to commit assets that may belong also to their spouse);

b. family situation (evolutions in the family situation of a client may impact their financial situation e.g. a new child or a child of an age to start university);

c. the client's age (which may be a relevant factor for assessing the investment objectives and in particular the investment risk that the investor is willing to enter into, as well as the holding period, which provides an insight into the willingness to hold an investment over a particular period);

d. employment situation (the degree of job security or pending retirement may impact the client's financial situation or investment objectives);

e. need for liquidity in certain relevant investments or need to finance future financial commitments (e.g. house purchase, education costs).

7. When collecting information about the client's investment objectives, enterprises are encouraged to consider non-financial aspects in addition to the elements designated in BT 7.2.4, and to collect information about the client's preferences with regard to "ESG" (environmental, social and governance) criteria, for example a reliable, intact governance structure, good labour relations, etc.

8. When investment services enterprises define the information considered to be necessary, they must consider the impact that any significant change in that information may have on the suitability assessment.

9. Investment services enterprises must take all appropriate steps to enable them to adequately assess their clients' understanding of the key features of the product types they offer and the associated risks. A correct assessment of the client's knowledge and experience demands in particular that investment services enterprises establish procedures that prevent self-assessment and ensure that the client's responses are consistent[8]. The assessment of the client's knowledge and experience must consist of an overall analysis of the client's understanding of the products and of the risks associated with the recommended transactions or the management of the client's portfolio.

10. It is also important for investment services enterprises to assess the client's understanding of fundamental financial concepts, such as investment risk (including cluster risk) and the relationship between risk and return. To do this, investment services enterprises are encouraged to consider using indicative, comprehensible examples of the levels of loss/returns that may arise depending on the level of risk taken, and should take into account the client's response to such scenarios.

11. When using questionnaires, investment services enterprises must design them in such a way that they can use them to collect all the necessary information about their clients. In light of the limited personal contact, this may be particularly relevant for investment services enterprises that offer robo-advice services. To ensure that they meet these requirements, enterprises must consider the following factors, among others:

[8] See BT 7.4.

- whether the information collected using the online questionnaire allows the enterprise to conclude that the advisory services provided are suitable for their clients, considering their knowledge and experience, financial situation, investment objectives and needs;
- whether the questions in the online questionnaire are sufficiently clear and/or the questionnaire has been designed in such a way that it contains further explanations or examples for the clients, if required (e.g. by using interactive elements such as tooltips or pop-ups);
- whether the clients are offered a minimum level of contact with an employee (including remote support via email or mobile phone) when they are filling out the online questionnaire; and
- whether steps have been taken to respond to inconsistent client responses (e.g. by incorporating interactive features in the questionnaire that tell clients if their responses appear to be inconsistent, and suggest that they reconsider the responses they have given; or by creating systems that identify clearly inconsistent information provided by clients for review and follow-up by the enterprise).

BT 7.3 Extent of information to be collected from clients (proportionality)

1. Before issuing recommendations in the context of investment advice or portfolio management, investment services enterprises shall always collect "all necessary information" about the client's knowledge and experience, financial situation and investment objectives. The scope of the necessary information may vary and depends on the investment advice and portfolio management to be provided, and the nature and features of the potential investment products.

2. In determining what information is "necessary", investment services enterprises shall consider, in relation to a client's knowledge and experience, financial situation and investment objectives:

   a. the type of the product or financial transaction that the enterprise may recommend or enter into (including the complexity and level of risk);

   b. the nature and extent of the services that the enterprise provides;

   c. client's needs and circumstances.

   d. type of client.

3. The WpHG allows enterprises to collect information proportionate to the type and risks of the products and services they offer, or for the products or services for which the client requests specific investment advice or portfolio management services. Enterprises may not depart from this obligation at the expense of the client.

4. For example, when providing access to complex[9] products or products assigned to a high risk class[10], they shall carefully consider whether they need to collect more in-depth information about the client than they would collect when less complex or risky products are at stake. This is so enterprises can assess the client's capacity to understand, and financially bear, the risks associated with such products[11]. Investment services enterprises are expected to adapt the level of detail of their assessment of knowledge and experience to the level of complexity of the products they offer. Among other things, it will be necessary to assess the client's ability to understand the mechanisms that make the investment product "complex", and whether the client has already traded such products (e.g. derivatives and leverage products) and for how long.

[9] See section 63 (11) of the WpHG, considering the criteria set out in BT 7.7.

[10] It is up to each investment services enterprise to define a priori the level of risk of the products it distributes.

[11] In any case, to ensure that the clients understand the investment risk and potential losses they may have to bear, the enterprises should, as far as possible, present these risks in a clear and understandable way, potentially using illustrative examples of the extent of loss in the event of an investment performing badly.

5. For illiquid financial instruments[12], the "necessary information" to be gathered shall include information on the length of time for which the client is prepared to hold the investment.

   For illiquid or risky products assigned to a high risk class, "necessary information" to be collected may include the following elements to establish whether the client's financial situation allows them to invest in such instruments:

   a. the extent of the client's regular income and total income, whether the income is earned on a permanent or temporary basis, and the source of this income (e.g. from employment, retirement income, investment income, rental yields);

   b. the client's assets, including liquid assets, investments and real property, which would include what financial investments, personal and investment property, pension funds and any cash deposits, etc. the client may have. If necessary, the enterprise must also gather information about conditions, terms, access, loans, guarantees and other restrictions, if applicable, to the above assets that may exist;

   c. the client's regular financial commitments, which would include what financial commitments the client has made or is specifically planning to make (client's debits, total amount of indebtedness and other periodic commitments, etc.).

6. In determining the information to be collected, investment services enterprises shall also take into account the nature of the service to be provided. Practically, this means that:

   a. When investment advice services are provided, enterprises shall collect sufficient information in order to be able to assess the ability of the client to understand the risks and characteristics of each of the products that the enterprise envisages recommending to that client.

   b. When portfolio management services are provided, the level of knowledge and experience needed by the client with regard to all the products that can potentially make up the portfolio may be less detailed than the level that the client should have when an investment advice service is provided. Nevertheless, even in such situations, the client shall at least understand the overall risks of the portfolio and possess a general understanding of the risks linked to each type of product that can be included in the portfolio. Enterprises shall gain a clear understanding and knowledge of the client's investor profile.

7. Similarly, the extent of the service requested by the client may also impact the level of detail collected about the client. Enterprises shall collect more information about clients asking for investment advice covering their entire investment portfolio than about clients asking for specific advice on how to invest a given amount of money that represents a relatively small part of their overall portfolio.

8. An investment services enterprise shall also take into account the relevant profile of the client when determining the information to be collected. As a general principle, more in-depth information shall be collected for clients asking for investment advice services for the first time. By contrast, where an enterprise provides investment advice or portfolio management to a professional client (who has been correctly classified as such), it is generally entitled to assume that the client has the necessary level of experience and knowledge, and therefore is not required to obtain information on these points.

[12] It is up to each investment services enterprise to define a priori which of the products it distributes it considers as being illiquid. However, it the competent authority has issued guidelines on this, they shall be taken into account.

9. Where the investment service consists of the provision of investment advice or portfolio management to "per se" professional clients under section 67 (2) of the WpHG, the enterprise is generally entitled to assume that the client is able to financially bear any related investment risks consistent with the investment objectives of that client and therefore is not generally required to obtain information on the financial situation of the client. However, such information shall be obtained where the client's investment objectives demand it. For example, where the client is seeking to hedge a risk, the enterprise will need to have detailed information on that risk in order to be able to propose an effective hedging instrument.

10. Information to be collected will also depend on the needs and personal circumstances of the client. For example, an enterprise is generally likely to need more detailed information about the client's financial situation where the client's investment objectives are multiple and/or long-term, than when the client seeks a short-term secure investment.

11. Information about the clients' financial situation includes information about their investments. It is assumed that the investment services enterprises know about the specific investments already held with them by their clients. Depending on the extent of the advice being provided (e.g. if portfolio-related advice also extends to securities accounts held by the client with other enterprises), enterprises must additionally require their clients to provide information about investments they hold with other enterprises, broken down by individual instruments if possible.

BT 7.4 Reliability of client information

1. Investment services enterprises shall take suitable steps and have suitable tools in place to ensure the reliability and consistency of the information collected about clients without relying solely on the client's self-assessment.

2. Clients are expected to provide correct, up-to-date and complete information necessary for the suitability assessment. However, the enterprises must take suitable steps to allow them to assess the reliability, accuracy and consistency of the client information they collect (as a minimum, they must assess whether the information provided by the client contains obvious discrepancies). Enterprises are responsible for ensuring that they have adequate, appropriate information for conducting the suitability assessment. Any and all agreements signed by the client or publications made by the enterprise whose purpose is to limit the liability of the enterprise for the suitability assessment are not compliant with the relevant requirements of the WpHG and the DR.

3. Any self-assessment by the client must be counterbalanced by objective criteria. For example:

    a. instead of asking whether the client is familiar with the concepts of risk/reward or risk diversification, for example, the enterprise could give examples of how these concepts may arise in practice, e.g. in the form of graphics or positive or negative scenarios.

    b. instead of asking whether a client feels sufficiently experienced to buy a certain product, the enterprise could ask the client what types of products the client is familiar with, how frequently the client trades in them and how far back those transactions were carried out.

    c. instead of asking whether clients believe they have sufficient funds to invest, the enterprise can ask the client to submit specific information about

the client's financial situation, such as the source of regular income, or whether there are any outstanding liabilities (such as bank loans or other liabilities that could materially affect the client's ability to bear financial risks or losses in connection with the investment).

d. instead of asking whether a client is willing to take risks, the asking the client what level of loss over a given time period the client would be willing to accept, either on the individual investment or on the overall portfolio.

4. When enterprises use a questionnaire to assess their clients' risk tolerance, they must examine not only the desired risk/return of future investments, but also the client's perception of risk. Although it is necessary to avoid any self-assessment with regard to the determination of risk tolerance, it is possible to ask explicitly how the client would behave or decide if faced with uncertain risks. Enterprises can also use e.g. graphics, percentages or concrete figures if they ask clients how they would react if the value of their portfolio decreases.

5. Where investment services enterprises rely on tools to be used by clients to assess suitability (such as online questionnaires or risk-profiling software), they should ensure that they have appropriate systems and controls to ensure that the tools are fit for purpose and produce satisfactory results. For example, risk-profiling software could include controls of plausibility of the replies provided by clients in order to highlight contradictions between different pieces of information collected.

6. Enterprises are additionally required to take reasonable steps to mitigate potential risks associated with the use of such tools. For example, potential risks may arise where clients are encouraged to give certain answers in order to get access to products that may not be
suitable for them (because the actual circumstances and needs of the client are not appropriately reflected).[13]

7. In order to ensure the plausibility of client information, the information collected shall be viewed as a whole. Investment services enterprises shall be alert to any relevant contradictions between different pieces of information collected, and shall contact the client if necessary in order to resolve any material potential inconsistencies or inaccuracies. Examples of such contradictions are clients who have little knowledge or experience and have a prudent risk profile, but still have high return objectives.

8. Enterprises must establish procedures for countering the risk that clients overestimate their knowledge and experience. For example, they can ask questions that enable the enterprises to assess the client's overall understanding of the features and risks of the individual product types. Such measures may be particularly important in the case of robo-advice because the risk of over-estimation rises if clients provide information through an automated (or semi-automated) system, especially in situations where there is limited or even zero personal contact between clients and the employees of the enterprise.

BT 7.5 Updating client information

1. Where an enterprise has an ongoing relationship with a client (such as portfolio management), it shall establish procedures covering the following aspects to undertake the suitability assessment:

[13] See also BT 7.5.5.

a. what elements of the client information collected have to be updated and how often they have to
be updated;

b. how the updating should be done and what the enterprise should do when it receives additional or updated information or when the client fails to provide the information requested.

2. Enterprises must update client information regularly to ensure that it is not obviously obsolete, inaccurate or incomplete. Enterprises must therefore deploy corresponding procedures to encourage clients to update the information they originally provided in the event of significant changes.

3. The frequency of updating might vary depending on, for example, clients' risk profile, taking into account the type of product being recommended. Based on the information collected about a client under the suitability requirements, the enterprise determines the client's investment risk profile, i.e. it decides what type of investment services or products can in general be suitable for the client, taking into account the client's knowledge and experience, financial situation (including the client's ability to bear losses) and investment
objectives (including the client's risk tolerance). A risk profile that enables access to a broader range of risky products for the client requires more frequent updating. Certain events might also trigger an updating process, for example the client
reaches retirement age.

4. Updating can, for example, be carried out during regular meetings with clients or by sending a questionnaire to clients to update their information. Resulting measures could include changing the client's profile based on the updated information collected.

5. Enterprises should take steps to ensure that clients are not tempted to update their profile in such a way that a particular investment product that would actually be unsuitable for them appears to be suitable, although there has been no change in the clients' actual circumstances.[14] Enterprises are encouraged in this connection to introduce procedures in the course of the regular control activities under AT 6 to verify before or after transactions whether a client's profile was updated unreasonably often or only a short time after the last change (in particular if that change was made at almost exactly the same time as a recommended investment). This is particularly important if there are conflicts of interest, e.g. in the case of self-placements or if an enterprise receives inducements to distribute a product. The communication channel with the client (e.g. personal consultation or using an automated system) must also be considered in this context.

6. Enterprises must inform their clients about changes to the profile due to the update, regardless of whether it becomes more risk-tolerant (and hence gains access to a broader range of risky products, which is associated with the possibility of greater losses) or, conversely, becomes more conservative (with the range of products suitable for this profile therefore possibly being limited).

BT 7.6 Client information for legal entities or groups

1. Investment services enterprises must have predefined policies governing how the suitability assessment will be undertaken if a client is a legal person or a group of two or more natural persons or where one or more natural persons are represented by another
natural person. The policies must state for each of these situations how information

[14] See also BT 7.4.6.

must be collected and suitability assessed in order to comply with the statutory requirements. Enterprises must inform these clients unequivocally in advance about who will be subjected to the suitability assessment, how it will be undertaken in practice, and the expected impact on the clients concerned based on the policies in force.

2. Enterprises must examine whether there are any national statutory requirements in this respect (this could be the case, for instance, if appointment of a legal representative is required by law, for example in the case of minors or legally incapable persons, or in the case of legal persons).

3. The policies must make a clear distinction between situations in which a representative is stipulated by applicable national law, for example in the case of legal persons, and situations in which no representative is stipulated. Enterprises must primarily implement procedures for the latter situations. If the policies provide for agreements between clients, those clients must be notified clearly and informed in writing about any consequences of such agreements for the protection of their respective interests. Enterprises must document the corresponding procedures and steps so as to enable follow-up checks.

BT 7.6.1 Situations in which applicable national law stipulates a representative

1. The second subparagraph of Article 54(6) of the DR sets out how the suitability assessment has to be carried out where the client is a natural person who is represented by another natural person, or where the client is a legal person who has requested treatment as a professional client. Regardless of the fact of whether treatment as a professional client was requested or not, the same approach should be applied to all legal persons.

2. Compliance with this requirement includes a review of whether the representative is actually authorised – under applicable national law – to carry out transactions on behalf of the underlying client.

BT 7.6.2 Situations in which applicable national law does not stipulate a representative

1. If the client consists of a group of at least two natural persons and if applicable national law does not stipulate a representative, the enterprise's policies must define the person from whom the necessary information has to be collected and how the suitability assessment is to be undertaken. Clients should be appropriately informed about this and about the consequences of this approach on the performance of the suitability assessment in practice.

2. Enterprises can consider the following approaches:
   - request the group of at least two natural persons to appoint a representative, or
   - collect information on each individual natural person and assess suitability for each individual natural person.

BT 7.6.2.1 Requesting a group of at least two natural persons to appoint a representative

1. If the group of at least two natural persons agrees to appoint a representative, the approach described in the second subparagraph of Article 54(6) of the DR can be applied: the relevant factors in this case are the knowledge and experience of the representative, whereas the financial situation and investment objectives are those of the underlying natural persons. This appointment must be made in writing and under and in compliance with the applicable national

law, and must be kept by the enterprise concerned. Clients that are part of the group must be informed clearly and in writing about the potential consequences of an agreement between clients for the protection of their respective interests.

2. In accordance with the enterprise's policies, however, the underlying client or clients can require them to agree on the investment objectives.
3. If the parties are unable to designate the person(s) from whom the information about knowledge and experience will be collected, the basis for measuring the financial situation for the purposes of undertaking the suitability assessment, or to agree on a common investment objective, the enterprise must adopt as prudent an approach as possible and base the information on the person with the least knowledge and experience, the weakest financial situation and the most conservative investment objectives. Alternatively the enterprise's policies may stipulate that it cannot provide any investment advice or portfolio management in such a situation. Enterprises must act prudently at least if there are considerable differences between the knowledge and experience or the financial situation of the various clients belonging to the group, or if the investment advice or portfolio management may cover leverage products or contingent liability transactions that are exposed to a risk of considerable losses that could exceed the original investment of the group of clients. Enterprises must clearly document the chosen approach.

BT 7.6.2.2 Collecting information on each individual natural person and assessing suitability for each individual natural person

If an enterprise decides to collect information on each individual client and assess suitability for each individual client in the group, it may happen that there are considerable differences between the individual clients in terms of their characteristics (and the enterprise would, for example, assign them to different investment profiles), which could call into question the consistency of investment advice and portfolio management relating to the assets or portfolio of that group of clients. In such a situation, a product may be suitable for one client or group, but not for another. The enterprise's policies must spell out clearly the approach to be adopted in such situations. In turn, the enterprise must adopt a conservative approach in such cases and consider the information on the client or group with the least knowledge and experience, the weakest financial situation and the most conservative investment objectives. Alternatively the enterprise's policies may stipulate that it cannot provide any investment advice or portfolio management in such a situation. Enterprises may not combine information on all clients who are part of a group and use an average profile of the knowledge and expertise of all of the clients for the purposes of the suitability assessment, as it would not act in the interests of its clients in such cases.

BT 7.7 Arrangements necessary to understand products

1. Enterprises must implement appropriate procedures to allow them to understand the product features and specificities (including costs and risks), so that they can make suitable investment recommendations or invest in suitable products on behalf of their clients.
2. Enterprises must implement robust procedures and tools so that they can classify the individual products of their investment universe objectively and consistently based on the various characteristics and relevant risk factors (such as credit risk, market risk, liquidity risk[15],

[15] The identified liquidity risk should not be offset by other risk indicators (e.g. indicators defined for assessing credit/counterparty default risk and market risk). The reason for this is that the liquidity characteristics of products should be offset by the information on the client's willingness to hold an investment for a certain period (the "holding period").

etc.). Enterprises must consider their own analysis undertaken for product governance/target market identification purposes.[16]

In this context, enterprises must carefully consider how certain products may develop under certain circumstances (e.g. convertible bonds or other debt instruments subject to bail-in[17] whose form may change and that may be converted into shares).

3. Enterprises should pay particular attention to considering the level of "complexity" of products that must be balanced by information on the clients (in particular with regard to their knowledge and experience). If enterprises determine the level of complexity of the products for the suitability assessment and grade the products appropriately on that basis, they must also, however, consider the criteria for determining complexity defined in the WpHG.
4. Enterprises must establish procedures to ensure that information used to understand and correctly grade investment products in their product range is correct, consistent and up-to-date. When introducing these procedures, enterprises must consider the various features and the nature of the products concerned.
5. Enterprises must also verify the information used to establish whether any changes may affect the grading of the product. This is of particular importance in light of the continuous transformation and ever faster developments on the financial markets.

BT 7.8 Identifying suitable investments for clients

1. In order to match clients with suitable investments, investment services enterprises shall establish policies and procedures to ensure that the following aspects are continuously taken into account:

   a. all available information about the client that is necessary for assessing whether an investment is suitable, including the client's current portfolio of investments (and asset allocation within that portfolio);

   b. all characteristics of the investments considered in the suitability assessment, including all relevant risks and any direct or indirect costs to the client.

2. The suitability assessment should be undertaken not only in relation to recommendations to buy a product. Any recommendation must be suitable, including a recommendation to buy, hold or sell, or not to do so.[18]

3. Investment services enterprises that rely on tools in the suitability assessment process (such as model portfolios, asset allocation software or a risk-profiling tool for potential investments), shall have appropriate systems and controls to ensure that the requirements of the WpHG and the DR governing the suitability assessment are observed when using these tools.

   In this regard, the tools shall be designed so that they take account of all the relevant specificities of each client or product. For example, exclusively using tools that classify clients or products broadly would not be fit for purpose.

4. The strategies and processes in the enterprise shall ensure the following:

[16] Specifically, section 63 (5) of the WpHG requires an enterprise to "understand the financial instruments it offers or recommends", so that it can discharge its obligation to ensure the compatibility of the products offered or recommended with the end client's relevant target market. Under section 96 of the WpHG, this also applies to structured deposits.

[17] See Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz*), Regulation (EU) 806/2014.

[18] See Recital 87 of the DR and BT 6.

a. the investment advice and portfolio management provided to the client take account of an appropriate degree of risk diversification,

b. the client has an adequate understanding of the relationship between risk and return, i.e. of the necessarily low remuneration of risk free assets, of the incidence of time horizon on this relationship and of the impact of costs on their investments,

c. the financial situation of the client can finance the investments and the client can bear any possible losses resulting from the investments,

d. any personal recommendation or transaction entered into in the course of providing investment advice or portfolio management, where illiquid products are involved, takes into account the length of time for which the client intends to hold the investment,

e. any conflicts of interest are prevented from adversely affecting the quality of the suitability assessment.

5. When deciding on the methodology to be introduced to undertake the suitability assessment, the enterprise must additionally consider the nature and features of the services offered and, in general terms, its business model (e.g. whether the investment advice is geared to the client's portfolio or to individual products). For example, if an enterprise manages a portfolio or advises clients on their portfolios, it must introduce a methodology that allows it to undertake the suitability assessment on the basis of the entire client portfolio.

6. When undertaking the suitability assessment on the one hand in accordance with BT 7.3.6 of these Guidelines, enterprises that provide portfolio management must assess the knowledge and experience of the client in relation to the individual types of products that come into question for the client's portfolio, as well as the types of risk in connection with the management of the client's portfolio. Depending on the level of complexity of the products concerned, the enterprise must assess the client's knowledge and experience in greater detail, and not limit itself solely to the type to which the product is allocated (e.g. subordinated debt instruments rather than bonds in general). On the other hand, the suitability assessment relating to the effects of the instrument(s) and transaction(s) at the level of the overall client portfolio can be undertaken in light of the client's financial situation and investment objectives. If the suitable investment strategy for the client is defined in sufficient detail in the portfolio management agreement, and if this investment strategy is adhered to by the enterprise, the assessment of the suitability of investment decisions can be undertaken in practice by referring to the investment strategy defined in the portfolio management agreement. The agreed investment strategy must be reflected overall in the client portfolio.

   If an enterprise undertakes a suitability assessment covering the entire client portfolio in the context of investment advice, this means, first, that the client's knowledge and experience relating to each investment product and the risks associated with the transaction concerned must be assessed. Second, the suitability assessment relating to the effects of the product and transaction at the level of the overall client portfolio can be undertaken in light of the client's financial situation and investment objectives.

7. If an enterprise undertakes a suitability assessment covering the entire client portfolio, it must ensure a reasonable level of risk diversification in the client portfolio and take into account various risks to which the client portfolio is exposed (currency risk, market risk, issuer risk, etc.). In cases in which, for example, the size of the client portfolio is not sufficient, in the enterprise's view, to ensure effective diversification of issuer risk, the enterprise can recommend asset classes to this client that are covered by specific safeguards or that are inherently diversified (e.g. a diversified investment fund).

Enterprises must consider credit risk in particular and pay particular attention to whether the client portfolio consists solely or predominantly of products of a single issuer or issuers belonging to the same group. The reason is that concentrating a client portfolio on products issued by a single undertaking (or by undertakings in the same group) can lead to the client losing the entire capital invested in the event of the default of that undertaking.[19] In addition to the procedures described in BT 7.7 that also address credit risk, enterprises must also implement measures and procedures to ensure that concentration with regard to credit risk is identified, controlled and mitigated (e.g. by defining ex ante thresholds).[20]

8. To ensure the consistency of suitability assessments, which may also be undertaken with the help of automated systems (even if contact with the client does not take place using automated systems), enterprises must monitor and test the algorithms on which the recommended transactions or transactions executed on behalf of the clients are based. When defining these algorithms, enterprises must consider the nature and features of the products that are included in their offering. In particular, enterprises must, as a minimum:
   - implement appropriate documentation of the system design showing clearly the purpose, scope and configuration of the algorithms. Decision trees or decision rules used must form part of this documentation;
   - have a documented testing strategy that explains the scope of the tests for the algorithms. This must include testing plans, testing scenarios, testing outcomes, error rectification (if applicable) and the final testing outcomes;
   - have adequate policies and procedures in place for managing changes to an algorithm and monitor and document those changes. This also includes implementing security measures to monitor and prevent unauthorised access to the algorithm;
   - revise and update the algorithms to ensure that they are adapted to relevant changes that could impair their effectiveness (e.g. market changes and changes in applicable law);
   - have adequate policies and procedures in place to enable errors in the algorithms to be identified and rectified appropriately, as well as e.g. discontinue advisory activities if it can be assumed that these errors could result in inappropriate advice and/or a breach of relevant legal requirements;
   - have adequate resources, including human and technical resources, to be able to adequately and promptly monitor the advisory services provided and thus verify the performance of the algorithms, and
   - have an appropriate internal control process that ensures that the steps described above are also implemented.

<u>BT 7.9 Costs and complexity of equivalent products</u>

1. Enterprises must implement procedures that, in connection with the suitability assessment, allow them to undertake a detailed examination of alternative investment opportunities, considering costs and complexity, before making a decision on the investment products that will be recommended or that will be invested on behalf of the client in the course of portfolio management.

[19] In the case of self-placements, enterprises should refer to ESMA's 2016 Statement on the Bank Recovery and Resolution Directive (BRRD), under which they should "avoid an excessive concentration of investments in financial instruments subject to the resolution regime issued by the institution itself or by entities of the same group in the investor's portfolio". ("MiFID practices for firms selling financial instruments subject to the BRRD resolution regime" (ESMA/2016/902).

[20] In line with this ESMA Statement, enterprises should also consider the specific features of the securities offered (including their risk characteristics and the circumstances of the issuer) as well as the financial situation of the clients, including their ability to bear losses and their investment objectives, including their risk profile.

2. Enterprises must have a process in place that considers the nature of the service, the business model and the nature of products offered so as to assess the available products that are mutually "equivalent" in terms of meeting the client's needs and concerns, such as products with similar target markets and similar risk/reward profile.
3. To determine the cost factor, enterprises must consider all relevant costs and fees that are listed in the relevant provisions under section 63 (7) of the WpHG and the corresponding provisions of the DR. The criteria referred to in module BT 7.7 must be used to determine complexity. If enterprises only offer a limited number of products or only recommend one type of product, with the result that the assessment of "equivalent" products is only possible to a limited extent, clients must be informed of this fact. In accordance with section 64 (2) no. 2 of the WpHG, client must be adequately informed about the extent to which the product offering is limited.[21]
4. If an enterprise uses common portfolio management strategies or model portfolios that (in line with the enterprise's policies) are used for different clients with the same investment profile, the assessment of costs and complexity in terms of "equivalent" products may be undertaken centrally at a higher level (e.g. in an investment committee or another body that is responsible for deciding common portfolio management strategies or model portfolios). The enterprise must continue to ensure that the selected investment products are individually suitable and match the profile of their clients.
5. Enterprises must be able to justify decisions in favour of a more expensive or more complex product, although additional criteria can be considered in the production selection process in the context of investment advice or portfolio management (e.g. diversification of the portfolio, liquidity or risk level). Enterprises must document these decisions and keep corresponding records, as these decisions must be included in the enterprise's control activities and treated with particular attention by the control function. In cases in which a large number of transactions are carried out due daily to the particular nature of the service and clients (e.g. when an asset management company outsources portfolio management or in the case of individual portfolio management mandates for professional clients), the documentation requirement can be complied with by means of a description of the equivalence assessment in the internal policies and, if applicable, in the regular reports to the portfolio management clients. The corresponding documents must be reviewed internally. When they provide investment advice, enterprises can also decide to inform clients about the decision in favour of the more expensive and more complex product. For retail investors, this can be done, for example, in the suitability statement.

BT 7.10 Costs and benefits of switching investments

1. Enterprises must implement appropriate policies and procedures for ensuring that the costs and benefits of switching investments are analysed. Enterprises must be able to demonstrate that the expected benefits of switching are greater than the costs. Enterprises must also put in place adequate controls to avoid the relevant provisions of the WpHG from being circumvented.
2. Investment decisions such as portfolio rebalancing in a passive strategy that (as agreed with the client) tracks an index are not switching within the meaning of this module. Any transaction that does not serve to track the index is deemed to be switching. For per se professional clients, the cost-benefit analysis can be undertaken at the level of the investment strategy.

[21] Under the WpHG and the DR, enterprises are not expected to examine the entire range of potential investment options on the market in order to comply with the requirement of Article 54(9) of the MiFID II Delegated Regulation.

3. In order to be able to analyse the costs and benefits of the switch, i.e. to assess the pros and cons of the new investment(s) being considered, enterprises must consider all necessary information. To determine the amount of costs, enterprises must consider all costs and fees that are listed in the relevant provisions under section 63 (7) of the WpHG and the corresponding provisions of the DR. Both monetary and non-monetary factors for costs and benefits may be relevant for the cost-benefit analysis. These include:
   - the expected net return from the proposed alternative transaction (which also includes possible up-front costs payable by the client) compared with the expected net return from the existing investment (which must also include the costs that might be incurred by client for the sale of the product contained in the client's portfolio);
   - any change in the client's personal circumstances and concerns that could be a reason for a switch, e.g. short-term liquidity requirements due to an unexpected, unplanned family event;
   - a change in the features and/or market conditions of the products that could be a reason for considering a switch in the client's portfolio, e.g. if a product becomes illiquid due to market developments;
   - benefits for the client's portfolio following the switch, such as i) greater portfolio diversification (by geographical regions, instrument type, issuer type, etc.), ii) greater alignment of the portfolio risk profile with the client's risk targets, iii) an improvement in portfolio liquidity or iv) a reduction in the portfolio's general credit risk.
4. When providing investment advice, the reasons why the benefits of the recommended switching outweigh the corresponding costs must be included in the suitability assessment that the enterprise must provide to the retail investor before the agreement is concluded[22].
5. In addition, enterprises must introduce processes and controls so that they can verify that the obligation to analyse the costs and benefits of any recommended switch is not circumvented. This applies, for example, to situations in which a recommendation to sell a product (e.g. days later) is followed by a recommendation to buy another product, although both transactions were closely linked from the outset.
6. If an enterprise uses common portfolio management strategies or model portfolios that (in line with the enterprise's policies) are used for different clients with the same investment profile, the analysis of the costs and benefits of any switch can be undertaken at a higher level than the level of the individual client or transaction. If a decision on a switch is taken centrally, for example in an investment committee or another body that is responsible for defining common portfolio management strategies or model portfolios, the cost-benefit analysis can be undertaken at the level of that committee. If a decision on such a switch is taken centrally, the cost-benefit analysis undertaken at this level generally applies to all comparable client portfolios, without the need to make an assessment for each individual client. The enterprise can define, at the level of the relevant committee, the reason why any resolved switch is not made for certain clients. Although the cost-benefit analysis can be undertaken at a higher level in such situations, the enterprise must still have adequate controls in place to verify that there are no special characteristics of certain clients that might require a more specific analysis.
7. If a portfolio manager has agreed a bespoke mandate and a customised investment strategy with a client because of that client's specific investment needs, it is appropriate, in contrast to the preceding remarks, to undertake a cost-benefit analysis of the switch at the level of the client.[23]
8. Regardless of this, if the portfolio manager is of the opinion that the composition or parameter of a portfolio needs to be changed in some way that is not compliant with the mandate agreed with the client (e.g. a share-based strategy will be replaced by a strategy focused on fixed

[22] See BT 6.

[23] For per se professional clients, see BT 7.10.2.

income), the portfolio manager must discuss this situation and review or repeat the suitability assessment in order to agree a new or modified mandate.

BT 7.11. Record-keeping obligations

1. As a minimum, enterprises must
   a. ensure orderly and understandable documentation with regard to the suitability assessment and therefore maintain adequate recording and retention arrangements; this also applies to collecting information from the client, any and all investment advice and all investments (or disinvestments) made following the relevant suitability assessment, as well as the corresponding suitability statements provided to the client;
   b. design record-keeping arrangements in such a way as to enable the detection of failures regarding the suitability assessment (such as mis-selling);
   c. ensure that the records, including the suitability statements provided to the clients, are accessible for the relevant persons in the enterprise and for the competent authorities;
   d. have adequate processes to mitigate any shortcomings or limitations of the record-keeping arrangements.
2. Enterprises must design their record-keeping arrangements in such a way that they can track ex post the reasons why an investment or disinvestment was made or an investment recommendation was made, even if this recommendation did not lead to an actual investment (or disinvestment). On the one hand, this could be important in the event of a dispute between a client and the enterprise. On the other, it is important for control purposes; for example, incomplete or deficient records would hamper BaFin's review of the suitability assessment, and the available information may also not be sufficient for management to identify risks of mis-selling.
3. Enterprises are therefore required to record all relevant information about the suitability assessment, such as information about the client (including how that information is used and interpreted to define the client's risk profile), information about products recommended to the client or purchased on the client's behalf and the suitability statements provided to the client. The records must include the following:
   - any changes made by the enterprise regarding the suitability assessment, in particular any change to the client's investment risk profile;
   - the types of products that fit that profile and the rationale for such an assessment, as well as any changes and the reasons for them.

BT 8 Requirements relating to remuneration systems in connection with the provision of investment services and ancillary investment services

BT 8.1 Scope and relationship with other legal requirements

1. To the extent that the Banking Act, the Regulation on the Supervisory Requirements for Institutions' Remuneration Systems, the Investment Code, a regulation issued under section 37 (3) of the Investment Code or the Insurance Supervision Act, or the Remuneration Regulation for Insurance Undertakings applies in addition to BT 8, and a requirement of BT 8 contradicts one of the above-mentioned legislative requirements, the application of those legislative requirements shall have priority over BT 8.

2. Relevant persons within the meaning of this BT 8 are persons who can have a material impact on the investment services or ancillary investment services provided or the behaviour of the investment services enterprise, including persons who are client-facing front-office staff (e.g. investment advisers), sales force staff or tied

agents, or other staff involved in the provision of investment and ancillary investment services, whose remuneration may create inappropriate incentives to act against the best interests of the client. This also includes all other persons who oversee the sales force (such as line managers or distribution officers) and who may pressurise sales staff, as well as financial analysts whose literature may be used by sales staff to induce clients to make investment decisions.

Depending on their function, staff involved in complaints handling, claims processing, client retention and product development may also be relevant persons within the meaning of this BT 8.

3. Remuneration within the meaning of this BT 8 is all forms of payments or benefits provided directly or indirectly by investment services enterprise to relevant persons who are involved in the provision of investment services or ancillary investment services to clients. It can be both financial (cash, shares, options, extension or assumption of loans, pension contributions, remuneration by third parties, e.g. through carried interest models, salary increases, etc.) and non-financial (career progression, health insurance, special allowances for cars, private use of company mobile phones, generous expense accounts, seminars in exotic destinations, etc.).

4. Financial or non-financial benefits that are awarded or paid on the basis of a statutory requirement or as statutory contributions are not considered to be remuneration. These include in particular contributions to statutory pension insurance within the meaning of Book Six of the German Social Security Code (Sozialgesetzbuch) and to occupational pension arrangements within the meaning of the German Occupational Pensions Act (Betriebsrentengesetz).

5. The requirements of this BT 8 are not applicable to remuneration that

- is agreed under a collective bargaining agreement,
- is agreed within the scope of a collective bargaining agreement through an agreement by the parties to an employment agreement on the application of the provisions of the collective bargaining agreement, or
- is agreed in a works or service agreement on the basis of a collective bargaining agreement.
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<u>BT 8.2 Formal criteria for the design and governance of remuneration systems</u>

<u>BT 8.2.1 Establishment and implementation of remuneration systems</u>

1. In consultation with its conflict of interest and risk management functions, an investment services enterprise shall establish an appropriate remuneration system that, among other things[24], is also designed to ensure that clients' interests are not impaired by the remuneration of relevant persons in the short, medium or long term.

2. The management board is responsible for the appropriate design and implementation of the remuneration system and for avoiding remuneration-related risk and the management of any residual risk. Within the scope of its business judgement, it is thus also ultimately responsible for determining the remuneration of individual relevant persons. To the extent that relevant persons are members of the management board, the administrative or supervisory body shall be responsible, rather than the management board.

3. Investment services enterprises shall document their remuneration system in writing and review it regularly. The compliance function shall be consulted in the design of remuneration systems before they are applied to relevant persons.

[24] Other criteria that are applicable in this respect arise from banking supervision law (e.g. section 25a of the KWG, section 4 of the InstitutsVergV or section 37 of the KAGB).

4. Relevant persons shall be informed at the outset in an understandable manner about the criteria that will be used to determine the amount of their remuneration and the steps and timing of their performance reviews. The criteria used by investment services enterprises to assess the performance of relevant persons (e.g. also the weighting of criteria, the exercise of judgement by the management board, the applicability of group-wide processes) shall be documented and accessible to and understandable by relevant persons.

5. Investment services enterprises shall ensure that the policies and practices for launching new products or services include an assessment of whether remuneration-related conduct of business and conflict of interest risks are associated with these products or services (for example, if particular remuneration features are already linked to the distribution of the product when the product is being developed) and whether the investment services enterprise's remuneration systems take adequate account of identified risks. If this is not the case, either the new product or service will have to be modified or the remuneration system will have to be adapted accordingly. Investment services enterprise shall appropriately document this assessment.

6. Appropriate organisational units shall be tasked with implementing remuneration systems.

7. The remuneration systems shall stipulate the effective performance of control activities by the operating areas to enable them to effectively identify cases in which relevant persons fail to act in the best interests of the client for remuneration-related reasons and to take remedial action.

BT 8.2.2 Governance of remuneration systems

1. The compliance function oversees the establishment, design and implementation of remuneration systems in accordance with the principles set out in BT 1.2.1. The assessment can be made using abstract criteria in relation to the remuneration of the management board.

2. Examples of good governance practice:

- An investment services enterprise uses a wide range of information on business quality monitoring and sales patterns, including trend and root-cause analysis, to identify areas of increased risk and to support a risk-based approach to sales monitoring, with a particular focus on high performing relevant persons (e.g. persons responsible for high levels of sales or persons with a high variable remuneration). The investment services enterprise ensures that the results of such analyses are documented and reported to the management board together with proposals for corrective action.

- An investment services enterprise uses information-gathering tools to assess the investment returns received by clients over various timelines in respect of the investment services provided by relevant persons who are remunerated by variable remuneration. The assessment of this information, rather than a sales target, is a factor in the provision of variable remuneration.

- An investment services enterprise annually assesses whether it adequately captures the qualitative data required to determine the variable remuneration it pays to relevant persons.

- In order to assess whether its incentive schemes are appropriate, an investment services enterprise undertakes a programme of contacting a sample of clients shortly after the completion of a sale involving a face-to-face sales process where it is not able to monitor recorded telephone sales conversations.

- A potentially higher risk is assumed in the case of persons with a particularly high variable remuneration, which is why they are subject to more detailed scrutiny.

- Information such as the results of earlier compliance assessments and the regular assessment in accordance with section 36 of the WpHG, justified complaints or information about reversals (e.g. because of reversals of transactions or cancellations of contracts) is used in the compliance assessment. The results flow into the design/review of the remuneration systems.

3. Example of practices that are generally prohibited:

    - An investment services enterprise fails to monitor, assess or prevent the risk posed by basing some or all variable remuneration on quantitative data.

BT 8.3 Substantive criteria for designing remuneration systems

1. When designing and reviewing remuneration systems, all

    - factors, for example the role performed by relevant persons, the type of products offered or the method of distribution (e.g. advised or non-advised distribution, face-to-face or through telecommunications), and
    - the conduct of business and conflict of interest risks that could arise

    that are relevant for the remuneration and the impact of the remuneration shall be identified and considered. In addition, the enterprise shall ensure that any residual risk is adequately managed (for example by clearly identifying the nature and source of remuneration-related conflicts of interest).

2. Remuneration systems may not be unnecessarily complicated. In particular, their design may not be so complex that any controls in place will not be as effective to identify the risk of detriment to the client. The investment services enterprise shall ensure the consistent design, application and control of remuneration systems.

BT 8.3.1 Use of variable remuneration components

1. Remuneration systems may not create incentives that may lead relevant persons to favour their own interest or the investment services enterprise's interests to the potential detriment of clients (for example in the case of self-placement or where products are sold that are more lucrative for the investment services enterprise).

2. Variable remuneration elements can be a legitimate component of performance-based remuneration systems if the requirements set out in this BT 8 are met.

3. If the remuneration consists of a variable and a fixed component, the ratio between both components shall be appropriate. The ratio is inappropriate if it is designed in contravention of the criteria set out in section 25a (5) of the KWG[25].

4. The remuneration systems shall enable the flexible management of variable remuneration and, in individual cases, the complete cancellation of the variable remuneration component.

5. When determining the remuneration for tied agents, investment services enterprise may take the tied agents' special status into account, in particular the fact that tied agents are normally self-employed sales representatives in accordance with section 84 of the German Commercial Code (Handelsgesetzbuch).

BT 8.3.2 Measuring the amount of variable remuneration components

1. The determination of variable remuneration may not be based solely on quantitative criteria (such as the value of instruments sold, sales volumes, establishment of targets for sales or new clients).

2. To measure the amount of variable remuneration, remuneration systems shall define

[25] If section 25a (5) of the KWG does not apply because of the exemption in section 2 (8)ff. of the KWG for financial services institutions, sentence 2 shall also not apply.

appropriate criteria for aligning the interests of relevant persons or the investment services enterprise with those of the clients. Appropriate criteria are in particular qualitative that encourage the relevant persons to act in the best interests of the client.

3. Examples of qualitative criteria are

- compliance with regulatory requirements (especially conduct of business rules and, in particular – if relevant – the proper conduct of the assessment of suitability of appropriateness) and internal procedures;
- fair treatment of clients, which can, for example, be measured – quantitatively – by a very low number of justified complaints over a large timescale;
- client satisfaction.

BT 8.3.3 Examples of practices for the use and measurement of variable remuneration components

1. Examples of good practice:

- The variable part of the remuneration paid out is calculated and awarded on a linear basis rather than being dependent on meeting an "all or nothing"target.
- The investment services enterprise decides to pay out the variable remuneration in several tranches over an appropriate time period or after deferral over an appropriate time period, in order to adjust for and take into account the long term results (for example, in the case of financial instruments without a fixed term, the remuneration is deferred for a certain number of years or until the financial instrument is paid out).
- The variable component of the remuneration is also based on qualitative criteria and more closely reflects the desired conduct of the employees to act in the best interests of the clients.
- References used in the calculation of variable remuneration of relevant persons are common across products sold and include qualitative criteria.
- Payment of variable remuneration may be aligned with the investment term or deferred in order to ensure that the product sold does in fact take into consideration the final return of the product for the client and, where applicable, an adjusted award of variable remuneration is made.
- Employees are paid in relation to both volume of products sold and effective return of these products for the client over an appropriate timeframe. In this instance, the assessment of financial data is used as a measure of the quality of the service provided.

2. Example of poor practices that are generally prohibited:

- The management board has defined a range of strategic objectives that the investment services enterprise should achieve in a particular year. All objectives appear to relate solely to financial or business aspects, without taking account of the potential detriment for clients of the investment services enterprise. The remuneration policy is aligned with these strategic objectives and will thus be driven to a large extent by short-term financial and business interests.
- An investment services enterprise has introduced a special bonus remuneration for advisers to encourage clients to buy particular financial instruments that are especially advantageous for the enterprise. There is a risk in this case that relevant persons will advise their clients to buy these financial instruments and sell other products that they would otherwise recommend holding.
- Executives and employees receive a large bonus for selling a particular product.

There is a risk that warnings by the risk management function will be ignored because the investment products are very lucrative for the investment services enterprise. If the identified risks occur, the products have already been sold and the bonus has been paid out.

- Remuneration systems that – without prejudice to section 5 (2) no. 2a of the WpDVerOV – could induce relevant persons to give preference to selling or pushing a financial instrument or a category of financial instruments or to make unnecessary/unsuitable sales or acquisitions for the client, because they offer different incentives for different financial instruments or use incentives to put the spotlight on new or certain financial instruments (e.g. as "product of the month" or by preferring "in-house products" over other financial instruments that are also in the enterprise's product range)

- Example: An enterprise uses remuneration systems linked to individual sales of financial instruments where the relevant person receives different levels of incentives depending on the specific financial instrument or category of products they sell.

- Example: An investment services enterprise uses remuneration systems linked to individual sales of financial instruments where the relevant person receives the same level of incentive across a range of financial instruments. However, at certain limited times, to coincide with promotional or market activity, the investment services enterprise increases the incentive paid on sales of certain financial instruments.

- Example: Incentive systems that might influence relevant persons (who may be remunerated solely by commission, for example), in cases where various groups of financial instruments may be equally suitable for clients, to sell one group of financial instruments rather than another suitable group of financial instruments because the sale of the first group of financial instruments pays substantially higher commissions.

- Inappropriate requirements that affect whether incentives are paid – in particular if payment of incentives is linked to particular conditions. These include, for example, remuneration systems that include a requirement to achieve a quota minimum sales levels for a group of financial instruments in order to earn any bonus at all, that include a requirement that the award of bonuses for sales depends on reaching a minimum sales target for each financial instrument in a range of different product types, or that reduce bonus or incentive payments if a secondary target or threshold has not been met.

- Example: Relevant persons in an investment services enterprise sell a range of financial instruments that meet different client needs, and the product range is split into three "buckets" based on the type of client need. The relevant persons can accrue incentive payments for each product sold, but these are only paid out at the end of the month if they have reached at least 50% of the target requirements for the individual buckets.

- Example: An investment services enterprise sells financial instruments with a range of optional add-on products. The relevant person receives incentive payments for sales and an additional payment if the client purchases an add-on product. However, no incentive payments are made at the end of the month unless at least 50% of the financial instruments are sold together with an add-on product.
- Remuneration systems that create a disproportionate return for marginal sales, for example where relevant persons need to achieve a minimum level of sales before incentive payments can be earned or incentives are increased, or that include "accelerators" where crossing a threshold increases the proportion of bonus earned, or incentives are payable retrospectively based on all sales rather than just those above a threshold.

- Example: An investment services enterprise makes accelerated incentive payments to relevant persons for each product sold during a quarterly

period as follows:

80-90% of target	no payments
91-100% of target	EUR 50 per sale
101-120% of target	EUR 75 per sale
101-120% of target	EUR 100 per sale
>120% of target	EUR 125 per sale

This example can also apply where the relevant person receives an increasing share of commission or income generated.

- Example: An investment services enterprise uses the same accelerated scale as the enterprise in the example shown above, but the increase in payments per sale is applied retrospectively to all sales in the quarter, e.g. on passing 91% of target the incentive payments accrued to date at the rate of EUR 50 per sale are increased to EUR 75 per sale. This creates a series of "cliff edge" points where one additional sale required to reach a higher target band causes a disproportionate increase in the incentive payment.

3. Examples of poor practices that are always prohibited:

- Rather than considering the suitability of a product for a client, relevant persons focus on the sale of products that have a short investment term in order to earn remuneration from re-investing the product after the short term.
- Relevant persons engage in frequent buying and selling of financial instruments in a client's portfolio in order to earn additional remuneration without considering the suitability of this activity for the client.
- Variable salaries where the arrangements vary base pay (up or down) for relevant persons based on performance against sales targets (i.e. purely quantitative criteria): in such cases, the relevant person's entire salary can become – in effect – variable remuneration.
- Example: An investment services enterprise will reduce a relevant person's basic salary substantially if they do not meet specific sales targets. There is therefore a risk that they will make inappropriate sales of financial instruments to avoid this outcome. Equally, relevant persons may be strongly motivated to sell by the prospect of increasing basic salary and associated benefits.

BT 9 Conflicts of interest in connection with sliding scale commissions

1. A "sliding scale commission" is the performance-related award of monetary or non-monetary benefits with variable, and normally progressive, rates or scales. Depending on the commission model, the nature and scope of the commission can depend on certain variables, e.g. reaching certain sales, revenue or portfolio levels. The performance-related component of the benefits also applies if it affects a different measurement period.

2. If it is possible that an investment services enterprise will receive sliding scale commissions relating to investment services or ancillary investment services, this shall be explicitly stated as a potential conflict of interest in the conflict of interest policy to be prepared by investment services enterprises in accordance with Article 34(1) sentence 1 of the DR, which shall explicitly specify which procedures were followed and which measures were adopted in order to prevent or manage the potential conflicts of interest resulting from the potential receipt of sliding scale commissions.

3. This shall not affect the other requirements relating to conflicts of interest and inducements, in particular sections 64 (5) and (7), 70 of the WpHG and sections 6 and 7 of the WpDVerOV.

BT 10 Record-keeping obligations under section 70 (1) sentence 2 of the WpHG

The record-keeping obligations under section 70 (1) sentence 2 of the WpHG in conjunction with section 6 (3) of the WpDVerOV are set out in greater detail in the following.

1. Under section 70 (1) sentence 2 of the WpHG, investment services enterprises shall hold evidence that all inducements paid or received by them are designed to enhance the quality of the relevant service to the client.

2. To meet this condition, section 6 (3) no. 1 of the WpDVerOV requires investment services enterprises to keep an internal list of all inducements they receive from a third party in relation to the provision of investment services or ancillary investment services (list of inducements).

3. Under section 6 (3) no. 2 of the WpDVerOV, investment services enterprises shall also record

    - how the inducements received or paid, or inducements that it intends to receive or pay, enhance the quality of the services provided to the relevant clients (list of applications), and

    - the steps taken in order not to impair the duty of the investment services enterprise to act honestly, fairly and professionally in accordance with the best interests of the client (list of measures).

<u>BT 10.1 List of inducements</u>

1. Any and all inducements accepted by investment services enterprises from third parties in relation to the provision of investment services or ancillary investment services in each financial year shall be recorded in an internal list of inducements. As a minimum, the description shall distinguish between monetary inducements from sales commissions, trail commissions, brokerage commissions and other commissions and fees, and non-monetary inducements.

2. The list of inducements shall be updated continuously and finalised once a year for each financial year without undue delay following the end of the financial year. If annual financial statements are required to be prepared, finalisation of the list of inducements within the period specified for preparation of the annual financial statements is considered to be without undue delay. The list of inducements can be maintained in written or electronic form.

3. Monetary inducements received, i.e. accepted and kept, in the previous financial year shall be listed by amount. The amount of non-monetary inducements that are not minor (see section 6 (1) of the WpDVerOV) and were received shall be disclosed. For minor non-monetary inducements, it is enough to described them generically.

4. Inducements that are forwarded to clients do not have to be included in the list of inducements. In this case, the amount forwarded shall be recorded separately in accordance with section 83 (1) of the WpHG. Alternatively, however, inducements forwarded to clients may be included in the list of inducements and shall then be designated as such.

<u>BT 10.2 List of applications</u>

1. To the extent that investment services enterprises accept and keep monetary and/or

non-monetary inducements, they shall maintain and continuously update a list of applications in addition to the list of inducements.

When managing the list of applications, a distinction shall be made between inducements received on the one hand and inducements paid on the other, with their application presented in each case in a separate section of the list of applications. In separate sections of the list of applications that are not required to be continuously updated, enterprises shall also describe how inducements whose receipt or grant is intended in the coming financial year are expected to enhance the quality of the services provided to the relevant clients.

2. The investment services enterprises shall also describe in the list of applications how the inducements received or granted enhance the quality of the services provided to the relevant clients. If these are monetary inducements, they shall disclose the amount for which inducements were used or are expected to be used for the quality enhancement concerned.

   In the case of minor non-monetary inducements, it is enough to describe generically the quality enhancement concerned for the relevant clients. For inducements that have been granted and for inducements that are intended to be granted, it is also enough to describe generically the quality enhancement concerned for the relevant clients of the investment services undertaking granting the inducement.

3. A simple summary comparison of inducements received and granted or future inducements across the company and their actual or planned application for enhancing quality is not enough.

   The applications for quality enhancement purposes related to the individual investment services and ancillary investment services shall be broken down by

   - the relevant standard cases in section 6 (2) sentence 1 no. 1 of the WpDVerOV. As well as the standard cases, one or more additional categories shall be established for potential further additional or higher level services for the client concerned;

   - the clients concerned for whom the additional or higher level service offered represents a quality enhancement. Homogeneous client groups in which a majority of clients are combined may be formed for this description.

   The application of the inducements for each standard case used and for each client or client group concerned shall be recorded in detail.

4. With the exception of the section on future inducements, the list of applications shall be continuously updated. The list of applications shall be prepared once a year for each financial year without delay following the end of the financial year. If annual financial statements are required to be prepared, finalisation of the list of applications within the period specified for preparation of the annual financial statements is considered to be without undue delay. The list of applications can be maintained in written or electronic form.

5. If quantification of the payments for the application to enhance quality for the client or group of clients concerned as an exact amount is only possible with significant effort, the enterprise may also make estimates.

   This applies in particular to the amount of still unpaid inducements whose receipt or grant is intended (for example because the payment of an inducement still depends on a future event). In connection with the intended inducements, however, there should also be intended or planned measures to enhance quality. The inducements and applications for quality assurance that have not yet been paid shall be compared separately in the list of applications. In particular – subject to no. 6 – it is not possible

to offset payments in the financial year with inducements already received.

6. As a general principle, inducements received shall be used promptly for quality enhancements for the client or group of clients concerned. An application in the following financial year is only permitted in objectively justified cases. If inducements were not used for measures to enhance quality for the client or group of clients concerned in the financial year in which they were received by the enterprise, they shall be reported as such in the list of applications.

7. On request, the investment services enterprise shall be able to explain to BaFin and the auditor in accordance with section 89 of the WpHG in detail the application of monetary and non-monetary inducements received for measures to enhance the quality for the clients concerned.

BT 10.3 List of measures

1. The steps (measures) taken in order not to impair the duty of the investment services enterprise to act honestly, fairly and professionally in accordance with the best interests of the client shall be documented in a list of measures. The description of the individual measures relating to the relevant investment service or ancillary investment service shall distinguish between non-recurring, recurring and continuous measures.

2. The list of measures shall be updated continuously and finalised once a year for each financial year without undue delay following the end of the financial year. If annual financial statements are required to be prepared, finalisation of the list of measures within the period specified for preparation of the annual financial statements is considered to be without undue delay. The list of measures can be maintained in written or electronic form.

BT 10.4 Quality enhancement

1. In line with Recital 23 of Delegated Directive (EU) 2017/593, maintaining an enhanced level of quality that has already been reached shall be considered to be a permitted quality enhancement of the service provided to the client concerned.

2. In accordance with section 6 (2) sentence 1 no. 1 of the WpDVerOV, an inducement is designed to enhance the quality of the service provided to the client if it is justified by the provision of an additional or higher level service to the relevant client that is proportional to the level of inducements received.

   In light of this, the ongoing services within the meaning of section 6 (2) sentence 1 no. 1 (b) (bb) of the WpDVerOV should also generate appropriate value added for the client. Advice about optimally structuring the client's assets should therefore not merely be based on simple, global assumptions about asset allocation. Rather, structuring the total assets should consider the client's individual risk appetite, investment objective and investment horizon – and in particular also the client's liquidity requirements over time. The financial instruments held by the client should be structured using appropriate financial ratios based on the relevant client portfolio in order to qualify as an additional or higher level service.

BT 11 Qualifications of staff of investment services enterprises

The requirements relating to the qualifications of staff in accordance with section 63 (1) and section 87 (1) sentence 1, (2) and (3), (4) sentence 1 and (5) sentence 1 of the WpHG, Article 21(1)(d) and Article 22(3)(a) of the DR, Article 2(1) sentence 1 of

Delegated Regulation (EU) 2017/589 and sections 1 to 6 of the WpHGMaAnzV are set out in greater detail in the following.

Staff within the meaning of this BT 11 means investment advisers, sales staff, portfolio managers, distribution officers and compliance officers, as well as staff involved in content-related aspects of the suitability assessment process. This shall also apply to tied agents within the meaning of section 2 (10) of the KWG.

BT 11.1 General requirements

1. Investment services enterprises shall ensure that their staff possess the necessary competence, knowledge and experience to meet the relevant regulatory and legal requirements and business ethics standards, and that they know, understand and apply the internal rules and internal procedures of the investment services enterprise that ensure compliance with the regulatory and legal requirements. Staff shall have the qualifications necessary to fulfil the obligations of the investment services enterprise to be complied with in their relevant activities, reflecting the types of investment services and ancillary investment services provided.

   Examples of good practice are:

   - regular mandatory training relating to conduct of business rules and organisational requirements,
   - issuing policies for staff to define standards of business conduct and behaviour necessary for the proper provision of relevant services, whereby the investment services enterprise shall obtain written acknowledgements from staff that they have read, understood and complied with them.
   - the publication of the criteria in a way that is consistent and meaningful to clients on how staff qualification is ensured.

   Investment services enterprise shall ensure that a staff member who has not obtained the necessary qualifications may not provide the relevant investment services and ancillary investment services.

2. Investment services enterprises are required to define the roles and responsibilities of their staff.

   The assignment of staff and their relevant activities and responsibilities shall be documented, in particular for investment advisers, sales staff, portfolio managers and distribution officers.

   For investment advisers and sales staff, investment services enterprises shall ensure, when documenting the assignment of these staff members and their responsibilities, that there is a clear distinction between the responsibilities of investment advisers and sales staff, reflecting the investment services and ancillary investment services provided and in accordance with the internal organisation of the investment services enterprise.

3. Staff shall possess and maintain an appropriate qualification for which training and continuous professional development is necessary, including through specific training – especially in advance of any new investment services, ancillary investment services, financial instruments and structured deposits being offered by the investment services enterprise.

   Investment services enterprises shall, on at least an annual basis, assess the knowledge and experience of their investment advisers, sales staff, portfolio managers and distribution officers, and shall verify the relevance of continuous professional development measures offered to these staff members in order to update them. The assessment of competence shall include a review of the knowledge and experience

requirements for each staff member. Examples of good practice are:

- regular mandatory training in the form of courses, seminars, independent studies or learning with updated materials, as well as tests to verify that staff have the necessary knowledge and experience,
- training content about functions and features, including potential risks, of the (especially new) financial instruments and structured deposits available on the market, as well as about current regulatory changes,
- guidance for staff about situations in which conflicts of interest may arise and training about how to apply the rules regarding the management of conflicts of interest; this shall include in particular situations in which investment services enterprises may pay or receive inducements and training about the legal requirements regulating inducements,
- monitoring the suitability assessments provided by investment advisers and their ability to assess suitability.

4. The responsible provision of investment advice to clients in the case of supervised activities also includes the provision of the suitability statement by the supervising staff member.

5. Investment services enterprises shall train investment advisers, sales staff and portfolio managers to ensure that particular care is taken when providing information, investment services and ancillary investment services with respect to financial instruments and structured deposits characterised by greater levels of complexity. Investment advisers and portfolio managers shall know their role in the assessment of suitability; they shall be able to assess the client's needs and situation

6. Staff who are not investment advisers, sales staff, portfolio managers or sales supervisors and are therefore not subject to the special requirements, but are otherwise involved in designing and implementing the suitability assessment, must nevertheless have the necessary skills, knowledge (including of the legal requirements) and experience, depending on their concrete role in the suitability assessment process. This may involve the creation of the questionnaires, for example, the definition of the algorithms for the suitability assessment or other aspects that are necessary for undertaking the suitability assessment and monitoring compliance with the suitability criteria. It does not include purely back-office or IT functions that merely implement the aforementioned aspects, without affecting the substance of the processes.

7. Enterprises that use automated procedures (including hybrid tools) must ensure that their staff involved in development and configuring these tools
   a. have an adequate understanding of the technologies and algorithms used to provide digital advisory services (and in particular that they are able to understand the principles, risks and rules relating to algorithms underlying digital advisory services), and
   b. are able to understand and validate digital/automated advisory services provided by the algorithms.

<u>BT 11.2 Additional requirements for compliance officers</u>

1. The compliance officer shall have a sufficiently high level of expertise and experience so as to be able to assume responsibility for the compliance function as a whole and ensure that it is effective.

   It should be noted that the necessary expertise of the compliance officer may differ from investment services enterprise to investment services enterprise because of the

range of business activities, the different types of investment services and ancillary investment services, and hence the different inherent risks and conflicts of interest in each case, as these differences can lead to differences in material compliance risks; with regard to section 80 (1) sentence 1 of the WpHG in conjunction with section 25a (1) sentence 3 no. 2 of the KWG and Article 22(3)(a) of the DR, a newly appointed compliance officer may therefore have to acquire additional specialist knowledge tailored to the specific business model of the investment services enterprise, even if that compliance officer has already worked as a compliance officer in another investment services enterprise.

2. In addition to the knowledge described in section 3 (1) of the WpHGMaAnzV, the compliance officer shall have knowledge about trading surveillance if the staff of the investment services enterprise regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular. Compliance officers of investment services enterprises that use algorithmic trading systems and trading algorithms shall have an understanding of at least the fundamentals of algorithmic trading systems and trading algorithms.

3. The necessary expertise of the compliance officer also comprises the practical application of the knowledge described in BT 1.3.1.3 no. 1 of this Circular, which can be achieved in particular by specialist professional experience. Specialist professional experience can be acquired, for example, in operational positions, in control functions or in regulatory functions. As a general principle, compliance officers of investment services enterprises whose staff regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular require necessary specialist professional experience of at least six months. In light of the principle of proportionality, a shorter period may be considered for other, and in particular smaller, investment services enterprises. The specialist professional experience may also generally be acquired during a probationary period.

BT 12 Complaints management and complaints report under Article 26 of the DR

The minimum requirements for complaints management and the complaints report in accordance with Article 26 of the DR are set out in greater detail in the following.

BT 12.1 Complaints management

BT 12.1.1 Definitions

A complaint means any statement of dissatisfaction that a client within the meaning of section 67 (1) of the WpHG or a potential client (complainant) addresses to an investment services enterprise relating to its provision of an investment service or an ancillary investment service. It is not mandatory to use the term "complaint". There is no specific requirement governing the form of a complaint.

BT 12.1.2. Internal arrangements for complaints handling

1. Investment services enterprises must establish, implement and maintain effective and transparent complaints management policies and procedures for the prompt handling of clients' or potential clients' complaints (Article 26(1) sentence 1 of the DR).
2. The complaints management policy must provide clear, accurate and up-to-date information about the complaints handling process (Article 26(1) sentence 3 of the DR). The policies must define the procedure for submitting complaints, complaints handling, including responsibilities,

the procedure for following up measures instituted to comply with policies and procedures, and the internal reporting system.

3. These policies must be endorsed by the management board of the investment services enterprise (Article 26(1) sentence 4 of the DR). The management board is also responsible for implementing and monitoring compliance with the complaints management policies and procedures.
4. The complaints management policies and procedures must be documented in writing (e.g. in working and organisational instructions, manuals) and made available to all relevant employees of the investment services enterprise through suitable internal channels.
5. Investment services enterprises must safeguard the internal flow of information and the establishment of and compliance with the internal reporting lines.
6. Investment services enterprises must establish a complaints management function responsible for the investigation of complaints (Article 26(3) sentence 1 of the DR). This function may be carried out by the compliance function (Article 26(3) sentence 2 of the DR).
7. The complaints management function ensures that
   - all complaints are examined objectively and appropriately in line with the complaints management policies and procedures; and that
   - potential conflicts of interest are identified and that anything that compromises the handling of complaints is avoided.

BT 12.1.3. Internal complaints handling procedures

1. Investment services enterprises must keep a record of the complaints received and the measures taken for their resolution (Article 26(1) sentence 2 of the DR).
2. All complaints, their handing, the measures taken and the final decisions must be systematically recorded without any unnecessary delay (internal complaints register, see Annex I to the DR, penultimate row). The requirements of Article 72 of the DR apply to the manner in which records are retained and to the internal complaints register.
3. The records must be retained for a period of at least five years (section 9 (4) of the WpDVerOV).
4. The investment services enterprise's compliance function must analyse complaints and complaints handling data to ensure that it identifies and addresses any risks or issues (Article 26(7) of the DR), e.g. by means of the following measures.
   - Analysing the causes of each and every complaint so as to identify the causes that are common to types of complaint,
   - Considering whether such root causes may also affect other processes or products; this also applies to processes or products that are not directly complained of,
   - Correcting the causes, where it appears reasonable to do so and is possible.
5. The knowledge obtained from the handling of complaints must be incorporated into the risk management system and taken into consideration by the internal audit function.
6. Investment services enterprises must publish the details of the process to be followed when handling a complaint (Article 26(2) sentence 1 of the DR). The detailed information must be easily accessible (e.g. in brochures, pamphlets, contract documents, or on the investment services enterprise's website). Such details must include information about the complaints management policy and the contact details of the complaints management function (Article 26(2) sentence 2 of the DR). The following issues in particular must be addressed:
   - how to complain (e.g. the information to be provided by the complainant, the complainant's contact details, the person or office at the supervised enterprise to whom the complaint should be directed).
   - the process that will be followed when handling a complaint (e.g. indicative handling timelines).

- the availability of a competent authority or alternative dispute resolution mechanism.

The information provided must be clear, accurate and up-to-date.

7. The information on the complaints management procedure must also be provided to clients or potential clients on request or when acknowledging a complaint (Article 26(2) sentence 3 of the DR).
8. Investment services enterprises must enable clients and potential clients to submit complaints free of charge (Article 26(2) sentence 4 of the DV).
9. Investment services enterprises must seek to gather and investigate all relevant evidence and information regarding the complaint.
10. When handling a complaint, investment services enterprises must communicate with clients or potential clients clearly in plain language that is easy to understand, and must reply to the complaint without undue delay (Article 26(4) of the DR). When an answer cannot be provided within the defined reasonable time limit, investment services enterprises must inform the complainant about the causes of the delay and indicate when the investigation by the investment services enterprise is likely to be completed.
11. Investment services enterprises must communicate their position on the complaint to the clients or potential clients and inform the clients or potential clients about their options, including that they may be able to refer the complaint to an alternative dispute resolution entity, or that the client may be able to take civil action (Article 26(5) of the DR).
12. All final answers to the complainant must be provided on paper or in another durable medium, to the extent that the complainant has not expressly demanded an oral answer only. Alternatively, oral complaints can only be answered only orally if the complainant consents to this.

BT 12.2 Complaints report

1. The complaints report in accordance with Article 26(6) of the DR (complaints report) shall be submitted once a year by 1 March for the preceding calendar year.

   The first complaints report, which shall contain all the information required by no. 3 below, shall be submitted by 1 March 2020 for calendar year 2019.

   The complaints report for calendar year 2018 shall be submitted by 1 March 2019 and shall, as a minimum, contain the following information: the number of complaints in accordance with Section A (b) and (c) of no. 3 below, as well as the information required by Section C of no. 3 below.

2. The complaints report should be submitted electronically in accordance with BaFin's requirements for the file format and submission method.

3. The complaints report contains the following information, which shall be aggregated in accordance with the Annex to BT 12.2. of this Circular:

   Section A:

   a. The number of complaints, both as a total and broken down by the individual investment services in accordance with section 2 (8) of the WpHG, the safe custody business in accordance with section 2 (9) no. 1 of the WpHG, the other ancillary investment services in accordance with section 2 (9) of the WpHG and "Miscellaneous";

      a complaint shall be allocated to a category based on the primary focus of the complaint, i.e. complaints shall be counted singly and not more than once;

   b. information about the processing status as at 31 December of the calendar year, in each case in aggregated form (broken down by the number of complaints

received in the calendar year, the number of complaints resolved in the calendar year, the number of complaints outstanding at the reference date, the number of complaints that were outstanding as at 31 December of the preceding calendar year);

c. information about how many complaints in the calendar year were resolved at least partly in favour of the complainant, the number of goodwill payments made in the calendar year and court and arbitration proceedings pending in the calendar year as a result of complaints;

Section B:

an overview of the reasons for complaints, disclosing the number of cases classified by the following reasons for complaints: (1) "Order execution (recording, execution including best execution, settlement)", (2) "Record-keeping obligations (e.g. suitability statement)", (3) "Collecting client information", (4) "Recommendation (suitability)", (5) "Fees, charges, costs, inducements", (6) "Conflicts of interest (avoiding, managing, disclosing)", (7) "Explanation of risks", (8) "Secondary market (price quotations)", (9) "Custody, administration" and (10) "Miscellaneous";

complaints shall be allocated to reasons for complaints based on the primary focus of the complaint, i.e. complaints shall be counted singly and not more than once;

Section C:

Information about any staff-related and organisational consequences of complaints.

4. The complaints report shall comprise complaints by clients within the meaning of section 67 (1) of the WpHG and potential clients, as well as complaints received by tied agents within the meaning of section 2 (10) sentence 1 of the KWG.

BT 13 Complex debt instruments and structured deposits in accordance with section 63 (11) no. 1 of the WpHG

This module expands on the requirements of section 63 (11) no. 1 b), c) and e) of the WpHG. It defines criteria used to assess whether debt instruments incorporate a structure that makes it difficult for clients to understand the risk involved. This module also defines criteria used to assess whether structured deposits incorporate a structure that makes it difficult for clients to understand the risk of return or the cost of exiting before term. Additionally, this module defines the term "embedded derivative" for the purpose of section 63 (11) no. 1 b) and c) of the WpHG.

The examples given in the following are not exhaustive.

BT 13.1 Debt instruments embedding a derivative, section 63 (11) No. 1 b) and c)

For the purpose of section 63 (11) no. 1 b) and c) of the WpHG, an embedded derivative is interpreted as meaning a component of a debt instrument that causes some or all of the cash flows resulting from the financial instrument to be modified according to one or more defined variables.

Examples:

- convertible and exchangeable bonds;
- index-linked bonds and turbo certificates;

- CoCo bonds (contingent convertible bonds);
- callable und puttable bonds;
- credit linked notes;
- warrants.

BT 13.2 Debt instruments incorporating a structure making it difficult for the client to understand the risk

For the purpose of points (b) and (c) of section 63 (11) no. 1 of the WpHG, debt instruments incorporating a structure making it difficult for the client to understand the risk include any of the following, among others:

1. Debt instruments whose return or performance depends on the receivables, either fixed or revolving, generated by the assets in the underlying pool.

   Examples:
   asset-backed securities (ABSs) and asset-backed commercial paper (ABCP), residential mortgage-backed securities (RMBSs), commercial mortgage-backed securities (CMBSs), collateralised debt obligations (CDOs)

2. Debt instruments structured in such a way that in the event of the default by the issuer, subordinated holders only have access to the assets of the issuer after the claims of senior holders have been satisfied.

   Examples:
   - subordinated liabilities;
   - certificates (as defined in Article 2(1)(27) of Regulation (EU) No 600/2014);

3. Debt instruments structured in such a way that the anticipated revenue stream or repayment of principal is dependent on variables set by the issuer at its discretion.
4. Debt instruments structured in such a way that there is no specified maturity date and typically therefore no repayment of the principal amount invested.

   Example:
   perpetual bonds.

5. Debt instruments structured in such a way that the anticipated revenue stream or repayment of principal is dependent on variables which are unusual or unfamiliar for the average retail investor.

   Examples:
   - debt instruments referencing e.g. the following underlyings: non-public benchmarks, synthetic indices, niche markets or highly technical measures (e.g. volatility or combinations of variables);
   - catastrophe bonds.

6. Debt instruments with complex mechanisms to determine or calculate the return. These include debt instruments structured in such a way that the anticipated revenue stream may vary frequently and/or markedly at different points of time over the duration of the financial instrument, either because certain pre-determined threshold conditions are met or because certain time-points are reached.

7. Debt instruments presenting a structure or subject to a mechanism which, under certain circumstances, triggers a partial repayment (or no repayment) of the principal.

   Example:
   debt instruments that can be used for a bail-in.

8. Debt instruments issued by a special purpose vehicle (SPV) in circumstances in which the name of the debt instrument or the legal name of the SPV may mislead the investors as to the identity of the issuer or guarantor.

9. Debt instruments guaranteed by a third party and structured in a way that makes it complex for the investor to assess accurately how the guarantee mechanism affects the risk of the investment.

   Examples:
   - debt instruments with a guarantee mechanism where the trigger for the guarantee
   - depends upon one or several conditions in addition to the default of the issuer; debt instruments with a guarantee mechanism where the level of guarantee or the actual trigger of the guarantee are subject to time limitations.

10. Debt instruments with leverage features. These include debt instruments structured in such a way that the return or losses to the investor may occur at multiples to the initial investment.

BT 13.3 Structured deposits incorporating a structure making it difficult for the client to understand the risk of return

The following criteria shall be used if the investment service relates to a structured deposit in accordance with section 2 (19) of the WpHG. For the purpose of section 63 (11) no. 1 e) of the WpHG, a structure making it difficult for the client to understand the risk of return exists in the following cases:

1. More than one variable affects the return received.

Examples:
- structured deposits where a basket of instruments or assets have to outperform a specified benchmark for a return to be paid;
- structured deposits where the return is determined by the combination of two or more indices.

2. There is a complex relationship between the return and the relevant variable or the mechanism to determine or calculate the return.

   Examples:
   - structured deposits that are structured in a way that the mechanism under which the price level of an index is reflected in the return involves different market data points (i.e. one or more thresholds have to be met), or several index measurements at different dates;
   - structured deposits that are structured in a way that the capital gain or interest payable steps up or down in certain specific circumstances;
   - structured deposits that are structured in a way that the anticipated revenue stream may vary frequently and/or markedly at different points in time.

3. The variable involved in the calculation of the return is unusual or unfamiliar to the average retail investor.

   Example:
   structured deposits where the return is linked to a niche market, an in-house index or other non-public benchmark, a synthetic index, or a highly technical measure such as asset price volatility.

4. The contract gives the credit institution the unilateral right to terminate the agreement before maturity.

BT 13.4 Structured deposits incorporating a structure making it difficult for the client to understand the cost of exiting before term

The following criteria shall be used if the investment service relates to a structured deposit in accordance with section 2 (19) of the WpHG. For the purpose of section 63 (11) no. 1 e) of the WpHG, a structure making it difficult for the client to understand the cost of exiting the product before term exists in the following cases:

1. No fixed sum is given as an exit fee.

   Examples:

   - structured deposits having a variable or "capped" exit fee (i.e. a fee up to EUR 300 is charged in case of early exit);
   - structured deposits referencing a variable factor such as an interest rate for the calculation of the exit fee.

2. The exit fee given is not a fixed sum for each month (or part thereof) remaining until the end of the agreed term:

   Example:

   structured deposits having a variable or capped exit fee per month remaining until the agreed term (i.e. a fee up to EUR 50 per month in case of early exit).

3. The exit fee given is not a fixed percentage of the deposit.

   Example:
   structured deposits having an exit fee that is at least equal to the amount of the returns accrued until the early exit date.

BT 14 Cross-selling

This module expands on the requirements of section 63 (9) of the WpHG.

BT 14.1 Scope and definitions

1. Cross-selling in accordance with section 63 (9) of the WpHG relates to investment services that are offered as part of a tied package or a bundled package. Additional, differing conduct of business rules may apply to specific products and services used to create the packages covered by BT 14. This section shall not affect in any way the obligations of investment services enterprises to comply with such applicable requirements.

2. A tied package is a package of products and/or services where at least one of the products or services offered is not available separately to the client of the investment services enterprise and thus becomes a condition for the transaction. At least one of the components of the package must be an investment service.

3. A bundled package is a package of products and/or services where each of the products or services offered can also be purchased separately and where the client retains the option to purchase the various components of the package separately from the investment services enterprise. At least one of the components of the package must be an investment service.

4. A component is the separate product/and or service that constitutes part of the bundled or tied package.

BT 14.2 Full, clear and timely communication of price and cost information

1. Investment services enterprises that distribute a tied or bundled package shall provide their clients with separate information on the price of its components. They shall provide their clients with a clear breakdown and the amount of all relevant known costs associated with the purchase of its components, e.g. administration fees, transaction costs and exit or prepayment penalties.

   Where costs cannot be calculated with precision on an ex ante basis, but these will

nevertheless be incurred by clients after the purchase of the package, the investment services enterprise shall provide the client with an estimate based on reasonable assumptions.

Example:
If the cross-selling relates to an interest rate swap with a variable rate loan to hedge interest rate risk (i.e. the client swaps their floating rate payment for a fixed interest rate payment), the investment services enterprise provides key information to the client on all aspects of the swap agreement that will materially affect the cost the client finally incurs. The scope of the information on costs for the swap is governed by section 63 (7) of the WpHG in conjunction with Article 50 of the DR.

2. In addition, the information on price and all relevant costs of the individual components of the package shall be made available in good time before a transaction is entered into to allow the client to make an informed decision. The information shall be provided in a prominent, accurate manner and in simple language. All technical terminology shall be explained.

3. When promoting individual components of a bundled or tied package, investment services enterprises shall always assign equal prominence to the price and cost information of the components so that the client can identify clearly and quickly how the purchase of the components impacts the cost of the package.

   Example 1:
   In any marketing communications used by the investment services enterprise, the font used to communicate the relevant price and cost information of each of the components of a package in the enterprise's offering is the same. Relevant information concerning one of the components is not given more emphasis through the use of a larger or bolder font.

   Example 2:
   Where the sale takes place on the internet or through another channel without a sales person directly involved, the price and cost information of both products that will form the package appears at an early stage on the relevant websites. It must be easily navigated by clients, i.e. the price and cost information of any product and/or service that will form part of a bundled package is not placed or hidden further down in the investment services enterprise's online sales form.

4. Investment services enterprises that distribute a tied or bundled package may not present price and cost information to clients in a way that is misleading or that distorts or obscures the real cost. Nor may clients be prevented by the manner of presentation from making a meaningful comparison with alternative products and/or services.

BT 14.3 Full, clear and timely communication of key information on non-price features and risks, where relevant

1. Investment services enterprises that distribute a tied or bundled package shall provide their clients with key information on non-price features and risks, where applicable, of each of the components and the package. This shall also include in particular information on how the risks are modified if the bundled package is purchased, rather than each of the components are purchased separately.

   Example:
   An investment services enterprise offers a preferential rate savings account only if the client purchases a structured bond at the same time. In this case, the level of risk posed by this total package is different from the risks posed by the savings account alone: the initial capital in a savings account is guaranteed; the only variable is the interest paid. By contrast, the initial capital investment in a structured investment product may not be guaranteed; as a result, it could be lost in part or altogether. In this example, the risk profiles of the components are clearly very different. If the two

components are combined, the level of risk associated with the structured investment product could negate the safety of the savings product to such an extent that the overall risk profile of the package is significantly increased. The investment services enterprise clearly informs the client about how the risk is modified as a result of purchasing the bundled package rather than each of the products separately. In this case, for example, the client should be informed that the overall return from the package could be reduced by price losses attributable to the structured bond.

2. Key non-price factors and the relevant risks shall be communicated to clients with the same prominence and weight as information on prices and costs of the individual components. These factors and risks shall be made clear to the client in simple language in good time before the agreement is entered into. All technical terminology shall be explained. The information shall be presented in a way that is not misleading and may not distort the presentation of the potential impact of these factors for the client.

   Example:
   It is not enough for the investment services enterprise to exclusively make a general reference to its terms and conditions to alert or disclose non-price information to clients. Instead, the enterprise has to explain the risks, if relevant, and non-price information to the client in plain language.

BT 14.4 Prominent display and communication of "optionality of purchase"

1. Investment services enterprises that distribute a tied or bundled package shall ensure that their clients are properly informed whether they have the option to purchase the components separately. In particular, clients shall be informed whether they have a choice to purchase only one of the components of a bundled package or, to the extent permitted by applicable law, whether they have to purchase another component of a bundled package.

2. Investment services enterprises that distribute a bundled package shall design their product/services purchase options in a way that enables clients to actively select a purchase and therefore make a conscious decision to purchase each individual component of the bundled package. Investment services enterprises that offer products or services as a package under a cross-selling arrangement are prohibited from anticipating client's purchase choices on digital platforms (such as apps or websites) or in other sales documents, for example by using pre-ticked boxes.

3. In addition, such investment services enterprises shall ensure that they present their purchase options in a way that avoids giving the impression that the purchase of the bundled package is compulsory, when in fact it is an optional purchase.

   Example 1:
   An investment services enterprise offers a range of different investment products. It sets out the client's options clearly and unmistakably. For example, it makes clear that the client has the option to purchase a non-advised, execution-only service without an assessment of appropriateness and with no additional products or services such as market data and financial analysis. It also clarifies whether the client's choice is restricted to particular bundles of component products, or if the client has a free choice as to which products/services can be combined.

   Example 2:
   The purchase option for a bundled package of a non-advised, execution-only service without an assessment of appropriateness and market research on the sales pages of the investment services enterprise's website is left blank. The client has to opt in to the purchase by clicking "yes" to the simple question of whether he/she wants to buy the market research as an add-on product (and therefore as a bundled package together with the non-advised service).

BT 14.5 Adequate training for staff

Investment services enterprises that distribute tied or bundled packages shall ensure that adequate training, including cross-sectoral training where relevant, is provided to staff in charge of distributing each of the products and/or services sold as components of a package. The staff training shall ensure that staff are familiar with the risks, where relevant, of the components and the bundled and tied package, and be able to communicate these to clients in plain (non-technical) language.

BT 14.6 Conflicts of interest in the remuneration structure of sales staff

Investment services enterprises that distribute tied or bundled packages shall ensure that suitable remuneration models and sales systems encouraging responsible business conduct by sales staff in business transactions, fair treatment of clients and avoidance of conflicts of interest for sales staff are in place. They shall be monitored by the management board.

Example 1:
The investment services enterprise refrains in its remuneration policy from operating practices and performance-based competitions that encourage sales staff who are remunerated on a commission basis to push the sale of the bundled package and which may therefore encourage the unnecessary or unsuitable sales of either a component of the package or the package itself. For instance, if sales staff are incentivised to cross-sell a loan with a portfolio management offering, this remuneration structure would result in the risk of incentivising a potential misselling of the loan and therefore also of the package.

Example 2:
The investment services enterprise does not use any remuneration structures and practices that substantially reduce the basic salary, bonuses or performance incentives of sales staff if a specific sales target in relation to the bundled or tied package is not met, thereby reducing the risk that the sales person will make inappropriate sales of the bundled package to avoid this outcome.

BT 14.7 Cancellation right

1. Investment services enterprises that distribute tied or bundled packages shall ensure that where cancellation or revocation rights apply to one of more components of a package (if the components are sold on a stand-alone basis), these rights shall continue to apply to those components within the package.

2. In addition, clients shall be allowed to subsequently split the components of a cross-selling offering without disproportionate penalties, unless there are justified reasons to reject this.

BT 14.8 Examples of cross-selling practices that do not comply with the requirements of section 63 (9) of the WpHG

Examples with a monetary detriment for clients:

1. Two components are offered together as a package, where the price of this package is higher than the price of the stand-alone products/services offered separately by the same investment services enterprise (provided that the product components offered and the products/services offered on a stand-alone basis have the same features).

2. An investment services enterprise wants to induce a client to buy a cross-selling offering by promoting the fact that, as of the date of the sale, the overall amount of

the costs and charges payable by the client is below the cumulative price of each component when sold separately, although in reality this amount of costs and charges is already scheduled to be increased to a higher amount over time, for example because of running costs or fees incurred.

BT 15 Interpretation of statutory requirements for preparation of information sheets under section 64 (2) of the WpHG/section 4 of the WpDVerOV

BT 15.1. General

1. Under section 64 (2) of the WpHG, the retail client, when provided with investment advice, must be given an information sheet concerning every financial instrument for which no key information document under the PRIIPS Regulation (Regulation (EU) No. 1286/2014) has to be prepared and to which a buy recommendation of the advisor relates in good time before a transaction in financial instruments is concluded. In the case of clients being provided with information outside an advisory situation, the general requirements of section 63 (6) and (7) of the WpHG apply.
   Example: If information on financial instruments for online banking is posted on the Internet by an investment services enterprise that does not provide investment advice, section 64 (2) of the WpHG does not apply. For these publications, only the general requirements of section 63 (6) and (7) of the WpHG have to be met.

2. Section 64 (2) of the WpHG codifies a public-law obligation for investment services enterprises. The obligation to provide information sheets is not subject to disposition. Section 4 of the WpDVerOV clarifies requirements to be met by the information sheets in terms of their content under section 64 (2) of the WpHG and prescribes the minimum data that an information sheet must contain.

BT 15.1.1 Relationship with other legal requirements

Moreover, the content of information sheets must be consistent with section 63 (6) sentence 1 of the WpHG and section 44 of MiFID II Delegated Regulation 565/2017. Information sheets likewise form part of the information that investment services enterprises address to clients. This is of particular significance for information exceeding the minimum data under section 4 (1) nos. 1 to 5 of the WpDVerOV. If e.g. it is expedient to include data on past performance in the information sheets and to consequently represent such data there, this must be effected in accordance with the requirements of Article 44(4) and (5) of MiFID II Delegated Regulation 565/2017. Accordingly, the principles of MaComp BT 3 also apply to information sheets pursuant to section 64 (2) of the WpHG, with the exception of BT 3.2. no. 3 (see below).

BT 15.1.2 Preparation of information sheets by third parties

1. The investment services enterprise giving the client advice as a general rule must ensure under its own responsibility that an information sheet used by it complies with the legal requirements. For information sheets procured by third parties, the principles of MaComp BT 3.2. no. 3 do not apply. Preparation of information sheets by third parties first requires a

regulation consistent with supervisory legislation that must contain statements on at least the following items:

a. The company preparing the information sheets warrants to the user of the information sheets that these are standard-compliant information sheets prepared in accordance with the requirements of the Supervisory Authority. It moreover grants the company using the information sheets, its auditor under section 89 (1) and (4) and section 88 (1) of the WpHG as well as the Supervisory Authority all information rights and rights of audit. Requested information shall be provided, as well as requested documents made available, without undue delay.
b. The company using the information sheets prepared by a third party must reasonably manage and monitor the risks associated with their preparation. As a general rule this would mean that the user of information sheets obtained from third parties would have to perform all required monitoring measures itself. In this regard, two exceptions are possible:

- The institution using information sheets of a third party may, as a rule, waive performance of its own audit activities if the entity preparing information sheets has in place an internal auditing function in compliance with the Minimum Requirements for Risk Management (*Mindestanforderungen an das Risikomanagement* – MaRisk) and promptly provides the user of the information sheets those portions of the auditing reports relating to the preparation of the information sheets.
- By way of alternative, an audit certificate of an auditor/auditing firm for the auditing field "Preparation of information sheets under section 64 (2) of the WpHG" may be sent. The certificate must satisfy the professional standards customary for the activity of auditors/auditing firms, e.g. IDW PS 951. The audit certificate is valid for three years. A new audit is necessary if fundamental changes arise during the validity period (e.g. changes in the product range) or BaFin identifies deficiencies in the information sheets.

BT 15.2. Timely provision

1. The information sheets under section 64 (2) of the WpHG must be provided in good time before the transaction is concluded, i.e. in any case before the client places the buy order. The clients must be allowed a reasonable timeframe within which to apprise themselves of the information contained in the information sheet before making their investment decision. The scope of the timeframe will be determined by the circumstances of the individual case and must take various aspects into account, such as the relevant product features. It is therefore not possible to lay down a defined time span as being generally binding.
2. The investment services enterprise may provide the client with the information sheets either in printed form or as an electronic document. If transmission by electronic means has been agreed, the information sheets e.g. may be sent by e-mail or posted to the client's electronic mailbox kept with the investment services enterprise.
3. The information sheets can also be made available by providing an exact link by which they can be accessed on the Internet. In this case it must be ensured that the client retains unrestricted control over the information sheet serving as the basis for the advice. This means that the client must be able to print out and save the electronic document. This is ensured e.g. by means of a PDF document.

BT 15.2.1. Investment advice provided to persons present

As a rule, the information sheet pursuant to section 64 (2) of the WpHG is handed out in printed form in the case of investment advice being provided to persons present. This in any case satisfies the duty defined in section 64 (2) of the WpHG.

BT 15.2.2. Investment advice provided to persons absent

If the advice is not provided on site, it is not possible for the client to be provided with the information sheet simultaneously in physical form. That carries the risk that an order for the purchase of financial instruments can be executed only with a time delay, for example after the information sheet has been sent by post.

This can be avoided if clients

a. are provided with the information sheet beforehand by post or electronic means and apprise themselves of the contents thereof in advance, as long as the principles of proper investment and investor advice are still observed; or
b. are provided with the information sheet during the informational meeting electronically and apprise themselves of its contents during such time.

BT 15.3. Requirements to be met by information sheets

BT 15.3.1. General requirements

The following general requirements must be observed when preparing information sheets:

BT 15.3.1.1. Clear identification

1. The prohibition on providing misleading information requires a distinction to be made between the different types of information received by the client. Both financial services enterprises and clients have an interest in information sheets pursuant to section 64 (2) of the WpHG being clearly and easily identifiable as such. Headers such as "Information sheet under section 64 (2) of the German Securities Trading Act" or "Product information sheet under the German Securities Trading Act" clearly distinguish information sheets under section 64 (2) of the WpHG from other types of information.
2. If an investment services enterprise entitles information addressed to a client as "Product information sheet under the German Securities Trading Act" or "Information sheet under section 64 (2) of the German Securities Trading Act", such information must satisfy all requirements set out in section 64 (2) of the WpHG, since otherwise such title has to be qualified as misleading.

BT 15.3.1.2. Recipient horizon and comprehensibility

1. Comprehensibility of the information sheet must be defined by the recipient horizon of a retail client. As a rule, no special prior linguistic and specialist knowledge on the part of the client may be assumed as a prerequisite for understanding financial instruments. What is decisive is the recipient horizon of reasonably well-informed investors.
2. Under section 64 (2) of the WpHG, the information sheets must be "easily understandable". Since these are addressed to the reasonably well-informed investor, it is normally necessary to explain uncommon abbreviations to such group of persons. Complex sentence structures are to be avoided. The mere reiteration of financial-mathematical formulas is no substitute for a generally comprehensible description of how a financial instrument works.

   Examples of impermissible wording:

- "Investors bear the risk of the issuer's financial situation deteriorating and of the issuer being subjected to a reorganisation procedure or transfer order, or of insolvency proceedings being instituted on its assets – and of payments due under the bonds therefore not being made, or not being made fully or on time."
- "The x product was designed as a recovery product for the holders of the y product."

Examples of abbreviations and unknown terms not permissible without explanations being provided:

- "Day count fraction: ACT/ACT"
- "Interest type: variable"
- "Settlement currency: NOK"
- "Stock exchange listing: EURO MTF"
- "Style of exercise: Bermudan"
- "Interest will be accrued"

The only exceptional case in which persons or entities other than reasonably well-informed investors may be addressed is when the information sheet is identified as being suitable for only certain groups of recipients. Such identification must be clearly emphasised in a conspicuous place in the information sheet.

Example:

"This Information Sheet is directed exclusively to investors possessing the requisite experience or knowledge relating to transactions in bonds exposed to interest rate changes/subordination/currency risk."

As a result, the relevant financial instrument may not be recommended to investors other than the specified group of recipients.

BT 15.3.2. No false or misleading information

Under section 64 (2) sentence 2 of the WpHG, information provided in the information sheet may be neither false nor misleading. Any exclusions of correctness of or responsibility for the information sheet are impermissible because they may give the impression with clients that the correctness of the information provided to them is in doubt or that such information is not correct at all.

BT 15.3.2.1. Consistency with the prospectus

1. Under section 64 (2) sentence 2, second half-sentence of the WpHG, the information sheet must be "in accordance with the information given in the prospectus". If a base prospectus/final terms exist, the information in the information sheet may not give the impression of trivialising the prospectus or the final terms, nor may they contradict the same.
2. If the prospectus defines certain addressed groups of persons and entities or requirements to be met in terms of the client's objective factual knowledge and/or experience, this must be deemed to be essential information and included in the information sheet.
3. A complete reproduction of all information contained in the prospectus is not required since the information sheets are limited in their scope and may contain only "essential" information.

BT 15.3.2.2. Up-to-datedness of the information

1. The information contained in the information sheets must be up to date so that investors are not misled when making their investment decisions. In keeping with the principle of presenting information in a way that is fair and not misleading, the information sheets under section 64 (2) of the WpHG must therefore be up to date, which in turn entails a duty to update them. It is not possible to lay down set intervals for updating because this depends on the type of financial instrument as well as the specific capital market situation. In the event of significant changes, the information sheet must be updated without undue delay (example: the issuer of share XY has filed for insolvency).

   The requirement to present information in a way that is clear, fair and not misleading as set out in section 63 (6) sentence 1 of the WpHG means that an easily recognisable reference to the date of the information needs to be provided, since it is only in this way that its up-to-dateness can be verified quickly and without significant additional work.

   It is not permissible to limit or exclude the up-to-dateness of the information provided in the information sheet.

   Example of an impermissible limitation:

   "This Product Information Sheet reflects the status at the time the document was prepared. It may be outdated by reason of future developments without the document having been amended."

2. The securities investment enterprise's duty to update the information sheet ends once provision of investment advice has been concluded. After conclusion of provision of investment advice, there is no requirement to point out to the client that the information sheet has been updated. This does not apply in cases where repeated investment advice on one and the same financial instrument is provided. The investment advisor is not automatically released from the duty to provide an information sheet, but instead must verify whether an updated information sheet has to be made available based on more recent information. For advice provided on a repeated basis, the obligation in any case does not apply where the client was already provided with an information sheet and such information sheet is still up to date. It is advisable to document such fact in the suitability statement.

BT 15.3.2.3. Prohibition on promotional information and other information provided for purposes other than those of the legislation

1. Under section 4 (1) sentence 3, second half-sentence of the WpDVerOV, the information sheets may not contain any promotional or other information not serving the purposes of the legislation. Ratings and the use of adjectives of a promotional character are therefore impermissible.

   Example of permissible wording:
   "Interest rate of x% p.a."

   Example of impermissible wording:
   "Attractive interest rate of x% p.a."

2. Information on ethical, social and environmental matters may not be used for promotional purposes and is only permissible if it presents essential characteristics of the product and the criteria forming the basis of such statements are stated and explained.

Example:

In the case of a bond with an ecological investment objective, it must be explained how "ecological" is defined by the issuer.

3. Nor may the information sheet contain information on a client's investment orientation.

   Example of impermissible information:
   "This product is suitable for risk-tolerant investors."

4. The terms "risk-tolerant", "risk-averse", etc. currently are not used uniformly throughout the industry. As a result, this might impair comparability of the information sheets for the investor. Until an industry-wide standard has been developed, information on a client's investment orientation cannot be deemed expedient for the purposes of the legislation.
5. A reference to BaFin in the information sheet as the Supervisory Authority for investment services enterprises is not permissible. This might create the impression with investors that each information sheet has been verified by the Supervisory Authority beforehand.

BT 15.3.3. Specific requirements in terms of content

Under section 4 (1) sentence 2 of the WpDVerOV, the information sheet must contain the essential information regarding the respective financial instrument in such clear and easily understandable terms so as to enable the client in particular to assess the type of financial instrument (BT 15.3.3.1.), its functioning (BT 15.3.3.2.), the risks associated with it (BT 15.3.3.3.), the prospects of the principal being repaid and the prospects of income being generated under various market conditions (BT 15.3.3.4.), and the costs involved in the investment (BT 15.3.3.5.) so that the client can make the best possible comparison with the characteristics of other financial instruments.

BT 15.3.3.1. Type of financial instrument (section 4 (1) sentence 2 no. 1 of the WpDVerOV)

At the beginning of the information sheet, it is first necessary to specify the product class (e.g. share, bond). To ensure accurate identification, the German Securities Identification Number (WKN) and the International Securities Identification Number (ISIN) must be stated in addition. In the case of financial instruments that are not issued with such information, all information necessary to accurately identify the financial instrument must be stated. The issuer of the financial instrument must also be specified. To make it easier for readers to access additional information, a reference to the sector and website of the issuer of the financial instrument must be provided. Also to be stated is the market segment in which the financial instrument is traded, and in the case of shares their type and whether they are listed on a generally known market index (such as DAX or M-DAX). In this way investors are provided with indications for assessing the liquidity of the financial instrument.

Not included in the description of the type of a financial instrument is information for which separate sub-items are provided in section 4 (1) of the WpDVerOV, e.g. risks or costs.

BT 15.3.3.2. Functioning of financial instrument (section 4 (1) sentence 2 no. 2 of the WpDVerOV)

1. After information has been provided on the type of the financial instrument, a general description is to be given on how it works. This must also include product specifications. The description may not confine itself merely to the level of the overall product class.

There are two ways in which to provide an adequate description:

a. either by providing a general description of the functioning followed by a separate enumeration of product-specific data; or
b. by linking the description of the financial instrument's functioning to the product-specific data.

Examples of permissible wording:

- Bond with a fixed interest rate

Re a.

"The product is a bond with a fixed term and fixed interest rate. The investor is entitled to an annual fixed interest payment for the term on the nominal amount of the bond. On the maturity date, the investment principal is repaid at the nominal amount of 100%.

Product data: Issuer: bank A, interest rate: x% p.a. with reference to the nominal value, term: until (date) [further information]."

Re b.

"XY bond is a bearer bond of bank A with a term running until (date). The annual interest rate is x% with reference to the nominal value. [further information]"

Examples of impermissible wording:

- Share

An information sheet on an ordinary share in the form of a bearer share contains statements on registered shares. If the information sheet describes a bearer share, details on registered shares are misplaced and thus not permissible.

- Bearer bond

"A bearer bond is a bond with a fixed or variable interest rate and a fixed or variable term."

2. In keeping with the aims of the information sheet, the key data must be stated, e.g. term, interest dates, denomination, possibility of exchanging the debtor, in some cases repayment of principal at fixed dates, issuer's call options, unusual interest calculation methods that lead to a significant difference in interest income, etc.

Stating the product-specific data may not be wholly or partly replaced by a reference to third-party publications.

Example of impermissible reference:

"Product data
Country of origin: USA
Primary trading currency: USD
Stock exchange admission: No

For precise details, please see the publications of the company."

3. If the term of the financial instrument is uncertain due to termination options of the issuer, this must be taken into account in the information stated with regard to the term (also in chart representations of the term).

   One difficulty presented relates to the presentation of product-specific data if such data have not yet been finally defined at the time when the information sheet is made available (e.g. for instruments marketed in the subscription phase). In such cases, at least the future event on which such data depend is to be described as specifically as possible.

   In any case, information on relevant product details must not be left out completely merely because they are not yet defined when the investment advice is provided.

BT 15.3.3.3. Risks associated with the financial instrument (section 4 (1) sentence 2 no. 3 of the WpDVerOV)

BT 15.3.3.3.1. Fundamental issues

1. The risks inherent in the recommended financial instrument must be specified and explained.

   Examples:

   - The income of the financial instrument is paid in a foreign currency. In this case, particulars must be provided with regard to the foreign currency risk.
   - The foreign issuer is exposed to the risk of currency export restrictions. In this case the transfer risk must be stated.
   - The instrument features a non-standard substitution right for the issuer. This substitution right constitutes a risk for the investor. In this case, the risk must be described in the abstract.

2. The risks specified in the information sheet must be weighted by importance, i.e. the risk of greatest importance for the investor must be specified before risks that are relatively insignificant. A risk is deemed to be insignificant if its realisation for the investor neither results in a significant loss nor has a significant likelihood of occurring.

   In most cases, however, the issuer risk will probably have to be stated first.

3. The significance of those risks of importance to the investor may not be diluted by adding excessive amounts of non-essential information. The mere enumeration of risks of no relevance for the financial instrument described in an information sheet is impermissible.

   Example of impermissible statement of risks in the case of a bond traded in euros:
   "For financial instruments not quoted in euros, a risk of currency exchange-rate losses exists for regular income, sale, redemption or return in each case."

BT 15.3.3.3.2. Risk-limiting instruments

1. If membership in a protection scheme exists, reference may be made to this fact. The reference in this regard must be neutral and objective, and confined to its core statement.

Example of permissible wording:
Bank X is a member of the protection scheme Z. For further information, please visit www.Z.de.

However, the objectivity of such reference is impaired if made immediately after the statements on issuer risk, since that creates the impression with the investor that the issuer risk is diminished by the membership in the protection scheme. Such manner of presentation thus conveys a statement going beyond the objective content of the reference itself.

2. For this reason, this brief reference must be provided only at a neutral place in the information sheet, for example under the section "Miscellaneous". Any statements going beyond such abstract reference that merely present the advantages of membership in a protection scheme are promotional in character and thus impermissible.

   Example of impermissible wording:
   "In addition, the bank, in the event of an economic crisis, will always be in a position in which it can fully meet its legal obligations at all times given the institution protection that has been put in place by the protection scheme."

3. If guarantee notices/letters of comfort of a third party exist (e.g. by the parent company in favour of a foreign subsidiary), these must be stated in the section "Miscellaneous" and explained in terms of their essential features. Also to be stated are material restrictions for the investor.
4. If the financial instrument could be potentially affected in the future by measures under the German Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz* – SAG) attention must be drawn to this possibility. This can be done, for example, by means of the following explanation: BaFin has additional, far-reaching powers to intervene (for example a bail-in) outside any insolvency, in particular if there is a significant deterioration in the financial position of (name of issuer). It is even possible that all of the capital invested could be lost. Additionally, reference can be to the corresponding explanations of the "bail-in sequence" on our home page by a link to www.bafin.de.

BT 15.3.3.3.3. Issuer's call rights

If the issuer is able to call a financial instrument early or if repayment of the principal depends on the occurrence of future unforeseeable events, the resulting risks must be stated and explained.

Example of permissible wording in the case of a bond with a call right for the issuer:
"Since the issuer can call the bond at an earlier date, the investment is subject to the risk of the financial instrument being repaid in a capital market situation that is unfavourable for the investor. In that case reinvestment would be possible only on less favourable terms for the investor."

BT 15.3.3.4. Prospects of repayment of principal and income under various market conditions (section 4 (1) sentence 2 no. 4 of the WpDVerOV)

BT 15.3.3.4.1. Market price-determining factors

1. Investors must first acquire a basic understanding of the impact that capital market developments may have on the investment decisions made by them. This is only possible if they are aware of the factors determining market prices. For that reason, the main price-determining factors must be stated and described in terms of their effects. The description may be provided in the form of a continuous text or in tabular form.

Example of impermissible information:

Market interest rate during term	Price of bond during term	Explanatory notes
↗ Market interest rate rises	↘ Bond price falls	If market interest rate rises, the price of the bond falls.
↘ Market interest rate falls	↗ Bond price rises	If market interest rate falls, the price of a bond rises.
→ Market interest rate unchanged	→ Bond price unchanged	In this case the price generally does not change.

Statements on the likelihood of the market price-determining conditions occurring are not required. It is not sufficient to provide a purely abstract listing of various influencing factors.

Examples of impermissible wording:

- "Factors such as price fluctuations on the equity markets, the company's business developments, price discount on dividend payment, changes in credit rating and rating adjustments as well as supply and demand may have an impact on the product. However, no statements can be made on the effects of the specific factors."
- "In times of crisis, price losses on the equity market in general and for an individual stock in particular may occur."

BT 15.3.3.4.2. Scenario descriptions

1. With reference to the financial instrument recommended in the investment advice provided, the prospects of the capital employed being repaid and of the expected returns being realised must be described under various market conditions. For this purpose, both sample calculations and chart representations may be used. In a sample calculation, an investment amount

deviating from the specific investment amount of the investor may be worked with (with regard to costs, see BT 15.3.3.5.).

2. The description must be balanced. As a rule, three different situations are to be presented for this purpose: a positive, a neutral and a negative scenario. The assumptions on which each of these scenarios is based must be disclosed (such as particulars on the investment period). In addition, the assumptions must be plausible, realistic and suited to the respective financial instrument. In the case of shares, stating the possibility that dividends might be paid is sufficient. As stated under 3.1.5, the example must be updated if its representativeness is significantly restricted or no longer exists.

   The descriptions must take account of the fact that a description in purely gross terms is not compliant with the legislation. This would give the client the incorrect impression that its capital employed is fully participating in a positive performance.

   Example of impermissible description of scenarios for a share (particulars on investment term and the costs to be borne by the investor are not provided):
   Price: + 20% Return: + 20%
   Price: +/–0% Return: +/–0%
   Price: –20 % Loss: –20%

3. Since the costs to be borne by the client have an impact on the success of its investment, a purely gross presentation is misleading. Only net or combined gross-net presentations are representative for the client. For all cost types, the scenario descriptions must be based on realistic cost rates. The cost assumptions made in the scenario descriptions must be disclosed to the client in the information sheet.

   In the description of the prospects for repayment of the principal and for returns, it is not permissible to repeat product features and to portray these as a special opportunity.

   Example:
   In an information sheet on a bond, features such as "fixed interest rate", "high liquidity and flexibility", "investment independent of the equity market" are listed again.

4. Given the prohibition of advertising in the information sheets, it must be ensured that opportunities are presented neutrally. In the example given above, the statement regarding "high liquidity" qualifies as a promotional statement. This also holds true for the statement regarding the "fixed interest rate" if the interest rate, though not being dependent on the benchmark rate, may change as a result of other circumstances during the term, such as a relevant clause in the terms of the issue.

BT 15.3.3.5. Costs associated with the investment (section 4 (1) sentence 2 no. 5 of the WpDVerOV)

1. The German legislators intended the cost disclosure duty to serve as a warning, since investors can make an investment decision only if they know the cost burdens entailed for them.

   It is acceptable to state the costs in the information sheet as institution-specific maximum cost of acquisition as a percentage of the investment amount, supplemented

by the specification of a minimum fee in euros if such fee is charged by the institution.

Example:
"On purchase of share A, acquisition costs of up to 1.0% of the listed price are payable; the minimum costs normally amount to as much as €50.00".

2. Since acquisition costs also include sales charges, they must be stated as a percentage of the investment amount. Cost items may also be stated in specific euro amounts.

   In the case of ancillary purchasing costs and consequential purchasing costs (e.g. stock exchange fees, custodian costs, selling costs), it is sufficient to provide in the presentation of costs an abstract reference to such costs to be borne by the investor, since at the time of the investment advice being provided these as a rule have not yet been established with the required certainty by reason of the best execution principle, or because custodian costs and selling costs can change over time.

   It is impermissible to refrain from stating costs in an information sheet by instead making reference to the schedule of prices and services or to information provided by the investment advisor.

BT 15.3.4. Other disclosures

1. The phrase "insbesondere" ("in particular") in section 4 (1) sentence 2 WpDVerOV leaves room for additional information provided such information is sensible for the investor and expedient for the aim pursued by the legislation. However, the maximum scope of two or three pages may not be exceeded. In practice, particularly disclosures on the availability of the financial instrument as well as on its tax treatment have come to be provided under other disclosures. Particulars on availability are especially advisable during the subscription phase of financial instruments, e.g. regarding the term of the subscription phase, the possibility of early termination, etc.
2. In the case of a financial instrument with limited liquidity, potential problems in purchasing are to be pointed out. Additionally, potential problems that may be encountered if the financial instrument is later sold are to be specified under the "Risks" item.

Act on the Federal Financial Supervisory Authority (*Finanzdienstleistungsaufsichtsgesetz* - FinDAG)

Section 4d – Reporting of breaches

(1) BaFin shall set up a system for accepting reports of potential or actual violations of laws, ordinances, general rulings and other provisions as well as regulations and directives of the European Union, where it is the task of BaFin to ensure compliance with these provisions by the companies and persons it supervises or to punish violations thereof. The reports can also be submitted anonymously.

(2) (repealed)

(3) BaFin shall not disclose the identity of a person who has made a report without first obtaining the express consent of that person. Furthermore, BaFin shall not disclose the identity of a person who is the subject of a report. Sentences 1 and 2 shall not apply if disclosure of the information is required in the context of further investigations or subsequent administrative or judicial proceedings based on a law or if disclosure is ordered by a court order or in judicial proceedings.

(4) In its annual report, BaFin reports in abbreviated or summarized form on the reports received. The annual report does not allow any conclusions to be drawn about the persons or companies involved.

(5) The Freedom of Information Act (*Informationsfreiheitsgesetz* – IFG) does not apply to the proceedings under the whistleblowing procedure.

(6) Employees who are employed by companies and persons that are supervised by BaFin or who are employed by other companies or persons to which activities of supervised companies or persons have been outsourced, and who submit a report in accordance with paragraph 1, may not be held responsible under labor law or criminal law for this report, nor may they be called upon to compensate for damages, unless the report was submitted deliberately or through gross negligence.

(7) The authorization to submit reports in accordance with paragraph 1 by employees who are employed by companies and persons supervised by BaFin or who are employed by other companies or persons to whom activities of supervised companies or persons have been outsourced may not be limited by contract. Any agreements to the contrary are invalid.

(8) The rights of a person who is the subject of a report, in particular the rights under sections 28 and 29 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz* – VwVfG), under sections 68 to 71 of the Administrative Court Code (*Verwaltungsgerichtsordnung* – VwGO) and under sections 137, 140, 141 and 147 of the Code of Criminal Procedure (*Strafprozessordnung* – StPO), shall not be restricted by the establishment of the system for reporting infringements under paragraph 1.

(9) The Federal Ministry of Finance may, by statutory order not requiring the consent of the Bundesrat, adopt more detailed provisions on the content, type, scope and form of the notification of violations of provisions of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L L 173, 12.6.2014, p. 1) as well as against other laws, regulations, general rulings and other provisions as well as regulations and directives of the European Union referred to in paragraph 1, to specify the implementing act of the European

Commission adopted on the basis of Article 32(5) of Regulation (EU) No 596/2014. The Federal Ministry of Finance may transfer the authorization to the Federal Authority by statutory order.

DIRECTIVES

COMMISSION DELEGATED DIRECTIVE (EU) 2017/593

of 7 April 2016

supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [1], and in particular Articles 16(12) and 24(13) thereof,

Whereas:

(1) Directive 2014/65/EU sets out comprehensive regime aiming to ensure investor protection.

(2) The protection of client financial instruments and funds is an important part of that regime, investment firms being subject to an obligation to make adequate arrangements to safeguard investor's ownership and rights in respect of securities and funds entrusted to an investment firm. Investment firms should have in place proper and specific arrangements to ensure the safeguarding of client financial instruments and funds.

(3) In order to further specify the regulatory framework for the protection of investors and increased clarity to clients, and in line with the overall strategy to foster jobs and growth in the Union through an integrated legal and economic framework that is efficient and treats all actors fairly, the Commission has been empowered to adopt detailed rules to address specific risks to investor protection or to market integrity.

(4) Where an investment firm deposits funds it holds on behalf of a client with a qualifying money market fund, the units or shares in that money market fund should be held in accordance with the requirements for holding financial instruments belonging to clients. Clients should be required to explicitly consent to the depositing of those funds. When assessing the quality of money market instrument there should be no mechanistic reliance on external ratings. However a downgrade below the two highest short-term credit ratings by any agency registered and supervised by ESMA that has rated the instrument should lead the manager to undertake a new assessment of the credit quality of the money market instrument to ensure it continues to be of high quality.

(5) A single officer with overall responsibility for the safeguarding of client instruments and funds should be appointed in order to reduce risks of fragmented responsibility across diverse departments, especially in large and complex firms, and to remedy unsatisfactory situations where firms do not have overarching sight of their means of meeting their obligations. The single officer should possess sufficient skills and authority in order to discharge duties effectively and without impediment, including the duty to report to the firm's senior management in respect of oversight of the effectiveness of the firm's compliance with the safeguarding of client assets requirements. The appointment of a single officer should not preclude that officer from carrying out additional roles where this does not prevent the officer from discharging the duties for safeguarding client financial instruments and funds effectively.

(6) Directive 2014/65/EU requires investment firms to safeguard client assets. Article 16(10) of Directive 2014/65/EU prohibits firms from concluding title transfer collateral arrangements (TTCAs) with retail clients for

[1] OJ L 173, 12.6.2014, p. 349.

the purpose of securing or covering present or future, actual or contingent or prospective obligations. Investment firms are, however, not prohibited from concluding TTCA with non-retail clients. There is therefore a risk that without further guidance investment firms could use TTCA more often than reasonably justified when dealing with non-retail clients, undermining the overall regime put in place to protect client assets. Therefore, in light of the effects of TTCAs on firms' duties towards clients and in order to ensure the safeguarding and segregation rules pursuant to Directive 2014/65/EU are not undermined, investment firms should consider the appropriateness of title transfer collateral arrangements used with non-retail clients by means of the relationship between the client's obligations to the firm and the client assets subject to TTCA. Firms should be allowed to use TTCA with non-retail client only if they demonstrate the appropriateness of TTCA in relation to that client and disclose the risks involved as well as the effect of the TTCA on his assets. Firms should have a documented process of their use TTCA. The ability of firms to enter into TTCAs with non-retail clients should not reduce the need to obtain clients' prior express consent to use client assets.

(7) Demonstrating a robust link between collateral transferred under a TTCA and client's liability should not preclude taking appropriate security against a client's obligation. Investment firms could thus continue to require a sufficient collateral and where appropriate, to do so by a TTCA. That obligation should not prevent compliance with requirements under Regulation (EU) No 648/2012 of the European Parliament and of the Council ([1]) and should not prohibit the appropriate use of TTCAs in the context of contingent liability transactions or repos for non-retail clients.

(8) While some securities financing transactions may require the transfer of title of clients' assets, in that context investment firms should not be able to effect arrangements prohibited under Article 16(10) of Directive 2014/65/EU.

(9) In order to ensure appropriate protection for clients in relation to securities financing transactions (SFTs), investment firms should adopt specific arrangements to ensure that the borrower of client assets provides the appropriate collateral and that the firm monitors the continued appropriateness of such collateral. Investment firms' duty to monitor collateral should apply where they are party to an SFT agreement, including when acting as an agent for the conclusion of a SFT or in cases of tripartite agreement between the external borrower, the client and the investment firm.

(10) Prior express consent by clients should be given and recorded by investment firms in order to allow the investment firm to demonstrate clearly what the client agreed to and to help clarify the status of client assets. However, no legal requirement should be set out in respect of the form in which consent may be given, and a record should be understood as any evidence permissible under national law. Client's consent may be given once at the start of the commercial relationship, as long as it is sufficiently clear that the client has consented to use of their securities. Where an investment firm is acting on a client instruction to lend financial instruments and where this constitutes consent to entering into the transaction, the investment firms should hold evidence to demonstrate this.

(11) To maintain a high standard of investor protection, investment firms depositing financial instruments held on behalf of their clients into an account or accounts opened with a third party should exercise all due skill, care and diligence in the selection, appointment and periodic review of the third party and of the arrangements for the holding and safekeeping of those financial instruments. To ensure that financial instruments are subject to due care and protection at all times, investment firms should, as part of their due diligence, also take into account the expertise and market reputation of the other third parties to which the initial third-party, with whom they might deposit financial instruments, may have delegated functions concerning the holding and safekeeping of financial instruments.

(12) Where investment firms place client funds with a third party, the investment firm should exercise all due skill, care and diligence in the selection, appointment and periodic review of the third party and of the arrangements

([1]) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

for holding and safekeeping client funds, and should consider the need for diversification and mitigation of risks, where appropriate, by placing client funds with more than one third party in order to safeguard clients' rights and minimise the risk of loss and misuse. Investment firms should not circumvent their duty to consider diversification by requiring clients to waive protection. Diversification requirement should apply to client funds deposited in accordance with Article 4 of this Directive. Diversification requirements should not apply to client funds placed with the third party merely for the purpose of executing a transaction for the client. Therefore where an investment firm has transferred client funds to a transaction account in order to make a specific transaction for the client, such funds should not be subject to a requirement to diversify, for example where a firm has transferred funds to a central counterparty (CCP) or exchange in order to pay a margin call.

(13) In order to ensure that client funds are adequately protected, as required by Article 16(9) of Directive 2014/65/EU, it is necessary to set a specific limit on the percentage of client funds that can be deposited at an intra-group credit institution. This should significantly reduce any potential conflicts with due diligence requirements and address the contagion risk inherent in depositing all client funds with a credit institution in the same group as the investment firm. While in certain circumstances it may be proportionate and appropriate for investment firms to deposit, after proper consideration, client funds with entities within their own group, national authorities should closely monitor the reasons for not diversifying client funds outside of the investment firm's group in order to avoid creating loopholes where the general intragroup limit is applied.

(14) In order to protect client financial instruments or funds from appropriation by third parties seeking to recover debts or charges which are not client's debts or charges, investment firms should be able to agree to security interests, liens or rights of set-off over client assets only where this is required by the applicable law in a third country. Sufficiently tailored risk disclosures should be made to clients in order to alert them to the specific risks they face in such cases.

(15) In order to avoid and reduce from an early stage potential risks of failure to comply with investor protection rules, investment firms manufacturing and distributing financial instruments should comply with product governance requirements. For the purpose of product governance requirements, investment firms that create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments, should be considered as manufacturers while investment firms that offer or sell financial instrument and services to clients should be considered distributors.

(16) Entities which are not subject to the requirements of Directive 2014/65/EU but which may be authorised to perform investment services under that Directive, should also comply, as regards such services, with the product governance requirements set out under Directive 2014/65/EU.

(17) Where an investment firm that creates, develops, issues or designs financial instruments is also involved in the distribution of those products, both the product governance rules for manufacturers and distributors should apply. While there is no need to duplicate the target market assessment and distribution strategy exercise, firms should ensure the single target market assessment and distribution strategy exercise is sufficiently detailed to meet the relevant manufacturer and distributor obligations in this area.

(18) In light of the requirements set out in Directive 2014/65/EU and in the interest of investor protection, product governance rules should apply to all products sold on primary and secondary markets, irrespective of the type of product or service provided and of the requirements applicable at point of sale. However, those rules may be applied in a proportionate manner, depending on the complexity of the product and the degree to which publicly available information can be obtained, taking into account the nature of the instrument, the investment service and the target market. Proportionality means that these rules could be relatively simple for certain simple, products distributed on an execution-only basis where such products would be compatible with the needs and characteristics of the mass retail market.

(19) The level of granularity of the target market and the criteria used to define the target market and determine the appropriate distribution strategy should be relevant for the product and should make it possible to assess which clients fall within the target market, for example to assist the ongoing reviews after the financial instrument is

launched. For simpler, more common products, the target market could be identified with less detail while for more complicated products such as bail-inable instruments or less common products, the target market should be identified with more detail.

(20) For the efficient functioning of product governance obligations, distributors should periodically inform the manufacturers about their experience with the products. While distributors should not be required to report every sale to manufacturers, they should provide the data that is necessary for the manufacturer to review the product and check that it remains consistent with the needs, characteristics and objectives of the target market defined by the manufacturer. Relevant information could include data about the amount of sales outside the manufacturer's target market, summary information of the types of clients, a summary of complaints received or by posing questions suggested by the manufacturer to a sample of clients for feedback.

(21) In order to strengthen the protection of investors and increase clarity to clients as to the quality of services they receive, Directive 2014/65/EU further restricted the possibility for firms to receive or pay inducements. For those purposes, detailed conditions for the reception or payment of inducements should be laid down. In particular, the condition that inducements should enhance the quality of the service to the client should be further specified and framed. For that purpose, and subject to certain other conditions, a non-exhaustive list of situations deemed relevant for the condition that inducements enhance the quality of the service to the relevant client should be provided for.

(22) A fee, commission or non-monetary benefit should only be paid or received where justified by the provision of an additional or higher level service to the relevant client. That may include the provision of investment advice on and access to a wide range of suitable financial instruments including an appropriate number of instruments from third party product providers, or the provision of non-independent advice combined with either an offer to the client, at least on an annual basis, to assess the continuing suitability of the financial instruments in which the client has invested or with another ongoing service that is likely to be of value to the client. This could also be the case, in the area of non-advisory services, where investment firms provide access, at a competitive price, to a wide range of financial instruments that are likely to meet the needs of the client, including an appropriate number of instruments from third party product providers having no close links with the investment firm, together with, for instance, the provision of added-value tools, such as objective information tools, helping the relevant client to take investment decisions or enabling the relevant client to monitor, model and adjust the range of financial instruments in which they have invested. The value of the above-mentioned quality enhancements that the investment firm provides to the clients receiving the relevant service has to be proportional to the inducements received by the investment firm.

(23) While investment firms should, once they have fulfilled the quality enhancement criterion, maintain the enhanced level of quality, this should not imply that they are required to provide for a continuously increasing quality of services over time.

(24) Investment firms' obligations to pass on to clients all fees, commissions or monetary benefits received from third-parties in relation to investment advice on an independent basis or portfolio management services should also be further specified. While firms should pass on inducements as soon as possible, a specific timeframe should not be imposed since third party payments may be received by the investment firm at various points in time and for several clients at once.

(25) In order to ensure clients receive a comprehensive overview of the relevant information in respect of the services provided, investment firms should inform clients about the fees, commissions or any monetary benefits transferred to them.

(26) Investment firms providing both execution and research services should price and supply them separately in order to enable investment firms established in the Union to comply with the requirement to not accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients set out in Article 24(7) and (8) of Directive 2014/65/EU.

(27) In order to provide legal certainty concerning the application of new rules for the reception or payment of inducements, in particular with respect to investment firms providing investment advice on an independent basis or portfolio management services, further clarifications in relation to the payment or reception of research should be provided. In particular, where research is not paid directly by the investment firm out of its own resources but in return for payments from a separate research payment account certain essential conditions should be ensured. The research payment account should only be funded by a specific research charge to the

client which should only be based on a research budget set by the investment firm and not linked to the volume and/or value of transactions executed on behalf of clients. Any operational arrangements for the collection of the client's research charge should fully comply with those conditions. When using such arrangements, an investment firm should ensure that the cost of research funded by client charges is not linked to the volume or value of other services or benefits or used to cover any other purposes, such as charges for execution.

(28) In order to ensure that portfolio managers and independent investment advisers properly monitor the amounts paid for research and to ensure that research costs are incurred in the best interests of the client, it is appropriate to specify detailed governance requirements on research spending. Investment firms should retain sufficient control over the overall spending for research, the collection of client research charges and the determination of payments. Research in this context should be understood as covering research material or services concerning one or several financial instruments or other assets, or the issuers or potential issuers of financial instruments, or be closely related to a specific industry or market such that it informs views on financial instruments, assets or issuers within that sector. That type of material or services explicitly or implicitly recommends or suggests an investment strategy and provides a substantiated opinion as to the present or future value or price of such instruments or assets, or otherwise contains analysis and original insights and reach conclusions based on new or existing information that could be used to inform an investment strategy and be relevant and capable of adding value to the investment firm's decisions on behalf of clients being charged for that research.

(29) For further clarity concerning the restriction on the receipt of inducements by investment firms in relation to independent investment advice or portfolio management and the application of research rules, it is also appropriate to indicate how the minor non-monetary benefit exemption may be applied in relation to certain other types of information or material received from third parties. In particular, written material from a third party that is commissioned and paid for by a corporate issuer or potential issuer to promote a new issuance by that company, or where the third party is contractually engaged and paid by the issuer to produce such material on an ongoing basis, should be deemed acceptable as a minor non-monetary benefit subject to disclosure and the open availability of that material. In addition, non-substantive material or services consisting of short term market commentary on the latest economic statistics or company results for example or information on upcoming releases or events, which is provided by a third party and contains only a brief summary of its own opinion on such information that is not substantiated nor includes any substantive analysis such as where they simply reiterate a view based on an existing recommendation or substantive research material or services, can be deemed to be information relating to a financial instrument or investment service of a scale and nature such so that it constitutes an acceptable minor non-monetary benefit.

(30) In particular, any non-monetary benefit that involves a third party allocating valuable resources to the investment firm shall not be considered as minor and shall be judged to impair compliance with the investment firm's duty to act in their client's best interest.

(31) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union and in particular the right to the protection of personal data, the freedom to conduct a business, the right to consumer protection, the right to an effective remedy and to a fair trial and has to be applied in accordance with those rights and principles.

(32) The European Securities and Markets Authority, established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council ([1]), has been consulted for technical advice on the rules laid down in this Directive.

(33) In order to allow competent authorities and investment firms to adapt to the new requirements contained in this Directive so that they can be applied in an efficient and effective manner, the date of transposition as well as date of application of this Directive should be aligned respectively with the transposition and entry into application dates of Directive 2014/65/EU,

(34) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments,

([1]) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Scope and definitions

1. This Directive shall apply to investment firms, to management companies in accordance with Article 6(4) of Directive 2009/65/EC of the European Parliament and of the Council ([1]) and to alternative investment fund managers in accordance with Article 6(6) of Directive 2011/61/EU of the European Parliament and of the Council ([2]).

2. For the purposes of Chapters II, III and IV of this Directive, references to investment firms and financial instruments shall include credit institutions and structured deposits in relation to all the requirements referred to in Article 1(3) and (4) of Directive 2014/65/EU.

3. 'securities financing transaction' means transactions as defined in Article 3 point (11) of Regulation (EU) 2015/2365 of the European Parliament and of the Council ([3]) on transparency of securities financing transactions and of reuse.

4. 'qualifying money market fund' means a collective investment undertaking authorised under Directive 2009/65/EC, or which is subject to supervision and, if applicable, authorised by an authority under the national law of the authorising Member State, and which satisfies all of the following conditions:

(a) its primary investment objective must be to maintain the net asset value of the undertaking either constant at par (net of earnings), or at the value of the investors' initial capital plus earnings;

(b) it must, with a view to achieving that primary investment objective, invest exclusively in high quality money market instruments with a maturity or residual maturity of no more than 397 days, or regular yield adjustments consistent with such a maturity, and with a weighted average maturity of 60 days. It may also achieve this objective by investing on an ancillary basis in deposits with credit institutions;

(c) it must provide liquidity through same day or next day settlement.

For the purposes of point (b), a money market instrument shall be considered to be of high quality if the management/investment company performs its own documented assessment of the credit quality of money market instruments that allows it to consider a money market instrument as high quality. Where one or more credit rating agencies registered and supervised by ESMA have provided a rating of the instrument, the management/investment company's internal assessment should have regard to, inter alia, those credit ratings.

CHAPTER II

SAFEGUARDING OF CLIENT FINANCIAL INSTRUMENTS AND FUNDS

Article 2

Safeguarding of client financial instruments and funds

1. Member States shall require that investment firms comply with the following requirements:

(a) they must keep records and accounts enabling them at any time and without delay to distinguish assets held for one client from assets held for any other client and from their own assets;

(b) they must maintain their records and accounts in a way that ensures their accuracy, and in particular their correspondence to the financial instruments and funds held for clients and that they may be used as an audit trail;

([1]) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

([2]) 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 (OJ L 174, 1.7.2011, p. 1).

([3]) Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

(c) they must conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third parties by whom those assets are held;

(d) they must take the necessary steps to ensure that any client financial instruments deposited with a third party, in accordance with Article 3, are identifiable separately from the financial instruments belonging to the investment firm and from financial instruments belonging to that third party, by means of differently titled accounts on the books of the third party or other equivalent measures that achieve the same level of protection;

(e) they must take the necessary steps to ensure that client funds deposited, in accordance with Article 4, in a central bank, a credit institution or a bank authorised in a third country or a qualifying money market fund are held in an account or accounts identified separately from any accounts used to hold funds belonging to the investment firm;

(f) they must introduce adequate organisational arrangements to minimise the risk of the loss or diminution of client assets, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence.

2. If, for reasons of the applicable law, including in particular the law relating to property or insolvency, investment firms cannot comply with paragraph 1 of this Article to safeguard clients' rights to satisfy the requirements of Article 16(8) and (9) of Directive 2014/65/EU, Member States shall require that investment firms put in place arrangements to ensure that clients' assets are safeguarded to meet the objectives of paragraph 1 of this Article.

3. If the applicable law of the jurisdiction in which the client funds or financial instruments are held prevents investment firms from complying with points (d) or (e) of paragraph 1, Member States shall prescribe requirements which have an equivalent effect in terms of safeguarding clients' rights.

When relying on such equivalent requirements under Article 2(1)(d) or (e), Member States shall ensure that investment firms inform clients that in such instances they do not benefit from the provisions envisaged under Directive 2014/65/EU and this Directive.

4. Member States shall ensure that security interests, liens or rights of set-off over client financial instruments or funds enabling a third party to dispose of client's financial instruments or funds in order to recover debts that do not relate to the client or provision of services to the client are not permitted except where this is required by applicable law in a third country jurisdiction in which the client funds or financial instruments are held

Member States shall require investment firms, where the firm is obliged to enter into agreements that create such security interests, liens or rights of set-off, to disclose that information to clients indicating to them the risks associated with those arrangements.

Where security interests, liens or rights of set-off are granted by the firm over client financial instruments or funds, or where the firm has been informed that they are granted, they shall be recorded in client contracts and the firm's own accounts to make the ownership status of client assets clear, such as in the event of an insolvency.

5. Member States shall require that investment firms make information pertaining to clients' financial instruments and funds readily available to the following entities: competent authorities, appointed insolvency practitioners and those responsible for the resolution of failed institutions. The information to be made available shall include the following:

(a) related internal accounts and records that readily identify the balances of funds and financial instruments held for each client;

(b) where client funds are held by investment firms in accordance with Article 4, details on the accounts in which client funds are held and on the relevant agreements with those firms;

(c) where financial instruments are held by investment firms in accordance with Article 3, details on the accounts opened with third parties and on the relevant agreements with those third parties, as well as details on the relevant agreements with those investment firms;

(d) details of third parties carrying out any related (outsourced) tasks and details of any outsourced tasks

(e) key individuals of the firm involved in related processes, including those responsible for oversight of the firm's requirements in relation to the safeguarding of client assets; and

(f) agreements relevant to establish client ownership over assets.

Article 3

Depositing client financial instruments

1. Member States shall allow investment firms to deposit financial instruments held by them on behalf of their clients into an account or accounts opened with a third party provided that the firms exercise all due skill, care and diligence in the selection, appointment and periodic review of the third party and of the arrangements for the holding and safekeeping of those financial instruments.

In particular, Member States shall require investment firms to take into account the expertise and market reputation of the third party as well as any legal requirements related to the holding of those financial instruments that could adversely affect clients' rights.

2. Where an investment firm proposes to deposit client financial instruments with a third party, Member States shall ensure that this investment firm only deposits financial instruments with a third party in a jurisdiction where the safekeeping of financial instruments for the account of another person is subject to specific regulation and supervision and that third party is subject to this specific regulation and supervision.

3. Member States shall ensure that investment firms do not deposit financial instruments held on behalf of clients with a third party in a third country that does not regulate the holding and safekeeping of financial instruments for the account of another person unless one of the following conditions is met:

(a) the nature of the financial instruments or of the investment services connected with those instruments requires them to be deposited with a third party in that third country;

(b) where the financial instruments are held on behalf of a professional client, that client requests the firm in writing to deposit them with a third party in that third country.

4. Member States shall ensure the requirements under paragraph 2 and 3 shall also apply when the third-party has delegated any of its functions concerning the holding and safekeeping of financial instruments to another third-party.

Article 4

Depositing client funds

1. Member States shall require investment firms, on receiving any client funds, promptly to place those funds into one or more accounts opened with any of the following:

(a) a central bank;

(b) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council ([1]);

(c) a bank authorised in a third country;

(d) a qualifying money market fund.

The first subparagraph shall not apply to a credit institution authorised under Directive 2013/36/EU in relation to deposits within the meaning of that Directive held by that institution.

2. Member States shall require that, where investment firms do not deposit client funds with a central bank, they exercise all due skill, care and diligence in the selection, appointment and periodic review of the credit institution, bank or money market fund where the funds are placed and the arrangements for the holding of those funds and they consider the need for diversification of these funds as part of their due diligence.

Member States shall ensure, in particular, that investment firms take into account the expertise and market reputation of such institutions or money market funds with a view to ensuring the protection of clients' rights, as well as any legal or regulatory requirements or market practices related to the holding of client funds that could adversely affect clients' rights.

([1]) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Member States shall require that investment firms ensure that clients give their explicit consent to the placement of their funds in a qualifying money market fund. In order to ensure this right to consent is effective, investment firms shall inform clients that funds placed with a qualifying money market fund will not be held in accordance with the requirements for safeguarding client funds set out in this Directive.

3. Member States shall require that, where investment firms deposit client funds with a credit institution, bank or money market fund of the same group as the investment firm, they limit the funds that they deposit with any such group entity or combination of any such group entities so that funds do not exceed 20 % of all such funds.

An investment firm may not comply with this limit where it is able to demonstrate that, in view of the nature, scale and complexity of its business, and also the safety offered by the third parties considered in the previous subparagraph, and including in any case the small balance of client funds the investment firm holds the requirement under the previous paragraph is not proportionate. Investment firms shall periodically review the assessment made in accordance with this subparagraph and shall notify their initial and reviewed assessments to NCAs.

Article 5

Use of client financial instruments

1. Member States shall not allow investment firms to enter into arrangements for securities financing transactions in respect of financial instruments held by them on behalf of a client, or otherwise use such financial instruments for their own account or the account of any other person or client of the firm, unless both of the following conditions are met:

(a) the client has given his prior express consent to the use of the instruments on specified terms, as clearly evidenced in writing and affirmatively executed by signature or equivalent, and

(b) the use of that client's financial instruments is restricted to the specified terms to which the client consents.

2. Member States shall not allow investment firms to enter into arrangements for securities financing transactions in respect of financial instruments which are held on behalf of a client in an omnibus account maintained by a third party, or otherwise use financial instruments held in such an account for their own account or for the account of any other person unless, in addition to the conditions set out in paragraph 1, at least one of the following conditions is met:

(a) each client whose financial instruments are held together in an omnibus account must have given prior express consent in accordance with point (a) of paragraph 1;

(b) the investment firm must have in place systems and controls which ensure that only financial instruments belonging to clients who have given prior express consent in accordance with point (a) of paragraph 1 are so used.

The records of the investment firm shall include details of the client on whose instructions the use of the financial instruments has been effected, as well as the number of financial instruments used belonging to each client who has given his consent, so as to enable the correct allocation of any loss.

3. Member States shall ensure that investment firms take appropriate measures to prevent the unauthorised use of client financial instruments for their own account or the account of any other person such as:

(a) the conclusion of agreements with clients on measures to be taken by the investment firms in case the client does not have enough provision on its account on the settlement date, such as borrowing of the corresponding securities on behalf of the client or unwinding the position;

(b) the close monitoring by the investment firm of its projected ability to deliver on the settlement date and the putting in place of remedial measures if this cannot be done; and

(c) the close monitoring and prompt requesting of undelivered securities outstanding on the settlement day and beyond.

4. Member States shall ensure that investment firms adopt specific arrangements for all clients to ensure that the borrower of client financial instruments provides the appropriate collateral and that the firm monitors the continued appropriateness of such collateral and takes the necessary steps to maintain the balance with the value of client instruments.

5. Member States shall ensure that investment firms do not enter into arrangements which are prohibited under Article 16(10) of Directive 2014/65/EU.

Article 6

Inappropriate use of title transfer collateral arrangements

1. Member States shall require that investment firms properly consider, and are able to demonstrate that they have done so, the use of title transfer collateral arrangements in the context of the relationship between the client's obligation to the firm and the client assets subjected to title transfer collateral arrangements by the firm.

2. When considering, and documenting, the appropriateness of the use of title transfer collateral arrangements, investment firms shall take into account all of the following factors:

(a) whether there is only a very weak connection between the client's obligation to the firm and the use of title transfer collateral arrangements, including whether the likelihood of a clients' liability to the firm is low or negligible;

(b) whether the amount of client funds or financial instruments subject to title transfer collateral arrangements far exceeds the client's obligation, or is even unlimited if the client has any obligation at all to the firm; and

(c) whether all clients' financial instruments or funds are made subject to title transfer collateral arrangements, without consideration of what obligation each client has to the firm.

3. Where using title transfer collateral arrangements, investment firms shall highlight to professional clients and eligible counterparties the risks involved and the effect of any title transfer collateral arrangement on the client's financial instruments and funds.

Article 7

Governance arrangements concerning the safeguarding of client assets

Member States shall ensure that investment firms appoint a single officer of sufficient skill and authority with specific responsibility for matters relating to the compliance by firms with their obligations regarding the safeguarding of client financial instruments and funds.

Member States shall allow investment firms to decide, ensuring full compliance with this Directive, whether the appointed officer is to be dedicated solely to this task or whether the officer can discharge responsibilities effectively whilst having additional responsibilities.

Article 8

Reports by external auditors

Member States shall require investment firms to ensure that their external auditors report at least annually to the competent authority of the home Member State of the firm on the adequacy of the firm's arrangements under Article 16(8), (9) and (10) of Directive 2014/65/EU and this Chapter.

CHAPTER III

PRODUCT GOVERNANCE REQUIREMENTS

Article 9

Product governance obligations for investment firms manufacturing financial instruments

1. Member States shall require investment firms to comply with this Article when manufacturing financial instruments, which encompasses the creation, development, issuance and/or design of financial instruments.

Member States shall require investment firms manufacturing financial instruments to comply, in a way that is appropriate and proportionate, with the relevant requirements in paragraphs 2 to 15, taking into account the nature of the financial instrument, the investment service and the target market for the product.

2. Member States shall require investment firms to establish, implement and maintain procedures and measures to ensure the manufacturing of financial instruments complies with the requirements on proper management of conflicts of interest, including remuneration. In particular, investment firms manufacturing financial instruments shall ensure that the design of the financial instrument, including its features, does not adversely affect end clients or does not lead to problems with market integrity by enabling the firm to mitigate and/or dispose of its own risks or exposure to the underlying assets of the product, where the investment firm already holds the underlying assets on own account.

3. Member States shall require investment firms to analyse potential conflicts of interests each time a financial instrument is manufactured. In particular, firms shall assess whether the financial instrument creates a situation where end clients may be adversely affected if they take:

(a) an exposure opposite to the one previously held by the firm itself; or

(b) an exposure opposite to the one that the firm wants to hold after the sale of the product.

4. Member States shall ensure that investment firms consider whether the financial instrument may represent a threat to the orderly functioning or to the stability of financial markets before deciding to proceed with the launch of the product.

5. Member States shall require investment firms to ensure that relevant staff involved in the manufacturing of financial instruments possess the necessary expertise to understand the characteristics and risks of the financial instruments they intend to manufacture.

6. Member States shall require investment firms to ensure that the management body has effective control over the firm's product governance process. Investment firms shall ensure that the compliance reports to the management body systematically include information about the financial instruments manufactured by the firm, including information on the distribution strategy. Investment firms shall make the reports available to their competent authority on request.

7. Member States shall require investment firms to ensure that the compliance function monitors the development and periodic review of product governance arrangements in order to detect any risk of failure by the firm to comply with the obligations set out in this Article.

8. Member States shall require investment firms, where they collaborate, including with entities which are not authorised and supervised in accordance with Directive 2014/65/EU or third-country firms, to create, develop, issue and/or design a product, to outline their mutual responsibilities in a written agreement.

9. Member States shall require investment firms to identify at a sufficiently granular level the potential target market for each financial instrument and specify the type(s) of client for whose needs, characteristics and objectives the financial instrument is compatible. As part of this process, the firm shall identify any group(s) of clients for whose needs, characteristics and objectives the financial instrument is not compatible. Where investment firms collaborate to manufacture a financial instrument, only one target market needs to be identified.

Investment firms manufacturing financial instruments that are distributed through other investment firms shall determine the needs and characteristics of clients for whom the product is compatible based on their theoretical knowledge of and past experience with the financial instrument or similar financial instruments, the financial markets and the needs, characteristics and objectives of potential end clients.

10. Member States shall require investment firms to undertake a scenario analysis of their financial instruments which shall assess the risks of poor outcomes for end clients posed by the product and in which circumstances these outcomes may occur. Investment firms shall assess the financial instrument under negative conditions covering what would happen if, for example:

(a) the market environment deteriorated;

(b) the manufacturer or a third party involved in manufacturing and or functioning of the financial instrument experiences financial difficulties or other counterparty risk materialises;

(c) the financial instrument fails to become commercially viable; or

(d) demand for the financial instrument is much higher than anticipated, putting a strain on the firm's resources and/or on the market of the underlying instrument.

11. Member States shall require investment firms to determine whether a financial instrument meets the identified needs, characteristics and objectives of the target market, including by examining the following elements:

(a) the financial instrument's risk/reward profile is consistent with the target market; and

(b) financial instrument design is driven by features that benefit the client and not by a business model that relies on poor client outcomes to be profitable.

12. Member States shall ensure that investment firms consider the charging structure proposed for the financial instrument, including by examining the following:

(a) financial instrument's costs and charges are compatible with the needs, objectives and characteristics of the target market;

(b) charges do not undermine the financial instrument's return expectations, such as where the costs or charges equal, exceed or remove almost all the expected tax advantages linked to a financial instrument; and

(c) the charging structure of the financial instrument is appropriately transparent for the target market, such as that it does not disguise charges or is too complex to understand.

13. Member States shall require investment firms to ensure that the provision of information about a financial instrument to distributors includes information about the appropriate channels for distribution of the financial instrument, the product approval process and the target market assessment and is of an adequate standard to enable distributors to understand and recommend or sell the financial instrument properly.

14. Member States shall require investment firms to review the financial instruments they manufacture on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market. Investment firms shall consider if the financial instrument remains consistent with the needs, characteristics and objectives of the target market and if it is being distributed to the target market, or is reaching clients for whose needs, characteristics and objectives the financial instrument is not compatible.

15. Member States shall require investment firms to review financial instruments prior to any further issue or re-launch, if they are aware of any event that could materially affect the potential risk to investors and at regular intervals to assess whether the financial instruments function as intended. Investment firms shall determine how regularly to review their financial instruments based on relevant factors, including factors linked to the complexity or the innovative nature of the investment strategies pursued. Firms shall also identify crucial events that would affect the potential risk or return expectations of the financial instrument, such as:

(a) the crossing of a threshold that will affect the return profile of the financial instrument; or

(b) the solvency of certain issuers whose securities or guarantees may impact the performance of the financial instrument.

Member States shall ensure that, when such events occur, investment firms take appropriate action which may consist of:

(a) the provision of any relevant information on the event and its consequences on the financial instrument to the clients or the distributors of the financial instrument if the investment firm does not offer or sell the financial instrument directly to the clients;

(b) changing the product approval process;

(c) stopping further issuance of the financial instrument;

(d) changing the financial instrument to avoid unfair contract terms;

(e) considering whether the sales channels through which the financial instruments are sold are appropriate where firms become aware that the financial instrument is not being sold as envisaged;

(f) contacting the distributor to discuss a modification of the distribution process;

(g) terminating the relationship with the distributor; or

(h) informing the relevant competent authority.

Article 10

Product governance obligations for distributors

1. Member States shall require investment firms, when deciding the range of financial instruments issued by themselves or other firms and services they intend to offer or recommend to clients, to comply, in a way that is appropriate and proportionate, with the relevant requirements laid down in paragraphs 2 to 10, taking into account the nature of the financial instrument, the investment service and the target market for the product.

Member States shall ensure that investment firms also comply with the requirements of Directive 2014/65/EU when offering or recommending financial instruments manufactured by entities that are not subject to Directive 2014/65/EU. As part of this process, such investment firms shall have in place effective arrangements to ensure that they obtain sufficient information about these financial instruments from these manufacturers.

Investment firms shall determine the target market for the respective financial instrument, even if the target market was not defined by the manufacturer.

2. Member States shall require investment firms to have in place adequate product governance arrangements to ensure that products and services they intend to offer or recommend are compatible with the needs, characteristics, and objectives of an identified target market and that the intended distribution strategy is consistent with the identified target market. Investment firms shall appropriately identify and assess the circumstances and needs of the clients they intend to focus on, so as to ensure that clients' interests are not compromised as a result of commercial or funding pressures. As part of this process, firms shall identify any groups of clients for whose needs, characteristics and objectives the product or service is not compatible.

Member States shall ensure that investment firms obtain from manufactures that are subject to Directive 2014/65/EU information to gain the necessary understanding and knowledge of the products they intend to recommend or sell in order to ensure that these products will be distributed in accordance with the needs, characteristics and objectives of the identified target market,

Member States shall require investment firms to take all reasonable steps to ensure they also obtain adequate and reliable information from manufacturers not subject to Directive 2014/65/EU to ensure that products will be distributed in accordance with the characteristics, objectives and needs of the target market. Where relevant information is not publicly available, the distributor shall take all reasonable steps to obtain such relevant information from the manufacturer or its agent. Acceptable publicly available information is information which is clear, reliable and produced to meet regulatory requirements, such as disclosure requirements under Directive 2003/71/EC ([1]) or 2004/109/EC ([2]) of the European Parliament and of the Council. This obligation is relevant for products sold on primary and secondary markets and shall apply in a proportionate manner, depending on the degree to which publicly available information is obtainable and the complexity of the product.

Investment firms shall use the information obtained from manufacturers and information on their own clients to identify the target market and distribution strategy. When an investment firm acts both as a manufacturer and a distributor, only one target market assessment shall be required.

([1]) Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

([2]) Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

3. Member States shall require investment firms, when deciding the range of financial instrument and services that they offer or recommend and the respective target markets, to maintain procedures and measures to ensure compliance with all applicable requirements under Directive 2014/65/EU including those relating to disclosure, assessment of suitability or appropriateness, inducements and proper management of conflicts of interest. In this context, particular care shall be taken when distributors intend to offer or recommend new products or there are variations to the services they provide.

4. Member States shall require investment firms to periodically review and update their product governance arrangements in order to ensure that they remain robust and fit for their purpose, and take appropriate actions where necessary.

5. Member States shall require investment firms to review the investment products they offer or recommend and the services they provide on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market. Firms shall assess at least whether the product or service remains consistent with the needs, characteristics and objectives of the identified target market and whether the intended distribution strategy remains appropriate. Firms shall reconsider the target market and/or update the product governance arrangements if they become aware that they have wrongly identified the target market for a specific product or service or that the product or service no longer meets the circumstances of the identified target market, such as where the product becomes illiquid or very volatile due to market changes.

6. Member States shall require investment firms to ensure their compliance function oversee the development and periodic review of product governance arrangements in order to detect any risk of failure to comply with the obligations set out in this Article.

7. Member States shall require investment firms to ensure that relevant staff possess the necessary expertise to understand the characteristics and risks of the products that intend to offer or recommend and the services provided as well as the needs, characteristics and objectives of the identified target market.

8. Member States shall require investment firms to ensure that the management body has effective control over the firm's product governance process to determine the range of investment products that they offer or recommend and the services provided to the respective target markets. Investment firms shall ensure that the compliance reports to the management body systematically include information about the products they offer or recommend and the services provided. The compliance reports shall be made available to competent authorities on request.

9. Member States shall ensure distributors provide manufacturers with information on sales and, where appropriate, information on the above reviews to support product reviews carried out by manufacturers.

10. Where different firms work together in the distribution of a product or service, Member States shall ensure the investment firm with the direct client relationship has ultimate responsibility to meet the product governance obligations set out in this Article. However, intermediary investment firms shall:

(a) ensure that relevant product information is passed from the manufacturer to the final distributor in the chain;

(b) if the manufacturer requires information on product sales in order to comply with their own product governance obligations, enable them to obtain it; and

(c) apply the product governance obligations for manufacturers, as relevant, in relation to the service they provide.

CHAPTER IV

INDUCEMENTS

Article 11

Inducements

1. Member States shall require investment firms paying or being paid any fee or commission or providing or being provided with any non-monetary benefit in connection with the provision of an investment service or ancillary service to the client to ensure that all the conditions set out in Article 24(9) of Directive 2014/65/EU and requirements set out in paragraphs 2-5 are met at all times.

2. A fee, commission or non-monetary benefit shall be considered to be designed to enhance the quality of the relevant service to the client if all of the following conditions are met:

(a) it is justified by the provision of an additional or higher level service to the relevant client, proportional to the level of inducements received, such as:

(i) the provision of non-independent investment advice on and access to a wide range of suitable financial instruments including an appropriate number of instruments from third party product providers having no close links with the investment firm;

(ii) the provision of non-independent investment advice combined with either: an offer to the client, at least on an annual basis, to assess the continuing suitability of the financial instruments in which the client has invested; or with another on-going service that is likely to be of value to the client such as advice about the suggested optimal asset allocation of the client; or

(iii) the provision of access, at a competitive price, to a wide range of financial instruments that are likely to meet the needs of the client, including an appropriate number of instruments from third party product providers having no close links with the investment firm, together with either the provision of added-value tools, such as objective information tools helping the relevant client to take investment decisions or enabling the relevant client to monitor, model and adjust the range of financial instruments in which they have invested, or providing periodic reports of the performance and costs and charges associated with the financial instruments

(b) it does not directly benefit the recipient firm, its shareholders or employees without tangible benefit to the relevant client;

(c) it is justified by the provision of an on-going benefit to the relevant client in relation to an on-going inducement.

A fee, commission, or non-monetary benefit shall not be considered acceptable if the provision of relevant services to the client is biased or distorted as a result of the fee, commission or non-monetary benefit.

3. Investment firms shall fulfil the requirements set out in paragraph 2 on an ongoing basis as long as they continue to pay or receive the fee, commission or non-monetary benefit.

4. Investment firms shall hold evidence that any fees, commissions or non-monetary benefits paid or received by the firm are designed to enhance the quality of the relevant service to the client:

(a) by keeping an internal list of all fees, commissions and non-monetary benefits received by the investment firm from a third party in relation to the provision of investment or ancillary services; and

(b) by recording how the fees, commissions and non-monetary benefits paid or received by the investment firm, or that it intends to use, enhance the quality of the services provided to the relevant clients and the steps taken in order not to impair the firm's duty to act honestly, fairly and professionally in accordance with the best interests of the client.

5. In relation to any payment or benefit received from or paid to third parties, investment firms shall disclose to the client the following information:

(a) prior to the provision of the relevant investment or ancillary service, the investment firm shall disclose to the client information on the payment or benefit concerned in accordance with the second subparagraph of Article 24(9) of Directive 2014/65/EU. Minor non-monetary benefits may be described in a generic way. Other non-monetary benefits received or paid by the investment firm in connection with the investment service provided to a client shall be priced and disclosed separately;

(b) where an investment firm was unable to ascertain on an ex-ante basis the amount of any payment or benefit to be received or paid, and instead disclosed to the client the method of calculating that amount, the firm shall also provide its clients with information of the exact amount of the payment or benefit received or paid on an ex-post basis; and

(c) at least once a year, as long as (on-going) inducements are received by the investment firm in relation to the investment services provided to the relevant clients, the investment firm shall inform its clients on an individual basis about the actual amount of payments or benefits received or paid. Minor non-monetary benefits may be described in a generic way.

In implementing these requirements, investment firms shall take into account the rules on costs and charges set out in Article 24(4)(c) of Directive 2014/65/EU and in Article 50 of Commission Delegated Regulation (EU) 2017/565 [1].

When more firms are involved in a distribution channel, each investment firm providing an investment or ancillary service shall comply with its obligations to make disclosures to its clients.

Article 12

Inducements in respect of investment advice on an independent basis or portfolio management services

1. Member States shall ensure that investment firms providing investment advice on an independent basis or portfolio management return to clients any fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the services provided to that client as soon as reasonably possible after receipt. All fees, commissions or monetary benefits received from third parties in relation to the provision of independent investment advice and portfolio management shall be transferred in full to the client.

Investment firms shall set up and implement a policy to ensure that any fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of independent investment advice and portfolio management are allocated and transferred to each individual client.

Investment firms shall inform clients about the fees, commissions or any monetary benefits transferred to them, such as through the periodic reporting statements provided to the client.

2. Investment firms providing investment advice on an independent basis or portfolio management shall not accept non-monetary benefits that do not qualify as acceptable minor non-monetary benefits in accordance with paragraph 3.

3. The following benefits shall qualify as acceptable minor non-monetary benefits only if they are:

(a) information or documentation relating to a financial instrument or an investment service, is generic in nature or personalised to reflect the circumstances of an individual client;

(b) written material from a third party that is commissioned and paid for by an corporate issuer or potential issuer to promote a new issuance by the company, or where the third party firm is contractually engaged and paid by the issuer to produce such material on an ongoing basis, provided that the relationship is clearly disclosed in the material and that the material is made available at the same time to any investment firms wishing to receive it or to the general public;

(c) participation in conferences, seminars and other training events on the benefits and features of a specific financial instrument or an investment service;

(d) hospitality of a reasonable *de minimis* value, such as food and drink during a business meeting or a conference, seminar or other training events mentioned under point (c); and

(e) other minor non-monetary benefits which a Member States deems capable of enhancing the quality of service provided to a client and, having regard to the total level of benefits provided by one entity or group of entities, are of a scale and nature that are unlikely to impair compliance with an investment firm's duty to act in the best interest of the client.

Acceptable minor non-monetary benefits shall be reasonable and proportionate and of such a scale that they are unlikely to influence the investment firm's behaviour in any way that is detrimental to the interests of the relevant client.

Disclosure of minor non-monetary benefits shall be made prior to the provision of the relevant investment or ancillary services to clients. In accordance with Article 11(5) (a) minor non-monetary benefits may be described in a generic way.

[1] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (see page 1 of this Official Journal).

Article 13

Inducements in relation *to research*

1. Member States shall ensure that the provision of research by third parties to investment firms providing portfolio management or other investment or ancillary services to clients shall not be regarded as an inducement if it is received in return for either of the following:

(a) direct payments by the investment firm out of its own resources;

(b) payments from a separate research payment account controlled by the investment firm, provided the following conditions relating to the operation of the account are met:

(i) the research payment account is funded by a specific research charge to the client;

(ii) as part of establishing a research payment account and agreeing the research charge with their clients, investment firms set and regularly assess a research budget as an internal administrative measure;

(iii) the investment firm is held responsible for the research payment account;

(iv) the investment firm regularly assesses the quality of the research purchased based on robust quality criteria and its ability to contribute to better investment decisions.

With regard to point (b) of the first subparagraph, where an investment firm makes use of the research payment account, it shall provide the following information to clients:

(a) before the provision of an investment service to clients, information about the budgeted amount for research and the amount of the estimated research charge for each of them;

(b) annual information on the total costs that each of them has incurred for third party research.

2. Where an investment firm operates a research payment account, Member States shall ensure that the investment firm shall also be required, upon request by their clients or by competent authorities, to provide a summary of the providers paid from this account, the total amount they were paid over a defined period, the benefits and services received by the investment firm, and how the total amount spent from the account compares to the budget set by the firm for that period, noting any rebate or carry-over if residual funds remain in the account. For the purposes of point (b)(i) of paragraph 1, the specific research charge shall:

(a) only be based on a research budget set by the investment firm for the purpose of establishing the need for third party research in respect of investment services rendered to its clients; and

(b) not be linked to the volume and/or value of transactions executed on behalf of the clients.

3. Every operational arrangement for the collection of the client research charge, where it is not collected separately but alongside a transaction commission, shall indicate a separately identifiable research charge and shall fully comply with the conditions set out in point (b) of the first subparagraph of paragraph 1 and in the second subparagraph of paragraph 1.

4. The total amount of research charges received may not exceed the research budget.

5. The investment firm shall agree with clients, in the firm's investment management agreement or general terms of business, the research charge as budgeted by the firm and the frequency with which the specific research charge will be deducted from the resources of the client over the year. Increases in the research budget shall only take place after the provision of clear information to clients about such intended increases. If there is a surplus in the research payment account at the end of a period, the firm should have a process to rebate those funds to the client or to offset it against the research budget and charge calculated for the following period.

6. For the purposes of point (b)(ii) of the first subparagraph of paragraph 1, the research budget shall be managed solely by the investment firm and shall be based on a reasonable assessment of the need for third party research. The allocation of the research budget to purchase third party research shall be subject to appropriate controls and senior management oversight to ensure it is managed and used in the best interests of the firm's clients. Those controls include a clear audit trail of payments made to research providers and how the amounts paid were determined with reference to the quality criteria referred to in paragraph 1 (b) (iv). Investment firms shall not use the research budget and research payment account to fund internal research.

7. For the purposes of point (b)(iii) of paragraph 1, the investment firm may delegate the administration of the research payment ac-count to a third party, provided that the arrangement facilitates the purchase of third party research and payments to research providers in the name of the investment firm without any undue delay in accordance with the investment firm's instruction.

8. For the purposes of point (b) (iv) of paragraph 1, investment firms shall establish all necessary elements in a written policy and provide it to their clients. It shall also address the extent to which research purchased through the research payment account may benefit clients' portfolios, including, where relevant, by taking into account investment strategies applicable to various types of portfolios, and the approach the firm will take to allocate such costs fairly to the various clients' portfolios.

9. An investment firm providing execution services shall identify separate charges for these services that only reflect the cost of executing the transaction. The provision of each other benefit or service by the same investment firm to investment firms, established in the Union shall be subject to a separately identifiable charge; the supply of and charges for those benefits or services shall not be influenced or conditioned by levels of payment for execution services.

CHAPTER V

FINAL PROVISIONS

Article 14

Entry into force and application

1. Member States shall adopt and publish, by 3 July 2017 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 3 January 2018.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 15

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 16

This Directive is addressed to the Member States.

Done at Brussels, 7 April 2016.

For the Commission
The President
Jean-Claude JUNCKER

Substituted Compliance Assessment Questionnaire

The Securities and Exchange Commission ("Commission" or "SEC") has adopted rules under the Securities Exchange Act of 1934 ("Exchange Act") that provide that the Commission may, conditionally or unconditionally, determine that a registered non-U.S. security-based swap dealer or major security-based swap participant (together, "Regulated Entities"), or class thereof, may satisfy certain Exchange Act provisions and SEC rules governing these non-U.S. Regulated Entities by complying with specified requirements under a foreign financial regulatory system. This regime is known as "substituted compliance." A foreign financial regulatory authority or authorities may request substituted compliance by filing an application with the Commission.

Before the Commission may make a substituted compliance determination, it must determine that the foreign requirements are comparable to the corresponding U.S. requirements, taking into account factors such as the scope and objectives of the foreign requirements, the effectiveness of the foreign supervisory compliance program, and the exercise of foreign enforcement authority. Substituted compliance also will be predicated, in part, on there being an arrangement between the Commission and the relevant foreign authority(ies) addressing supervisory and enforcement cooperation and other matters related to substituted compliance.

This questionnaire is intended to assist you in preparing an application for substituted compliance as well as assist the Commission in conducting its comparability assessment of your jurisdiction's regulatory regime. Part I of this questionnaire provides a list of the U.S. requirements for which substituted compliance potentially is available. The questions in Part II of the questionnaire contain questions relating to the supervision and enforcement portions of the comparability assessment. Section III of Part II has specific questions relating to supervisory and enforcement cooperation, including the requirements of Exchange Act Rule 3a-71-6(c)(3). In completing these questionnaires, please provide detailed responses and hyperlinks to the relevant laws, regulations, policies, or other sources, as applicable.

Please note, Commission staff intends to keep the information provided in response to this questionnaire non-public to the extent permitted by law. However, in accordance with Exchange Act Rule 0-13, once a completed application has been submitted, the Commission will publish a notice in the Federal Register for public comment. Commission staff anticipates that the published notice will include the information contained in the filed application, which may incorporate the information provided in response to this questionnaire. As such, please note that the information provided in response to this questionnaire could become public.

Furthermore, under the Freedom of Information Act (FOIA), the information provided in response to this questionnaire may be provided to any person unless the records are protected by an exemption to FOIA. However, certain records received from foreign securities authorities may be considered exempt from disclosure by the Commission under the Exchange Act.

Part I

The Commission is considering applications for substituted compliance to permit Regulated Entities that are not U.S. persons to satisfy certain U.S. requirements by complying with comparable foreign requirements. The U.S. requirements for which substituted compliance potentially is available are set forth in the table below. Please indicate in the table below the regulations for which you would like to seek substituted compliance in your jurisdiction:

List of Abbreviations

A	AktG	Stock Corporation Act	*Aktiengesetz*
	AML	Anti-Money Laundering	
B	BaFin	Federal Financial Supervisory Authority	*Bundesanstalt für Finanzdienstleistungsaufsicht*
	BCBS	Basel Committee on Banking Supervision	
C	CCP	Central Counterparty	
	CRD	Capital Requirements Directive (EU regulation)	
	CRR	Capital Requirements Regulation (EU regulation)	
D	blank		
E	EBA	European Banking Authority	
	ECB	European Central Bank	
	ECB-SSM	European Central Bank-Single Supervisory Mechanism	
	EMIR	European Markets and Infrastructure Regulation (EU regulation)	

	EIOPA	European Insurance and Occupational Pension Funds Authority	
	ESA	European Supervisory Authorities (ESMA, EBA, EIOPA)	
	ESMA	European Securities and Markets Authority	
	ETD	Exchange traded derivatives	
	EU	European Union	
F	FinDAG	Act Establishing the Federal Financial Supervisory Authority (BaFin)	*Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht (Finanzdienstleistungsaufsichtsgesetz)*
	FINREP	Finanicial Reporting of Institutions in accordance with Regulation (EU) No. 680/2014	
G	GwG	[Anti-] Money Laundering Act	*Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten (Geldwäschegesetz)*
	GDPR	General Data Protection Regulation (EU) 2016/679	
H	blank		
I	ICAAP	Internal Capital Adequacy Assessment Process	
I	IOSCO	International Organization of Securities Commissions	

J	JST	Joint Supervisory Team	
K	KWG	Banking Act	*Gesetz über das Kreditwesen (Kreditwesengesetz)*
M	MaComp	Minimum Requirements for Compliance	*Mindestanforderungen an die Compliance-Funktion und die weiteren Verhaltens-, Organisations- und Transparenzpflichten Wertpapierdienstleistungsunternehmen*
	MAR	Market Abuse Regulation (EU regulation)	
	MaRisk	Minimum Requirements for Risk Management	*Mindestanforderungen an das Risikomanagement*
	MiFID	Markets in Financial Instruments Directive (EU Regulation)	
	MiFID II	Markets in Financial Instruments Directive (EU Regulation)	
	MiFIR	Markets in Financial Instruments Regulation (EU Regulation)	
	MLD 4	Fourth Money Laundering Directive ((EU) 2015/849) (MLD4)	
N	Non-US-SBSD	Non-US Security Based Swap Dealers Registration under Final SEC rule 18 December 2019 “Rule	

		Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements“	
O	OTC	Over the counter	
	OWiG	Act on Breaches of Administrative Regulations	*Gesetz über Ordnungswidrigkeiten*
P	blank	blank	
R	blank	blank	
S	SI	Significant institutions under ECB supervision	
	SSMR	Single Supervisory Mechanism Regulation (EU regulation)	
	SREP	Supervisory Review and Evaluation Process	
	StGB	Criminal Code	*Strafgesetzbuch*
T	blank		
U	blank		
V	blank		
W	WpDPV	Ordinance on the Examination of Investment Services Enterprises	*Verordnung über die Prüfung der Wertpapierdienstleistungsunternehmen*
	WpHG	Securities Trading Act	*Gesetz über den Wertpapierhandel (Wertpapierhandelsgesetz)*

X blank

Y blank

Z blank

Area of Regulation	Substituted Compliance?
1. Capital requirements for nonbank firms	n/a (see explanation below)
2. Margin requirements for nonbank firms	n/a (see explanation below)
3. Recordkeeping and reporting requirements	yes
4. Trade acknowledgement and verification requirements	yes
5. Supervision and chief compliance officer requirements	yes
6. Counterparty protection requirements	yes
7. Additional requirements regarding eligible contract participant verification, special entities and political contributions	yes
8. Risk mitigation requirements	yes
9. Risk Mitigation techniques[1]	yes
Relevance of Non-US-SBSD for the German industry: the substituted compliance program is only relevant for **significant institutions (SI)**, (also) supervised by the prudential regulators. The following assessment will consequently focus on supervision and enforcement for SI with focus on the derivatives business.	

[1] https://www.sec.gov/rules/other/2019/34-87781.pdf.

Part II

Preamble
General overview of the German Financial Supervisory Framework

The Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) is one of the largest **financial supervisory authorities** in Europe. With its more than 2,600 employees, BaFin takes an industry-appropriate and risk-oriented approach to supervision on the basis of recognized European supervisory standards. Regarding the different responsibilities, BaFin refers to its chart of organization which also demonstrates how an integrated financial supervisory authority (*Allfinanzaufsichtsbehörde*) manages securities and asset management supervision as well as banking supervision, insurance supervision and pensions funds and resolution.

BaFin is managed by its Executive Board consisting of President Felix Hufeld, Deputy President Elisabeth Roegele and the Chief Executive Directors managing their respective BaFin directorates; Banking Supervision (Raimund Röseler), Insurance and Pension Funds Supervision (Dr. Frank Grund), Securities Supervision/Asset Management (Elisabeth Roegele), Resolution (Dr. Thorsten Pötzsch) and Internal Administration and Legal Affairs (Béatrice Freiwald).

As an integrated financial supervisor, BaFin supervises credit institutions (details next paragraph), financial and payment service providers, insurers, pension funds, asset management companies and securities trading. In contrast to the SEC supervisory system the German/European supervisory system is regarding banking and insurance mainly **entity specific driven while securities includes a strong market related supervision**.

With respect to significant credit institutions (currently 59 in Germany), banking supervision is conducted by the ECB-single supervisory mechanism (SSM) which constitutes a legislative and institutional framework. As part of the SSM, the supervision is executed by joint supervisory teams (JST) under the leadership of the ECB-SSM with BaFin as team member in respect to German banks.

With view to the fact that only German significant credit institutions will be affected by the Non-US-SBSD,[2] the **BaFin self-assessment** will **focus** on the German Banking Supervision and German Securities Supervision in respect to **significant institutions (SI)**. Consequently, the assessment will not deal with the supervision of non-bank firms, such as broker dealers.

As a matter of principle the **banking supervisor** concentrates most closely on whether institutions have adequate capital and liquidity and have installed appropriate risk control mechanisms.

[2] Final SEC rule 18 December 2019 "Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements" ("Non-US-SBSD"): https://www.sec.gov/rules/final/2019/34-87780.pdf.

Any party wishing to conduct banking business in Germany requires written authorisation. Once institutions have been established, the banking supervisor monitors them on an ongoing basis. It pays particular attention to adequate own funds and monitors whether institutions have adequate capital to cover risks incurred in respect of on-balance-sheet assets and off-balance-sheet transactions – such as lendings, securities, derivatives or participating interests. In addition to default and market risks, operational risks must also have adequate capital backing. The institutions must also set aside funds for several capital buffers. In addition, banking supervision checks whether adequate liquidity is guaranteed at all times. Under the supervisory review process BaFin also supervises those risks which do not require capital backing under the CRR. A key element is the establishment of adequate risk management systems. For instance, institutions must establish the so-called Internal Capital Adequacy Assessment Process (ICAAP), which ensures that they have adequate internal capital to cover all material risks. In addition, they must have appropriate management, monitoring and control processes („robust governance arrangements“).

In this respect the following EU regulations, directives and its delegated acts as well as German legal statutes are relevant:

Area of Regulation	EU Legal Sources	German Statues	Area of Supervision
I. Risk Control			
1. Capital requirements for nonbank firms	n/a[3]	n/a	n/a
2. Margin requirements for nonbank firms	n/a	n/a	n/a
3. Risk Management Requirements	EMIR, MiFID CRR, CRD IV and delegated acts	KWG[4] WpHG[5]	Securities, Banking
4. Trade Acknowledgement and Verification	MiFID, EMIR and delegated act	WpHG	Securities
5. Risk Mitigation Requirements	EMIR MiFID	WpHG	Securities
II. Recordkeeping and Reporting	**MiFIR, MiFID,**	**WpHG**	**Banking Securities**

[3] only **banks** (significant institutions licensed under the German Banking Act) will be affected by Non-US-SBSD
[4] This term includes regulations (*Rechtsverordnungen*) empowered by this statute
[5] This term includes regulations (*Rechtsverordnungen*) empowered by this statute

	EMIR, MLD 4, CRR and delegated act		
III. Internal Supervision and compliance officer requirements	**MiFID, CRD IV and delegated acts**	**WpHG KWG**	**Securities Banking**
IV. Counterparty protection requirements	**MiFID, EMIR, MLD 4 and delegated acts**	**WpHG KWG GWG**	**Securities Banking/AML**
V. Additional requirements regarding eligible contract participant verification, special entities and political contributions	**MiFID and delegated acts**	**WpHG**	**Securities**

General approach for answering the questions as financial supervisory authority:

As you can conclude from the description above **derivative supervision** is not conducted by a single rule set, but by various different legal statutes and regulations at EU and national level supervised by the securities supervision of BaFin and/or banking supervision of BaFin/ECB-SSM (ECB-SSM only regarding significant institutions (SI) for which Non-US-SBSD is only relevant).

Moreover, we would like to highlight that the SI in question/Non-US-SBSD Dealers are treated for the purpose of:

- EMIR as financial counterparties subject to clearing obligation (FC+)
- MiFIR/MiFID as investment firms
- CRR/CRD IV as CRR firms
- KWG as CRR credit institutions

Consequently, the answers in the questionnaire distinguish between securities and banking supervision, where relevant.

Section I - Supervisory Framework
1. Please generally describe your jurisdiction's supervisory authority and related requirements or procedures to identify deficiencies and weaknesses in its Regulated Entities' relevant market activities. To the extent relevant, please consider the following: a. the statutory, regulatory or other provisions under law that grant the relevant supervisory authority, or that otherwise describe or limit the scope of this supervisory authority; b. a description of how you supervise recordkeeping and retention requirements applied to Regulated Entities; c. a description of the authority of the applicable regulator to access and inspect the records of Regulated Entities for domestic and cross-border activities, including activities in foreign offices or branches; d. a description of the authority of the applicable regulator to conduct on-site or off-site inspections of Regulated Entities, including the ability to inspect foreign offices or branches; e. a description of the authority of the applicable regulator to obtain information related to the customers, clients, or employees of Regulated Entities; f. a description of the ability of the applicable regulator to test or verify responses or other information obtained from the Regulated Entities during the course of supervisory efforts; g. a description of how examination priorities are developed and the process for adjusting and updating such priorities, including what factors are used in developing priorities; and h. any other information that would assist in understanding the scope of the relevant supervisory authority.
BaFin has supervisory authority and procedures to identify deficiencies and weaknesses in its Regulated Entities (with respect to credit institutions licensed by BaFin which includes derivatives business). a. The legal statutes for its supervision of the derivatives business are the Securities Trading Act (WpHG)[6], the European Market infrastructure regulation (EMIR)[7], the Markets in Financial Instruments Regulation (MiFID)[8] and its related delegated acts as well as the Capital Requirements Directive (CRR)[9], German Banking Act (KWG)[10]. Such statutes are supplemented by regulations (*Rechtsverordnungen*) and circulars (*Rundschreiben*).

[6] https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html
[7] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012R0648-20190617&from=EN
[8] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014L0065-20181001&from=EN
[9] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0575&from=DE
[10] https://www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_kwg_en.html

b. Recordkeeping and retention requirements:
As a general rule Section 83 WpHG stipulates that investment services enterprises (includes credit institutions with respect to their securities business) must keep records of the investment services and ancillary investment services provided by them as well as records of the transactions undertaken by them, to enable BaFin to monitor compliance with the obligations set out in this Part, Regulation (EU) No. 600/2014 and Regulation (EU) No. 596/2014. This is supervised as part of the ongoing supervision, periodically as part of the yearly external auditors work which certifies in its auditors report (*Prüfbescheinigung des Wirtschaftsprüfers*) compliance with the statutory provisions as well as ad-hoc if BaFin comes to the conclusion, that these requirements may not be fulfilled properly. BaFin also has the authority to perform additional audits at any time with regard to the code of conduct provisions, without requiring a specific cause but subject to proportionality EMIR further stipulates recordkeeping and retention requirements on trade repositories (to which all counterparties are required to report their derivatives contracts (whether OTC, ETD, cleared or non-cleared) and CCPs (Art. 9 (2) EMIR).

c. access and inspect the records:
Section 6 subsection 3 WpHG empowers BaFin to require any person to provide information, submit documents or other data, provide copies, and to summon and question persons. Statutory rights to provide or refuse to provide information as well as statutory obligations of confidentiality remain unaffected. In general the information can be accessed by issuing a formal request for information and submission (*Auskunfts- und Vorlageersuchen*). Moreover, access could be obtained e. g. by way of special investigations or audits which do not require a specific cause (*Sonderprüfung*); however this kind of audit would only be applied for major issues and based on reasonable suspicion (proportionality).

d. on-site or off-site inspections:
On-site inspections are an integral part of the ongoing supervision as well as regular and special audits.

Regarding **EMIR** BaFin has the ability to conduct on-site or off-site inspection in Germany and cross-boarder. The latter in cooperation with the foreign regulatory authorities pursuant to the applicable MoU/MMoU.

Under **MiFID II** with respect to EU branches, there is a shared responsibility of NCAs within the EU according to the so called home/host-principle . This principle provides that conduct rules are supervised by the local NCA, while organizational requirements are supervised by the Homestate-NCA. In non-EU jurisdictions BaFin has the competence to perform cross-border on-site and off-site inspections with regard to organisational requirements which have a group wide application. In the area of conduct rules inspections take place in cooperation with local NCAs.

With regard to **banking supervision** within the European Economic Area (EEA), the principles of home country control and consolidated supervision enable the German supervisory authorities to obtain information and documents or conducting audits at branches and subsidiaries in other EEA States in order to receive information required for consolidation purposes. However, coordination

with the foreign national supervisory authorities is required. With regard to companies domiciled in third countries outside the EEA, the respective national legislation must be observed, which may impair the free transfer of data to Germany. In particular, audits are only possible with the prior consent of the foreign authorities or in accordance with an applicable MoU/MMoU.

e. obtain information related to the customers, clients, or employees:
See answer c) as the general way to obtain information. Please note that any request must be proportionate and relating to a specific supervision task.

With regard to employees, Section 87 subsection 5 WpHG states that any investment firm that is subject to BaFin's supervision is obliged to register every employee that works as an investment advisor or as a sales representative with the BaFin's non-public register. In addition, a compliance officer responsible for securities compliance must be registered as well. The investment firm is responsible to ensure that these employees as well as the compliance officer is personally and professionally fit and proper and the compliance officer independent.

f. test or verify responses or other information obtained:
BaFin possesses various means to test or verify the response and on the respective supervisory issue. For example, responses from regulated entities are tested against BaFin information or other external sources.

g. examination priorities developed, adjusted and updated on regular basis:

As stated above, BaFin's supervision approach is both ongoing as well as risked based. Priorities are developed accordingly. E.g. BaFin publishes its high-level supervisory priorities (*Aufsichtsschwerpunkte*) on an annual basis.[11] In addition, BaFin communicates other priorities by using its web page, press communication, press conference, public speeches etc. The detailed procedure is confidential and not intended to be revealed for the public.

Please note that BaFin is not bound by these priorities. Ad-hoc measures and changes in regard to the supervisory focus are always possible and are usually decided on a case by case basis.

h. [to be added if needed in the course of this assessment]

In addition, with regard to **banking supervision,** BaFin would like to share the following information:

a.) The responsibilities and objectives of the authorities involved into German banking supervision are defined in Section 6 of the KWG. BaFin exercises in cooperation with Deutsche Bundesbank supervision over credit institutions pursuant to the provisions of the KWG, the statutory orders enacted in connection therewith, Regulation (EU) No. 575/2013

[11] https://www.bafin.de/dok/11737950

(CRR) and legal acts enacted on the basis of the CRR and Directive 2013/36/EU (CRD). BaFin and Deutsche Bundesbank cooperate as stipulated in Section 7 KWG. The responsibilities of the ECB are defined in Art. 4 of Regulation (EU) No 1024/2013 (SSMR).

The tasks of BaFin are not limited to administrative acts, as it can also issue general instructions which lay down rules for carrying out banking business and providing financial services and for limiting risks. It can do this by issuing principles and regulations. BaFin's duties also include solving problems in the banking and financial services sector that could jeopardize the safety of the assets entrusted to institutions, impair the orderly conduct of banking business or the orderly provision of financial services or bring about considerable disadvantages for the economy as a whole.

b.) Pursuant to Section 26 (1) KWG, institutions must submit without delay the annual accounts as drawn up and approved by the institution, bearing the certificate of audit, and the management report to BaFin and Deutsche Bundesbank. In addition, as a matter of general principle the auditors of the annual accounts must also file their report on the auditing of the annual accounts without delay. According to Section 26 (3) KWG, the above requirements also apply in principle to the annual accounts, management reports and auditors' reports on a consolidated level. The auditors must also submit specified data supplementing the auditors' reports. These data contain e.g. detailed information on asset quality and loan loss provisioning. Annual accounts are complemented by interim financial information on a risk-oriented basis.

Institutions are required to report information according to Regulation (EU) No. 680/2014 (ITS on Reporting, FINREP), if applicable. With FINREP a harmonized financial reporting exists on a quarterly basis.

c.), d.), e.) Sections 44 et seq. KWG grant the supervisory authorities a number of information and audit rights which they can make use of at any time either routinely or for specific reasons.

According to Section 44 (1) sentence 1 KWG, information and audit rights are directed to the institution itself as well as the members of its governing bodies and its employees. The institutions have to provide information and submit documents concerning all business activities upon request. BaFin can also send representatives to the general meetings and to the meetings of the supervisory board. In addition, Section 24c KWG gives BaFin automated access to the customer account information of individuals and institutions.

Section 25a (1) KWG requires an appropriate risk management, which also covers cross-border activities (this includes foreign branches or subsidiaries); the basic principle is that a parent undertaking has to manage all its material risks regardless where they arise. Moreover, the audit right includes enterprises to which an institution has outsourced major operational units within the meaning of Section 25b KWG, and the holders of qualified participating interests are also required to provide information. This duty applies both to information relating to business activities and to the submission of documentation. Section 44 (2) KWG grants the supervisory authorities information rights vis-à-vis subordinated enterprises that are included in the banking supervisory consolidation, as well as financial holding companies. These information rights are,

however, limited to verifying the accuracy of information or data submitted that are necessary for consolidated supervision.

Where the German supervisory authorities are responsible for the consolidated supervision of a group of institutions, a financial holding group or a mixed financial holding group within the meaning of Section 10a KWG which is headed by an EU parent institution, an EU parent financial holding company or an EU parent mixed financial holding company, they will be responsible e.g. for cross-border inspections (Section 8a (1) no. 2 KWG). Apart from this, the process regarding cross-border information and audits is governed by Section 44a KWG.

f.) The requirements of Section 29 KWG in conjunction with the Audit Report Regulation (*Prüfungsberichtsverordnung* – PrüfbV, which includes, among others, details on EMIR audits) ensure that all items deemed to be relevant by German banking supervisors are audited as part of the audit of the annual accounts. In accordance with Section 19 PrüfbV, this includes checking that the reports issued by the institutions are complete, accurate and timely. Any infringements ascertained must be noted in the auditor's report. In addition, pursuant to section 30 KWG, BaFin can instruct the auditor of the annual accounts of an institution to focus on certain aspects during the audit. German banking supervisors check – if necessary by way of a special audit demanded by BaFin – whether found deficiencies are remedied.

a.)-f.) The abovementioned rights are granted to BaFin and Deutsche Bundesbank as far as they are not conferred on the ECB by the SSMR.

g.) Institutions in Germany are classified as Significant, Less Significant and Non-SSM-Institutions. With the launch of the SSM in November 2014, the ECB took over the direct supervision of those banking groups classified as significant. A joint supervisory team (JST) has been responsible for each of these significant institutions (SIs) since then.

BaFin's banking supervision sector was responsible for supervising 1,521 credit institutions subject to special audits at the end of 2018. 59 of them were classified as significant institutions and were therefore directly supervised by the ECB. The responsibility for the 1,407 less significant institutions (LSIs) rested with BaFin as the national competent authority (NCA) in the context of the SSM, and therefore only indirectly with the ECB. In addition, other, non-SSM institutions are supervised by BaFin directly.

With respect to SIs, examination priorities are developed annually jointly by the ECB and NCAs. It follows a bottom-up procedure whereby the staff identifies areas of examinations at the institution level, which is enhanced by findings of horizontal units.

2. Please describe the supervisory tools your jurisdiction uses in practice to identify risk and detect potential breaches of law. To the extent relevant, please consider the following:
   a. any form(s) of ongoing or ad hoc monitoring and surveillance by the regulator or another organization;
   b. any process to receive tips or complaints about the activities of a Regulated Entity;
   c. the submission of periodic filings from Regulated Entities; and
   d. the submission of reports from Regulated Entities based on any event or trigger.

BaFin has various tools to identify risk and detect potential breaches of law.

a, c, d: The ongoing monitoring process of BaFin's **supervision** includes evaluating in particular the auditor's reports[12] (*Prüfbescheinigung des Wirtschaftsprüfers*) covering all aspects of securities and banking regulation (tailored to the specific business of the entity)[13], regulatory reports/filings, tips/complaints (depending on the subject), annual accounts, internal audit reports, economic reports, press releases supplemented by on-site and off-site inspections as well as special investigations/audits (*Sonderprüfung*), if needed. Moreover, BaFin holds both routine and ad hoc discussions with the institutions.

Regarding its supervision BaFin highlights that the KWG and WpHG contain a large number of notification, reporting and submission requirements. They include periodic filings as well as submissions based on events or triggers.

Regarding the securities supervision and in order to avoid duplications, BaFin refers to answer 12 (FSAP self assessment) which includes a comprehensive description on this topic.

b: BaFin has a workflow for this issue which includes, among others, an electronic whistleblowing system, so BaFin receives disclosures about actual or suspected violations of supervisory provisions. The central contact point is also responsible for any subsequent, case-specific communication with whistleblowers in order to protect them and, if desired, to maintain their anonymity. More information is provided under the following link.[14] Moreover, it is also still possible to make disclosures by post, by telephone or in person.[15]

[12] Role of the public sworn auditor (see also answer to question 12, section I): Compliance with EU legal sources and German statutes such as EMIR, MiFiR/MiFID, CRR, KWG, WpHG is examined by an independent public sworn auditor on BaFin's behalf. The content and procedure are stipulated in the respective examination regulations (*Prüfungsverordnungen*).

[13] Regarding derivatives the annual auditors report for credit institutions (*Jahresabschlussprüfung für Kreditinstitut*e, section 28-30 KWG) with its EMIR section as well as the auditor's report on "conduct rules" (WpHG *Prüfungsbericht zu Verhaltensregeln, Organisationspflichten und Aufzeichnungspflichten*, section 89 WpHG) is relevant.)

[14] Contact point for disclosures about violations of supervisory law:
https://www.bafin.de/EN/Aufsicht/Uebergreifend/Hinweisgeberstelle/hinweisgeberstelle_node_en.html

[15] https://www.bafin.de/EN/Aufsicht/Uebergreifend/Hinweisgeberstelle/hinweisgeberstelle_node_en.html;jsessionid=A9E877DC%200E65C8C229513352A265FDD5.1_cid363

With regard to tips and complaints, BaFin offers different ways to receive and handle customer complaints, including but not limited to a customer help line[16] as well as an online complaint form.[17]
3. Please describe your jurisdiction's examination or inspection processes. In responding, please include: a. a description of the examination cycle (e.g., routine periodic basis or risk-based). If the examination is periodic, please include the time frame; b. a description of the processes and factors considered when selecting Regulated Entities for examination (e.g. time since last examination, tip, complaint or referral, etc.); c. a description of the processes, including factors considered, to determine the scope for examination or inspection and the process for amending the scope if warranted; d. a description of the types of books and records typically reviewed during examinations; e. whether you conduct interviews with employees of the Regulated Entities; f. whether you test or verify responses given to you by the Regulated Entities; g. how you communicate deficiencies or other areas of concern to Regulated Entities, whether such communications are public, and how such communications are documented; h. to whom you direct communications (e.g., compliance office, senior management); and i. how Regulated Entities respond to identified issues.
BaFin has a variety of examination and inspection processes: a, b: The examination cycles are risk-based as well as periodic. They depend on the subject matter and the external (risk) factors. For SIs there are usually more than one inspection per year. Factors for examination include, among others, findings in the external auditors' reports, audit focuses, tips/complaints, or referrals from other units (e.g. AML). c-f: The inspections have different scopes. The scope highly depends on the risk situation of the institution as well as the subject matter. In general, the starting point is the issue to be examined. In relation to standard examinations the first step is a request for information and submission of documents (*Auskunfts- und Vorlageersuchen*). In individual cases, the supervisory authorities conduct special investigations/audits (*Sonderprüfungen*) which include on-site inspections with interviews as well as direct access to books and records. The received information will be assessed, tested and verified. g-i: Deficiencies and areas of concern are usually communicated via an official letter to the Regulated Entity. If necessary (in case of more severe issues), the deficiencies are addressed

[16] https://www.bafin.de/dok/7858218
[17] https://www.bafin.de/dok/7858096

with an administrative act (*Verwaltungsakt*). A written response is expected, often accompanied by meetings to discuss the issues and to elaborate the "to dos" for the institution.

Regarding **EMIR** the examination process for SI/FC+ includes review of the annual auditor's report on credit institutions with its EMIR part as well as survey examination of entities under BaFin's supervision. Survey examination follow a risk based approach which is based on various factors (e.g. findings in (other) auditor's reports, risk categorization based on gross nominal value). BaFin inspections are not conducted periodically but with a risk based approach instead.

4. Please describe the resources available for your supervisory efforts. In responding, please include:
    a. the typical background and qualification of your supervisory staff;
    b. the use of experts, such as persons who can analyze models or perform data analytics;
    c. the use of analytical software and tools in conducting examinations and other supervisory work;
    d. the use of SROs or exchanges to perform supervisory functions;
    e. training programs for supervisory staff; and
    f. the resources/size of the supervisory group relative to the volume and complexity of Regulated Entities.

a.-d: With respect to complex supervisory tasks, BaFin only hires staff with a bachelor or master degree in administration, economics, law, mathematics, computer science or other respective subjects. Often the hired staff has a professional background in the private sector (law firms, banks, investment funds etc.). BaFin hires staff with special skills, e.g. model experts. Special units for data analytics and model analysis bundle this knowledge. As BaFin is an integrated supervisory authority supervising e.g. insurance undertakings, pension funds and banks, BaFin benefits from its knowledge in the different areas of supervision.

With respect to SIs, BaFin uses its own analytical software as well as ECB software for its analysis. The use of software depends very much on the entity and area supervised. With regard to conduct rules tasks are not performed by SROs or exchanges.

e.: BaFin staff can participate in various training programs from several providers. While BaFin has its own large training program, this is supplemented by the training program of the ECB (specific to "banking supervision", but also general skills), of the European Supervisor Education Initiative (ESE), of the Centre for Central Banking Studies (CCBS) and the European Supervisory Authorities (ESAs). In addition, this is enhanced by various training possibilities of the German public administration.

f: BaFin's Banking Supervision Sector is responsible for supervising 1,521 credit institutions. 59 of these credit institutions are classified as significant institutions and are therefore directly supervised by the ECB. Regarding insurance supervision BaFin supervises 527 insurances and 33 pension funds. Securities Supervision includes the supervision of 5,917 investment funds, 722 financial services institutions and the responsibility for the supervision of the German capital market (e.g. insider trading, market manipulation, prospectuses). BaFin allocates the resources in view of the volume and the complexity of the specific supervisory tasks, taking into account its supervisory priorities (Aufsichtsschwerpunkte).

Based on the BaFin annual report 2018, BaFin has 2,713 employees.

For more Information regarding this topic in general we would like to refer to the BaFin annual report 2018, page 155 et seq and our organization chart.

5. Please describe whether your jurisdiction has regulatory authority and related requirements or procedures to obtain the information necessary from Regulated Entities (or their offices or branches) to support your supervisory functions.

As part of its supervision, BaFin has authority and procedures in place to obtain information necessary from Regulated Entities (in particular by the request for information and submission (*Auskunfts- und Vorlageersuchen*)).

Please also see our answers to question 1 and question 2.

In respect to banking supervision, BaFin would like to highlight Section 24 (3b) KWG, according to which the supervisory authorities may impose additional notification and reporting requirements on institutions or certain types or categories of institutions, in particular in order to obtain deeper insight into developments in the institutions' final situation, into their principles or proper management or into the abilities of members of the institution's governing bodies where it is necessary to fulfil the tasks of BaFin and the Deutsche Bundesbank.

6. How do you communicate deficiencies or other areas of concern to Regulated Entities? For example, what remedies, or other corrective actions, are available to your supervisory program (e.g., deficiency letters, referrals to other regulators, enforcement actions, etc.)? Please include whether one type of action may be more prevalent than another and whether the actions are verbal or in writing. Please include recent statistics on how often each type of action is used.

If an institution violates the requirements of **supervisory** law, or if the business of the institution is not conducted properly, BaFin has recourse to a series of measures aimed either at the institution itself or at the managers of the institution.

In general, the first step is a deficiency letter to the Regulated Entity addressing the issue. If the issue is not solved, formal orders might be necessary. In other cases, issues can be addressed in meetings with representatives responsible.

The exact approach depends on the subject matter and the respective case.

For example, with regard to MiFID rules of conduct largely focussing on the systems and procedures of a Regulated Entity, the first goal is to tackle the issues on a systematic basis. Therefore, the firm is requested to change their system or procedure to address the issue. If the firm does not follow the request, more formal measures might be taken (enforcement actions).

Regarding EMIR the relevant data is evaluated separately.

In addition, with regard to **banking supervision,** BaFin would like to share the following information:

Should an institution violate the provisions of the KWG or other special banking supervisory regulations, the competent authority can take action in the form of deficiency letters, written admonition or a formal order in accordance with Sections 6 (3) or 25 a (2) KWG to establish or restore a situation complying with the law.

Due to BaFin being an integrated supervisory authority for all financial sectors, deficiencies and remedial actions in relation to a bank are internally communicated to and coordinated with every relevant department and section that supervises an entity or a market that could be affected.

It should be noted that the supervisor acts at an early stage to address unsafe and unsound practices or activities that could pose risks to banks or to the banking system. The supervisor has at its disposal an adequate range of supervisory tools to bring about timely corrective actions. Which action is taken depends on the nature and gravity of the problem and is decided on a case-by-case basis. Several escalation levels include increasingly severe measures from day-to-day supervision to the ultima ratio of revoking the license.

As a general rule, any objections to or appeals against measures taken by the supervisory authority do not have a postponing effect. In principle, the measures are immediately enforceable, i.e. they come into effect as soon as they have been announced.

Compliance with administrative orders may be ensured under the conditions laid out in Section 17 FinDAG by means of administrative enforcement (e.g. penalty payments of up to EUR 2,500,000). In addition, BaFin has the power to disclose certain supervisory decisions and actions against an institution or its managers in accordance with Section 60b KWG.

Recent statistics:

The BaFin annual report[18] includes under the heading "Sanctions" certain statistics on enforcement matters, but not for this particular issue. More information on enforcement matters is provided to question 6, Section II.

7. Does your jurisdiction use risk monitoring and assessment or surveillance as part of your supervisory framework? If so, how do you use this information and what actions do you take if potential violations are identified?

Risk monitoring, assessment or surveillance is part of BaFin's supervisory framework. Organizationally, BaFin has specialized divisions or organization units (e.g. for strategy and risk or market abuse analysis), supported by experts in other divisions. The high-level responsibilities for these issues can be derived from the organization chart[19]. Based on this matrix structure it is ensured that violations are identified and tackled with appropriate actions. The instruments vary among the subject matters. For example, the **surveillance** of suspicious market activities is conducted by using various software tools. Regarding conduct rules, the **risk monitoring** is conducted by using internal databases with individual risk profiles for each regulated entity. Moreover, regulated entities are required to conduct own risk analyses and reports of the compliance functions which are challenged by the auditor's report.

In addition, with regard to **banking supervision,** BaFin would like to share the following information:

The German supervisory authorities perform the Supervisory Review and Evaluation Process (SREP) in order to know where the banks under their direct banking supervision stand in terms of risks and the way they deal with these risks.

On 19 December 2014, the European Banking Authority (EBA) published guidelines on common procedures and methodologies for the SREP in order to flesh out Articles 97 et seq. CRD. The deadline for implementing these guidelines, directed at national supervisors, was 1 January 2016. According to the EBA guidelines, SREP comprises the evaluation of four key elements: business model analysis, governance and risk management assessment, risks to capital, and risks to liquidity and funding. Following the risk assessment, supervisors should determine whether an institution's own funds and liquidity are adequate to ensure sound coverage of current or prospective risks to the institution. The process culminates in an overall assessment that forms the basis for further supervisory actions and guidelines for eliminating deficiencies.

The competent supervisory authority sets individual capital add-ons for credit institutions to address issues identified in the SREP. This "SREP capital requirement" – as an addition to the minimum capital requirements under Pillar I of the regulatory framework for banks – relates to those risks that Pillar I (8% of risk-weighted assets) covers only inadequately or not at all. The Pillar I requirement is therefore supplemented by an additional capital requirement. It must be complied with just as rigorously as the 8% requirement under Pillar I.

[18] https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/jahresbericht_node_en.html
[19] https://www.bafin.de/SharedDocs/Downloads/EN/Liste/dl_organigramm_en.pdf?__blob=publicationFile&v=49

The SREP assessment – including the quantification of additional capital requirements – is conducted regularly for all credit institutions on a graduated and set schedule. The risk assessment for the four key elements and the overall assessment are conducted annually. According to the SREP guidelines, the SREP quantification of additional capital requirements shall be conducted regularly in a 12-month to three-year cycle, taking proportionality criteria (size, structure and internal organisation, as well as the nature, scope and complexity of the activities) into account. However, more frequent assessments are also possible if German competent authorities deem this to be appropriate.
8. Please describe how your jurisdiction reviews and evaluates corrective action undertaken by Regulated Entities.
The review and evaluation of corrective action is performed on a case-by-case basis. The use of supervisory powers depends on the individual situation and may include in particular correspondences and meetings with the credit institution, the request of substantiating documents or special follow-up inspections (internally by the regulator or by external auditors). In cases of corrective actions, supervisory measures are usually combined with the duty to submit regular progress reports as well as with deadlines by which the institution has to restore compliance with the supervisory requirements.
9. Please describe any regulatory consequences for non-compliance with corrective actions, including the form and frequency of referrals to enforcement or other judicial authorities.
As part of markets supervision BaFin can impose various actions for non-compliance with corrective actions. This includes in particular Administrative Fines (*Bußgelder*) and Coercive Fines (*Zwangsgelder*). If the action of the regulated entity concerns criminal law (*Strafrecht*), the case will be referred to the state prosecutor (*Staatsanwaltschaft*). Please also refer to Section II, question 4. Measures or sanctions available in the area of **banking supervision** in case of non-compliance with corrective actions include the imposition of a fine in accordance with Section 56 KWG, the (partial) transfer of the powers incumbent upon the institution's governing bodies to a special representative in accordance with Section 45c KWG or, as a last resort, the revocation of the institution's licence in accordance with Section 35 (2) KWG. In such cases, measures can also be taken against the managers in accordance with Section 36 (1) or (2) KWG as a less severe alternative to the revocation of the institution's licence, insofar as the managers have, either intentionally or recklessly, caused the violation of supervisory law. These measures include demanding the dismissal of a manager or the prohibition of carrying out their activities. As described above, compliance with administrative orders may be ensured under the conditions laid out in Section 17 FinDAG by means of administrative enforcement (e.g. penalty payments of up to EUR 2,500,000). In addition, BaFin has the power to disclose certain supervisory decisions and actions against an institution or its managers in accordance with Section 60b KWG.

If institutions or natural persons act contrary to the provisions enumerated in Section 56 KWG, this can also fulfil the preconditions for the application of a fine. Finally, violations of the provisions of the KWG (including conducting prohibited business, conducting banking services without a license, failure to report insolvency) may also qualify as criminal offences under Sections 54 et seq. KWG. These violations are not prosecuted by the supervisory authorities, but by the responsible criminal prosecution authorities.
10. Please describe how your jurisdiction communicates with the industry and the public about best practices, common compliance issues or other areas of misconduct risk, including how Regulated Entities are informed about the consequences of misconduct or noncompliance.
BaFin uses various means of communications with the industry and the public. This includes press releases, interviews, publication on its websites (circulars, BaFin journal, Q&As, reference to other publications from ESMA, IOSCO etc.). Moreover, BaFin conducts round tables, workshops, meetings and conference calls with associations/the industry. These instruments are also used to communicate consequences of misconduct.
11. Please describe your jurisdiction's participation in international organizations of securities and other regulators, such as the IMF and IOSCO.
Germany (BaFin, Bundesbank, Ministry of Finance) participates in international organizations or other regulators, such as ESMA, EIOPA, EBA (European level) or IOSCO, IAIS, IOPS, BCBS, IMF (worldwide level). This includes participation in board meetings, standing committee meetings, as well as the majority of working groups and task forces.
12. Please provide a copy of Principles 10 and 12 from your most recent self-assessment for the FSAP.
The most recent self-assessment of BaFin for Principle 10 and 12 was provided for the 2010/2011 FSAP. BaFin's supervisory system in the area of supervision of organizational and code of conduct rules has significantly evolved since the last FSAP Assessment in 2010/2011. As of today, BaFin's directorates "Financial Services Institutions, Organizational Requirements (WA 3)" and "Consumer Protection (VBS)" apply a combined supervisory approach consisting of several routine/periodic ("ongoing") and "risk-(assessment-)based" elements as shown below. BaFin's combined approach was evaluated as a good and effective regulatory system, most recently in ESMA's Final Report on the Peer Review on the collection and use of STORs under the Market Abuse Regulation as a source of information in market abuse investigations as of 12 December 2019.

Selected aspects of the ongoing monitoring programme

The ongoing supervision of investment firms and credit institutions is the supervisory "base-layer" and consists of several elements: In Germany, compliance of investment firms with the investor protection and organizational rules under MiFID is examined by public sworn auditors on BaFin's behalf. The content and procedure of the audit reports are stipulated in the "Regulation on the Examination of Investment Services Enterprises" (Wertpapierdienstleistungs-Prüfungsverordnung, WpDPV). These audits are generally carried out on a yearly basis, cover all regulated entities and all regulatory requirements under the German Securities Trading Act (WpHG). BaFin may also take over the audit, demand the appointment of a different auditor and/or set specific audit focuses. The results of the audit (alongside a plethora of other information such as the additional annual prudential audit) are entered into a database (FIS) where they are used to create a risk profile for each firm. This indicator inter alia supports possible risk based supervisory measures.

Selected aspects of the risk based monitoring programme

On the basis of the ongoing monitoring program further risk-based supervisory tools like inter alia information gathering requests, audit focuses, special audits as well as on-site-inspections, are applied (to further resolve specific issues/situations).

One particular instrument used as a part of the risk based monitoring programme is the employee and complaints register: In Germany firms need to register employees who provide investment advice or who are sales representatives or compliance officers in a BaFin-internal database. In addition, firms need to report e.g. the number of complaints associated with a specific registered employee. Besides this requirement having a disciplining effect on the institutions, BaFin can detect complaints accumulations regarding individual employees or firms. Certain risk-based thresholds then trigger on-site visits in order to identify shortcomings (e.g. insufficiently qualified employees, organizational deficiencies).

BaFin additionally uses thematic reviews frequently to assess an organizational or code of conduct issue across a larger number of firms. Such thematic reviews complement the usual risk-based on-site inspections by deepening supervision in specific regulatory areas and are an effective tool to discover of good and bad practices amongst firms. This also supports BaFin defining and fine-tuning its supervisory practice (e.g. by including and utilizing such findings in publication of guidance or BaFin's general supervisory rulebook "MaComp").

Please note that the legal provisions cited in the excerpt from the self-assessment are (partially) no longer valid as they have been amended in the course of the implementation of MiFID II and MAR. This does not affect the content of the self-assessment.

Excerpt from the BaFin 2010 self-assessment:
QUOTE

Principle 10 The regulatory system should ensure an effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance program.

Is there evidence of an effective system in place to detect breaches, gather and use information, promote compliance and sanction non-compliance, using surveillance, inspection, investigation, enforcement and intervention powers, as follows:

Detecting Breaches

1. Is there an effective system of inspection in place whereby the regulator carries out inspections:

a) On a routine periodic basis?

As already explained under Principle 8, Key Question 1, all investment services enterprises are under an obligation to have their business activities examined once a year by an independent auditor. The auditor must submit to BaFin a report on the enterprise's compliance with the statutory provisions. On the basis of this periodic reporting, BaFin performs further examinations and, if necessary, takes measures to end existing or prevent future contraventions of regulations of the WpHG if the audit reports have found anomalies. On the one hand, this ensures that the activities of all investment services enterprises are examined regularly and thoroughly by an independent party; on the other hand, this enables BaFin to focus its resources specifically on the problem cases. Moreover, BaFin regularly conducts special audits at investment services enterprises. Furthermore, BaFin uses all available information sources, especially information extracted of complaints, media reports or reports by other national or foreign supervisory authorities.

Assessment: Affirmative response

1. Is there an effective system of inspection in place whereby the regulator carries out inspections:

b) Based upon a risk assessment?

On the basis of a risk assessment, BaFin grants exemptions from the annual audit of investment services enterprises. This particularly relieves smaller enterprises of high auditing expenses. In addition, BaFin defines the points of emphasis for routine audits and special audits, thus enabling it to review particularly risky activities specifically for irregularities based on current findings. Irrespective of annual audits, BaFin inspects all regulated entities with regard to their relevance for the financial system and investor protection. All resources of BaFin's investigation and enforcement powers mentioned under Principle 8 and 9 are used proportionate to the risk assessed. For example, investigation resources are focused on entities which are large in size and/or prone to misconduct and breach of supervision laws.

Assessment: Affirmative response

1. Is there an effective system of inspection in place whereby the regulator carries out inspections:

c) Based upon a complaint associated with an inspected entity?

BaFin takes complaints by customers of investment services enterprises or of other persons and institutions as an occasion to initiate examinations against enterprises. These examinations include special audits and all measures mentioned under Principles 8 and 9. Depending on the results of examinations, BaFin takes all adequate administrative actions to ensure compliance with the regulation in future.

Assessment: Affirmative response

2. Is there an automatic system which identifies unusual transactions on authorized exchanges and regulated trading systems?

Pursuant to section 9 WpHG, investment services enterprises have an obligation to notify to BaFin every transaction in financial instruments admitted to trading on a regulated market or on the regulated unofficial market. Based on the data notified, which BaFin stores in a database, unusual or suspicious transactions can be identified at all exchanges. By means of special software, the data reported are routinely searched for indications of insider trading or market manipulation. In further steps the unusual or suspicious data are examined more closely and the results verified by investigations carried out with the companies and persons concerned. If the investigation gives proof for insider trading or market manipulation, BaFin provides the information to the public prosecutor for criminal procedure.

Assessment: Affirmative response

3. Can the regulator demonstrate adequate mechanisms and procedures to detect and investigate:

a) Market and/or price manipulation?

Please refer to the answer to Key Question 2 above.

Assessment: Affirmative response

3. Can the regulator demonstrate adequate mechanisms and procedures to detect and investigate:

b) Insider trading?

Please refer to the answer to Key Question 2 above.

Assessment: Affirmative response

3. Can the regulator demonstrate adequate mechanisms and procedures to detect and investigate:

c) Failure of compliance with other regulatory requirements, for example:
conduct of business, capital adequacy, disclosure or segregation of client assets?

All regular and special audits mentioned under Principle 8 include the investigation of regulatory requirements like capital adequacy, conduct of business rules and disclosure and segregation of client assets. Therefore, BaFin uses a regular monitoring process to detect and investigate all breaches of the aforementioned regulation.

Assessment: Affirmative response

4. Does the regulator have an adequate system to receive and respond to investor complaints?

Through internal organizational measures, BaFin ensures that complaints by customers of investment services enterprises supervised by it as well as other complaints by investors are assigned to the competent BaFin section and examined there to determine whether or not to initiate a supervisory proceeding for the further clarification of the matter and for taking any necessary pre-emptive measures.

Assessment: Affirmative response

Gathering and Using Information

5. Is there evidence, such as inspection reports and follow up action, which indicates that the regulator is competently discharging inspection responsibilities?

In its internal files, BaFin documents all incoming complaints and reports as well as all its other supervisory activity. Using these files it is possible to show at all times that BaFin meets its responsibility as a supervisory authority and duly carries on the supervision of the financial markets. All internal files are stored physically or electronically at least for ten years, often much longer, depending on their importance.

Assessment: Affirmative response

6. Is there evidence that the regulator is adequately addressing unusual market activity?

All transactions are monitored by a special unit in BaFin's securities supervision. There are automatic procedures in place detecting unusual market activity, e.g. in the run-up of ad hoc disclosures or annual reports. Please also refer to the answer to Key Question 5 above.

Assessment: Affirmative response

Compliance System

7. Does the regulator require regulated entities to have in place supervisory and compliance procedures reasonably designed to prevent securities laws violations?

Investment services enterprises have an obligation to establish adequate principles, keep available resources and put in place procedures aimed at ensuring that the investment services enterprise itself and its staff comply with the obligations of the WpHG (section 33 (1) sentence 2 no. 1 WpHG). For this purpose, they must notably set up a permanent and effective compliance function which can perform its task independently. The compliance function must continuously supervise and regularly evaluate the internal principles and procedures as well as measures for eliminating deficiencies. It must also advise and assist the enterprise's staff with regard to compliance with the statutory requirements. The institutions must appoint a responsible compliance officer who reports to the management board and the supervisory board. The staff of the compliance function must be sufficiently qualified and have access to all information necessary for their independent activity.

Assessment: Affirmative response

8. Does the regulator monitor how compliance procedures are executed and communicated to employees of such entities?

Through the mechanisms described under the answer to Key Question 1.a) above, BaFin supervises compliance by investment services enterprises with the requirements as set out under the answer to Key Question 7 above. This also includes the obligation of the enterprises to adequately train their staff. The execution and communication of compliance principles is part of the regular periodic auditing examination and may also be subject to special audits.

Assessment: Affirmative response

9. Can the regulator take measures against or discipline or sanction intermediaries for failure to supervise reasonably subordinate personnel whose activities violate the securities laws?

If BaFin finds that an investment services enterprise fails to adequately monitor its staff for compliance with the provisions of the WpHG relating to capital markets law, it may call the enterprise to account for this. The activity of the institution's staff is imputed to the enterprise. BaFin responds to this misconduct on the part of the institutions with appropriate measures by issuing orders, imposing fines, revoking the institution's authorization or taking action against the management board.

Assessment: Affirmative response

10. Does the regulator require market surveillance mechanisms that permit an audit of the execution and trading of all transactions on authorized exchanges and regulated trading systems?

The exchanges are required by law to organize themselves in such a way as to ensure proper trading, correct pricing and proper execution of market transactions. These organizational requirements are monitored by the ESAs of the Federal States (*Länder*) pursuant to the BörsG and, if necessary, enforced by administrative measures.

Assessment: Affirmative response

11. Does the regulator or other competent authority have an effective enforcement program in place to enforce regulatory requirements?

BaFin has an internal organization ensuring that it fully meets its statutory duties in the supervision of the public capital markets. This includes developing strategic supervisory objectives, preparing organizational handbooks and having an internal reporting organization. Moreover, BaFin is legally and functionally supervised by the Federal Ministry of Finance. BaFin emphasizes certain issues according to the current work program; for example, in 2010 BaFin performed an enforcement program regarding all transparency obligations.

Assessment: Affirmative response

UNQUOTE

Section II - Enforcement Framework
1. Please describe your jurisdiction's ability to investigate and bring administrative or judicial actions against domestic and foreign parties to enforce your regulatory framework. In responding, please address: a. your jurisdiction's authority (statutory, regulatory or otherwise) to take enforcement action both domestically and in connection with cross-border activity, describing both judicial and non-judicial forms of action where applicable; and b. the impact of any privacy laws or other related provisions that may impede your ability to conduct thorough investigations.
BaFin has statutory jurisdiction's authority to take enforcement action in line with its responsibilities. With respect to cross-border activity, this may include the support of the foreign legal authority. The European General Data Protection Regulation (GDPR) provides for data protection and privacy in Europe. Processing of personal ata that is any information relating to an identified or identifiable natural person, without a specific basis in law is prohibited. Any processing activity has to comply with the provisions of GDPR. However, investigations (precise in scope with reasonable suspicion (proportionality)) by the financial regulators ~~are~~ have a legal basis to process personal data[20] (Art. 6 (1) (e) GDPR: "necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller"; this requirement needs an empowerment in the respective national law which grants such power for investigations precise in scope with reasonable suspicion (proportionality)).
2. Please describe the tools your jurisdiction can utilize to conduct investigations, including the ability to obtain detailed records to reconstruct transactions and identify parties to a transaction. For example, please address the ability to: a. obtain electronic communication and other records from internet service providers or other third-parties; b. compel statements and information from witnesses; and c. receive tips, complaints and referrals from corporate insiders (such as whistleblowers) and the public.
a. BaFin receives the relevant transaction data from the market participants (in particular EMIR, MiFIR-reporting) and could also obtain external data (Reuters etc.) b. BaFin has the ability to compel statements and information from witnesses

[20] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN;

c. BaFin receive tips, complaints and referrals from corporate insiders (such as whistleblowers) and the public. Among others BaFin has an electronic whistleblower system (please see answer to question 2, Section I).

3. Please describe the investigative capacities your jurisdiction has under relevant law, including methods and technology used for market surveillance. Please also describe the role of experts, self-regulatory organizations and exchanges in assisting or performing enforcement functions.

The Securities Trading Act (*WpHG*) provides BaFin with the respective legal investigative capacities which includes receiving of relevant transaction data from market participants and obtaining external data, if needed (Reuters etc.). The investigation is supported by software tools for market surveillance. In addition to that, exchanges provide data and information about issues which comes to their attention.

4. Please describe the legal proceedings, remedies, and sanctions available in your jurisdiction to support your enforcement mechanism, including, for example, available tribunals, types of penalties or other monetary sanctions, and the ability to seek prospective relief, temporary restraining orders, asset freezes or make criminal referrals.

BaFin can initiate an administrative procedure in order to end objectionable behavior by a market participant. This could also involve the use of coercion, for example by imposing a coercive fine. Additionally or alternatively BaFin can conduct administrative offence proceedings in order to impose an administrative fine.

The BaFin has issued an article which gives an overview of BaFin´s supervisory practice[21]:

In the area of Securities Supervision/Asset Management the imposition of administrative fines is the main tool to counteract breaches of capital markets law. Nevertheless, BaFin's Securities Supervision could order other measures as well, e.g. the dismissal of a manager or the termination of a license.

For further information regarding administrative fine proceedings please refer to the attached article: Canzler/Hammermaier, The prosecution and sanctioning (…)[22]

BaFin's Supervision has issued the so called Administrative Fine Guidelines in order to make its assessment procedure for administrative fines more understandable and transparent. To describe the process in very broad terms, BaFin can determine the amount of an administrative fine according to the fixed maximum fine amount as laid down in the law or it may be calculated at, for example, three times the amount of the profits gained or losses avoided

[21] https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2015/fa_bj_1510_bafin_und_sec_en.html

[22] See attachment to this questionnaire

because of the infringement. Alternatively, and only in the case of legal entities, the fine can be defined as a percentage of revenues, for example to up to 15% of the total annual turnover.

BaFin refers to the following links for further information[23]
A translation of the WpHG Administrative Fine Guidelines II is attached.[24]
BaFin only conducts administrative procedures, criminal proceedings lie in the responsibility of the public prosecutor´s office and the courts. If an investigation by BaFin indicates that a criminal offence has been committed, the case is transferred to the public prosecutor´s office.

5. Please describe how your jurisdiction publishes information about enforcement initiatives, including disclosure of enforcement matters and violations and public disclosure of enforcement objectives.

BaFin's Securities Supervision publishes measures and sanctions, in German and English, on its website.[25]

These publications state the provision that was infringed and the natural or legal person that is responsible for the infringement. BaFin's Securities Supervision does not publish the complete administrative fine order. Regarding the contents of these publications, please refer to the following example from BaFin´s website:

23.12.2019 | Topic Measures

Deutsche Cannabis AG: BaFin imposes administrative fines

On 11 December 2019, BaFin imposed administrative fines amounting to 55,000 euros against Deutsche Cannabis AG.

The sanction related to the following breaches by Deutsche Cannabis AG:

In Contravention of section 115 (1) sentence 1 of the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG), Deutsche Cannabis AG had failed to make its half-yearly financial report for the financial year of 2018 publicly available within the prescribed period.

In Contravention of section 115 (1) sentence 2 of the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG), Deutsche Cannabis AG had failed to publish, within the prescribed period, an announcement stating the date and the website on which the half-yearly financial report for the financial year of 2018 were made publicly available in addition to its availability in the business register.

On 19 December 2019 the company lodged an appeal against the administrative fine order.

[23] https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2017/fa_bj_1703_WpHG_Bussgeldleitlinien_II_en.html
https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2016/fa_bj_1607_sanktionen_en.html

[24] See attachment to this questionnaire

[25] https://www.bafin.de/DE/Aufsicht/BoersenMaerkte/Massnahmen/massnahmen_sanktionen_artikel.html

Sanctions published by BaFin's Securities Supervision are also distributed via BaFin´s Newsletter.
6. Please provide information regarding your jurisdiction's track record of enforcement activity for the last [three] years and the use of civil or criminal enforcement authority against individuals and entities, including a. information about the number of actions taken; b. the types of violations subject to action, including in connection with requirements for which substituted compliance is sought (*e.g.*, capital and margin, business conduct, etc.); and c. the outcomes of such actions, including whether money was returned to harmed investors. In responding, please provide information about the types of penalties assessed and length of time from initiation of an investigation to the date of charge or closure.
a, b: BaFin´s Annual Reports for the years 2016 – 2018 give an overview over its measures and sanctions and the types of violations for which they were issued in the last three years.[26] a, b: BaFin´s Annual Reports for the years 2016 – 2018 give an overview over its measures and sanctions and the types of violations for which they were issued in the last three years.[27]

[26] https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/jahresbericht_node_en.html
[27] https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/jahresbericht_node_en.html

Annual Report 2016:

For further information regarding the following overview please refer to chapter V.7.:

Administrative fine proceedings

	Proceedings pending at the beginning of 2016	New proceedings initiated in 2016	Administrative fines*	Highest administrative fine imposed** (€)	Proceedings discontinued for		Proceedings pending at the end of 2016
					factual or legal reasons	discretionary reasons	
Reporting requirements (section 9 of the Securities Trading Act)	5	7	3	25,000	0	0	9
Ad hoc disclosures (section 15 of the Securities Trading Act)	81	21	13	195,000	0	7	82
Managers' transactions (section 15a of the Securities Trading Act)	6	1	0	0	0	1	6
Market manipulation (section 20a of the Securities Trading Act)	27	14	0	0	3	2	36
Notification and publication requirements (sections 21 *et seq.* of the Securities Trading Act)	692	152	75	120,000	65	137	567
Duties to provide information to securities holders (sections 30a *et seq.* of the Securities Trading Act)	50	10	5	16,500	8	10	37
Short selling (section 30h of the Securities Trading Act)	6	7	1	35,000	0	0	12
Financial reporting requirements (sections 37v *et seq.* of the Securities Trading Act)	109	59	6	93,000	17	14	131
Securities Prospectus Act	12	7	0	0	0	0	19
Capital Investment Act/Prospectus Act	8	2	2	12,000	1	1	6
Company takeovers (Securities Acquisition and Takeover Act)	42	0	1	5,500	1	22	18
Other	3	1	0	0	0	0	4

** Proceedings completed by imposing an administrative fine.** Individual administrative fines.*

For further information regarding the following overview please refer to chapter I.1.5.3:

	New proceedings initiated in 2016	Administrative fines	Proceedings discontinued for factual or legal reasons	Proceedings discontinued for discretionary reasons
Conduct of business rules & organisational and transparency requirements for investment firms	7	8	4	6

Annual Report 2017:

For further information regarding the following overview please refer to chapter V.7:

	Proceedings pending at the beginning of 2017	New proceedings initiated in 2017	Administrative fines*	Highest administrative fine imposed** (€)	Proceedings discontinued for factual or legal reasons	Proceedings discontinued for discretionary reasons	Proceedings pending at the end of 2017
Transaction reporting requirements	9	2	2	25,000			9
Ad hoc disclosures	82	22	11	250,000		10	83
Market manipulation	36	7	8	42,000	1	2	32
Notification and publication requirements (part 5 of the Securities Trading Act)	567	57	56	375,000	11	112	445
Duties to provide information to securities holders (part 5a of the Securities Trading Act)	37	2	2	26,600	2	9	26
Financial reporting requirements	131	78	10	668,000	9	22	168
Company takeovers (Securities Acquisition and Takeover Act)	18	1	1	17,000	1	7	10

* Proceedings completed by imposing an administrative fine.

** Individual administrative fines.

For further information regarding the following overview please refer to chapter II.2.4.3:

	New proceedings initiated in 2017	Administrative fines	Proceedings discontinued for factual or legal reasons	Proceedings discontinued for discretionary reasons
Conduct of business rules & organisational and transparency requirements for investment firms	6	6	1	12

Annual Report 2018:

For further information regarding the following overview please refer to chapter VI.2.6:

	Proceedings pending at the beginning of 2018	New proceedings initiated in 2018	Proceedings completed by imposing an administrative fine	Highest individual administrative fine imposed (€)	Proceedings discontinued for		Proceedings pending at the end of 2018
					factual or legal reasons	discretionary reasons	
Reporting requirements	9	0	1	20,000	0	3	5
Ad hoc disclosures	83	16	6	192,000	1	7	85
Managers' transactions	6	1	2*	5,325	0	1	4
Market manipulation	32	6	10*	42,000	6	6	16
Notification and publication requirements	445	51	79	1,340,000	16	95	306
Duties to provide information to securities holders	26	0	1	11,300**	6	12	7
Short selling	16	0	4	57,500	0	2	10
Financial reporting requirements	168	46	10	148,500	3	22	179
Prospectuses (Securities Prospectus Act/ Capital Investment Act)	30	2	0	0	0	3	29
Company takeovers (Securities Acquisition and Takeover Act)	10	5	2	9,000	0	2	11
Other	10	5	3	9,750	0	2	10

* Includes 1 case that led to the conviction of the individual concerned in criminal proceedings. Also includes an assessment of life circumstances in the determination of the administrative fine.

** The administrative fine was imposed due to a breach of the duty of oversight for this and other violations.

For further information regarding the following overview please refer to chapter II.2.5.2:

	New proceedings initiated in 2018	Administrative fines	Proceedings discontinued for factual or legal reasons	Proceedings discontinued for discretionary reasons
Conduct of business rules & organisational and transparency requirements for investment firms	3	9	1	6

c: In the case of the administrative fines issued by BaFin's Securities Supervision, the proceeds are not returned to harmed investors. Although the amount of a fine might be calculated according to the profits gained by an infringement, all proceeds from the issuance of administrative fines are part of the federal budget of the German State. Individual investors who have been harmed can seek monetary compensations via the civil courts.

The length of time from the initiation of an administrative fine proceeding to its closure varies from case to case. A minor infringement where the underlying circumstances can be readily investigated might be concluded in a couple of months, provided that the party concerned does not object to the administrative fine order. If a party concerned appeals an administrative fine order and if BaFin's Securities Supervision upholds its initial decision, then the case is referred to the court via the public prosecutor´s office. Under these circumstances, the conclusion of the case might last considerably longer. However, it has to be noted that BaFin's Securities Supervision needs to observe the statute of limitation. This period might, under certain circumstances, last for up to six years and usually begins as soon as the infringement is completed.

7. Please describe whether the enforcement authorities in your jurisdiction have readily accessible mechanisms to obtain documents and other forms of assistance from a foreign enforcement authority. In responding, please address:
    a. whether your jurisdiction has ratified international conventions, treaties and agreements relevant to cooperation in enforcement matters,
    b. whether the relevant authorities in your jurisdiction have signed the IOSCO MMoU or IOSCO EMMoU, and
    c. whether your jurisdiction has any legal requirements to preserve records obtained in the course of investigative matters such that those records would be available upon request from another enforcement authority.

a. BaFin has signed numerous bilateral and multilateral Memoranda of Understanding ("MoU") on information exchange with foreign – European Union ("EU"), European Economic Area ("EEA") and Non-EU – authorities, incl. with US regulatory authorities: i.e.

i. Memorandum of Understanding Between The United States Securities And Exchange Commission And The German Bundsaufsichtsamt Für Den Wertpapierhandel Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Law – October 17, 1997

ii. Memorandum Of Understanding Between The German Bundesaufsichtsamt Für Den Wertpapierhandel And The United States Commodity Futures Trading Commission Concerning Consultation and Cooperation in the Administration and Enforcement of Futures Laws, October 17, 1997

iii. Memorandum of Understanding Between The German Bundesanstalt Für Finanzdienstleistungsaufsicht And The United States Securites And Exchange Commission Concerning Consultation, Cooperation and the Exchange of Information in Relation to the Supervision of Financial Services Firms and Market Oversight – April 26, 2007

iv. Arrangement For Consultation, Cooperation And The Exchange Of Information Relating To The Oversight Of Affiliated Markets Made Under The Supervisory MOU Between The US SEC And The German BaFin, December 12, 2007

v. Cooperation And The Exchange Of Information Related To The Supervision Of Cross-Border Clearing Organizations between United States Commodity Futures Trading Commission, Bundesanstalt Für Finanzdienstleistungsaufsicht and Deutsche Bundesbank– Memorandum Of Understanding, January 25, 2016

Additionally, Germany and the US are signatories to the Mutual Assistance Treaty (MLAT) in criminal matters.

b. BaFin became a signatory to the IOSCO MMoU on November 5, 2003.
BaFin is currently not signatory to the IOSCO EMMoU.

c. Retention periods vary depending on the applicable retention rules in a range from 5 years up to 30 years. The retention rules are codified in BaFin's file/record plan (*Aktenplan*) and in the data protection concept (*Datenschutzkonzept*).

Section III – Supervisory and Enforcement Cooperation
1. Please describe your jurisdiction's ability to share, and the process for sharing, non-public information with (or obtain it for) authorities such as the SEC. In responding, please address any limitations for sharing (a) information from Regulated Entities and (b) internal work product. Please address whether any blocking statutes, privacy or secrecy laws, or other legal or regulatory requirements impede sharing information, including customer or employee information, by authorities or firms located in your jurisdiction.
Under Section 18 (10) of the WpHG BaFin may cooperate and exchange information with competent authorities, provided that: • these authorities need the information for the purpose of performing their functions • these authorities are subject to an appropriate confidentiality regime (has been established for the SEC and all other IOSCO MMoU signatories). Generally, BaFin may use the powers conferred upon it by the WpHG and European Acts to the extent that this is appropriate and necessary in order to comply with the requests of the authorities (sec. 18 (10) (1) WpHG). BaFin provides assistance within the scope of the specific relevant MoU on a bilateral basis and is able to assist overseas authorities (IOSCO MMoU signatories) as required under paragraph 7 of the Multilateral Memorandum of Understanding Concerning Consultation And Cooperation And The Exchange Of Information ("IOSCO MMoU"). In principle, BaFin may refuse to comply with a request for assistance, if judicial proceedings have already been instituted or final judgment has already been delivered with regard to the persons in question in respect of the same actions (Section 18 (6) WpHG). In practice, to date a request has not been refused on these grounds. Persons employed by BaFin and authorised persons in accordance with section 4 (3) of the Act Establishing the Federal Financial Supervisory Authority (Finanzdienstleistungsaufsichtsgesetz) are subject to a confidentiality regime (sec. 21 WpHG). However, exemptions apply to the exchange of information to foreign regulatory authorities, such as the SEC (sec. 21 (1) WpHG). The transfer of personal data to authorities outside the EU is governed by Chapter V (Artt. 45 – 50) of the Regulation (EU) 2016/679 Of The European Parliament And Of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ("General Data Protection Regulation", GDPR). BaFin may transfer personal data to the SEC on the basis of the Administrative Arrangement for the transfer of personal data, to which the BaFin and SEC are signatories, subject to its applicability to the Exchange of Information Related to the Supervision and Oversight of Certain Cross-Border Over-the-

Counter Derivatives Entities In Connection with the Use of Substituted Compliance by Such Entities.
2. Under your jurisdiction's relevant laws, regulations, and policies, would the SEC, (a) have prompt access to the books and records of a Regulated Entity located in your jurisdiction, and (b) be able to conduct onsite inspections or examinations of a Regulated Entity located in your jurisdiction? Please describe any applicable limitations or conditions on such access.
In Germany no explicit blocking laws exists which would prevent access to books and records and on-site inspection of German banks by foreign regulatory authorities. However, the extraterritorial intervention and political impact needs to be so considered. Consequently the details and procedures of such intervention needs to be agreed "up-front" by a Memorandum of Understanding between the BaFin and the SEC. Moreover, BaFin would like highlight that any access to the books and records or onsite inspection needs to be in compliance with GDPR.

Peer Reviews as further factor for assessing comparability: In consideration of comparability of BaFin supervision and enforcement system with the SEC BaFin would like to refer to peer reviews conducted in the last years by the FSAP, IOSCO or ESMA,[28] demonstrating effective supervision and enforcement.

[28] https://www.imf.org/external/np/fsap/fsap.aspx;
https://www.esma.europa.eu/sites/default/files/library/esma42-111-4916_-_stor_peer_review_report.pdf

Information to be included in the Application (Element 4)

Please note that responses to these questions should relate to those institutions that will be registering as security-based swap entities in the U.S. and should be tailored to the securities-based swap business in areas where substituted compliance has been requested.

1. For each of the areas of regulation for which substituted compliance is requested, identify whether BaFin-Securities Supervision, BaFin-Banking Supervision, BaFin-Resolution (Prevention of Anti Money Laundering) (each a "Supervisory Group") or the ECB is the primary supervisory entity and/or the primary entity for enforcing such regulations.

   BaFin is the primary supervisor for BaFin-Securities Supervision which includes MiFID and EMIR and BaFin-Resolution (Prevention of Anti Money Laundering). Regarding BaFin-Banking Supervision we refer to the Substituted Compliance Assessment Questionnaire ("Questionnaire"), preamble I.1.g). Banking supervision also covers internal governance/compliance as well as market risks (incl. capital requirements) and the respective risk management, i.e. does include OTC derivatives business of banks. ECB/SSM is therefore the primary supervisory entity from a prudential supervision perspective for SIs.

2. If any of the regulations for which substituted compliance is requested do not apply to certain cross-border transactions, please explain (e.g., transactions with counterparties located outside of the EU).

   Art. 1 Directive 2014/65 EU (MiFID II) stipulates that the rules apply to firms providing investment services or performing investment activities within the EU. Therefore in general, MiFID rules apply, when there is a link to the EU, e. g. the business or activity (at least in part) takes place within the EU or the client is located in the EU.

   With respect to investment services provided from Germany cross-border to clients in a jurisdiction outside the EU, MiFID rules generally apply, subject to specific conflicting rules, which are applicable in the target country. Where the investment service is provided by a branch located in the third country, MiFID rules are only applicable if the service is provided to MiFID-clients (clients having their place of residency or their registered office within the EU).

   If there is no link between the investment service and the EU, generally MiFID rules do not apply. Therefore, a trade between the NY branch of a German institution and a non-EU-client outside of the EU (so e. g. US client or Hong Kong client), generally

would neither be subject to MiFID rules nor BaFin supervision. In this case, the third country rules apply.
Under EMIR BaFin is the legal authority, if a German counterparty is a party to a derivative transaction (OTC or exchange traded). Counterparty is either a Financial Counterparty (FC) or a Non-Financial Counterparty (NFC) according to EMIR. The place of trade is not a deciding factor. When it comes to the clearing obligation, BaFin may have authority if two third country counterparties are involved if the transaction of one counterparty is guaranteed by a German financial counterparty and certain thresholds are met. In case the EU-Commission had set in place a decision of equivalence, certain obligations under EMIR may be met by fulfilling the respective third country regulation.
Under German anti-money-laundering regulation obliged entities that are parent companies of a group are required to conduct a risk analysis for all branches, establishments and group companies under section 1 (16) nos 2 to 4 of the Money Laundering Act (GwG) that are subject to obligations under anti-money laundering and counter terrorist financing law (section 9 (1) sentence 1 of the Money Laundering Act (GwG)).
On the basis of this risk analysis, they must take the following measures on a group-wide basis:

- **the establishment of consistent internal controls and safeguards under section 6 (2);**
- **appointment of a money laundering officer who is responsible for devising a group-wide strategy for the prevention of money laundering and terrorist financing and for the coordination and monitoring of its implementation;**
- **the creation of procedures for the exchange of information within the group to prevent money laundering and terrorist financing and**
- **the creation of precautions for the protection of personal data.**

They must ensure that the measures they have taken are effectively implemented by their branches, establishments and group companies, insofar as they are subject to obligations under anti-money laundering and counter terrorist financing law and are controlled by the parent company (section 9 (1) sentence 3 of the Money Laundering Act (GwG)).

The provision of § 9 GwG, which is based on the 4th EU Anti-Money Laundering Directive, is ultimately intended to prevent the application of different anti-money laundering standards within a group and to prevent money launderers and terrorism financiers from switching to subordinated companies, branches or subsidiaries with lower prevention standards.

In order to enforce the desired uniform standard, the regulations made for branches and companies subject to group obligations in other countries are of particular importance. Thus, parent companies have to ensure that the group-managed branches and companies located in another EU country comply with the regulations applicable there. The same applies in principle also to third countries. If, however, less stringent requirements for measures to prevent money laundering or terrorist financing apply in a third country, the parent company must take the aforementioned group-wide measures and ensure their effective implementation to the extent permitted by the law of the third country. If the implementation of these measures is not permitted or not actually feasible under the law of the third country, the parent company must ensure that its branches and companies subject to group reporting requirements located there take additional measures without delay in order to effectively counter the resulting risk of money laundering and terrorist financing and inform BaFin of the additional measures taken by the branches or companies.

3. Explain the supervisory processes over significant institutions' security-based swap ("SBS") activities by the Supervisory Groups. All responses should relate to those institutions that will be registering as security-based swap entities in the U.S. and should be tailored to the SBS business in areas where substituted compliance has been requested. Please include a list of the main reports reviewed by each Supervisory Group (*e.g.*, the Securities Trading report, the MiFID conduct report,), a brief summary of the general contents of each report, how often the report is filed with BaFin, and the process BaFin undertakes to review the report, including what happens when it sees areas of concern within the report.

The ongoing monitoring process of BaFin's supervision includes evaluating in particular the auditor's reports[1] (*Prüfbescheinigung des Wirtschaftsprüfers*) covering all aspects of securities and banking regulation (tailored to the specific business of the entity)[2], regulatory reports/filings, tips/complaints (depending on the subject), annual accounts, internal audit reports, economic reports, press releases supplemented by on-site and off-site inspections as well as special investigations/audits (*Sonderprüfung*), if needed. Moreover, BaFin holds both routine and ad hoc discussions with the institutions.

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[1] Role of the public sworn auditor (see also answer to question 12, section I): Compliance with EU legal sources and German statutes such as EMIR, MiFiR/MiFID, CRR, KWG, WpHG is examined by an independent public sworn auditor on BaFin's behalf. The content and procedure are stipulated in the respective examination regulations (*Prüfungsverordnungen*).

[2] Regarding derivatives the annual auditors report for credit institutions (*Jahresabschlussprüfung für Kreditinstitut*e, section 28-30 KWG) with its EMIR section as well as the auditor's report on "conduct rules" (WpHG *Prüfungsbericht zu Verhaltensregeln, Organisationspflichten und Aufzeichnungspflichten*, section 89 WpHG) is relevant.)

Regarding its supervision BaFin highlights that the KWG and WpHG contain a large number of notification, reporting and submission requirements. They include periodic filings as well as submissions based on events or triggers.

Compliance of investment firms (including Banks) with the investor protection and organizational rules of MiFID II and the German Securities Trading Act is examined by public sworn auditors. The auditors provide BaFin with comprehensive reports on an annual basis.

Annual (mandatory) WpHG-report:
The auditors provide BaFin with comprehensive reports on an annual basis.

The content of this audit is defined in section 89 WpHG and specified by the Regulation on the Audit of Investment Services Enterprises in accordance with Section 89 of the Securities Trading Act (WpDPV). A suitable auditor must, on at least an annual basis, examine whether the following requirements are being complied with:

1. the reporting requirements under Article 26 of Regulation (EU) No. 600/2014, including in conjunction with the regulatory technical standards adopted on the basis of that Article,
2. the requirement to report positions under section 57 (1) to (4),
3. the notification requirements under section 23,
4. the obligations governed by Part 11 of the WpHG
5. the obligations arising from

- **Articles 4, 16 and 20 of Regulation (EU) No. 596/2014,**
- **Articles 3 to 15, 17, 18, 20 to 23, 25, 27 and 31 of Regulation (EU) No. 600/2014,**
- **Delegated Regulation (EU) 2017/565**
- **section 29 (2) in conjunction with the first subparagraph of Article 4(1) and Article 5a(1) of Regulation (EU) No. 1060/2009**

Audit Focus:
If there are particular issues or areas of interest, BaFin has the authority to order the auditor to focus the audit on particular issues. In general, there is a regular communication between BaFin staff and the responsible auditors on the content, progress and results of the audit.

Special Audit:

Special audits are conducted following a risk-based approach. In practice BaFin considers a special audit if there is some degree of suspicion regarding a violation of regulatory provisions, which can be derived from various sources, such as discussions with representatives of banks, whistleblowers, media coverage etc. A special audit requires a tender procedure. BaFin provides the appointed auditor with a comprehensive and detailed assignment on the scope of the audit and the issues and questions that need to be addressed. The audit, conducted by the public sworn auditor will include a wide variety of measures such as on-site presence, interviews, data requests etc. During the special audit BaFin staff is usually in close contact with the auditor and discusses preliminary findings and the progress of the audit. The auditor issues a final report on the special audit which serves as a basis for further regulatory measures.

For the Banking Supervision Group please see question 5/refer to the ECB/SSM who owns the information. German banking supervisors typically review the report of the annual auditor, internal audit reports, management reports, risk and capital reports, etc. but also written documentation of banks, such as internal risk management policies and key operating procedures.

The responsibilities and objectives of the authorities involved into German banking supervision are defined in Section 6 of the KWG. BaFin exercises in cooperation with Deutsche Bundesbank supervision over credit institutions pursuant to the provisions of the KWG, the statutory orders enacted in connection therewith, Regulation (EU) No. 575/2013 (CRR) and legal acts enacted on the basis of the CRR and Directive 2013/36/EU (CRD). BaFin and Deutsche Bundesbank cooperate as stipulated in Section 7 KWG. The responsibilities of the ECB are defined in Art. 4 of Regulation (EU) No 1024/2013 (SSMR).

The tasks of BaFin are not limited to administrative acts, as it can also issue general instructions which lay down rules for carrying out banking business and providing financial services and for limiting risks. It can do this by issuing principles and regulations. BaFin's duties also include solving problems in the banking and financial services sector that could jeopardize the safety of the assets entrusted to institutions, impair the orderly conduct of banking business or the orderly provision of financial services or bring about considerable disadvantages for the economy as a whole.

Regarding EMIR, BaFin review the report of the annual auditor under the Banking Act as this also contains specific information on EMIR requirements (cf. Section 29 para 1 Nr. 2 c) German Banking Act in conjunction with Section 14a par 1, 3 and 4 PrüfBV, Audit Report regulation, which details the duties of the auditor . However, Banking

Supervision may pass on additional information, such as internal audit reports etc. to the extent that they entail relevant information.

Please include the following information:

a. The approximate number of supervisors assigned to a significant institution.
The ongoing supervision of significant institutions within supervisory groups is conducted by teams consisting of a varying number of supervisors depending on the specific subject matter. On EMIR a dedicated team is responsible for the supervision besides of the reporting obligations as this is in the remit of another team.

b. The ways in which, and how often, the supervisors interact with the significant institution (including meetings, phone calls, requiring special audits, etc.).
Interaction between supervisors within the different supervisory groups and the significant institution might take place in an institutionalized manner at regular intervals or on an ad-hoc basis. The frequency of interactions depends on the responsibilities of the respective supervisory group and on current events of regulatory relevance. Also, BaFin in general pursues a risk-based approach.

c. The supervisory tools BaFin uses to correct red flags/violations of law (for example speaking with or written communication to management, requiring a special audit, referring to enforcement).

There are various tools at BaFin's disposal such as document and data requests, formal meetings with the management, meetings with compliance, internal audit or staff from other relevant areas of the bank, on-site inspections, accompaniments of annual audits and special audits. However, accompaniments of annual audits and special audits are not available with regard to EMIR as they are only part of the yearly audit under German Banking Act. With regard to prudential supervision the information is owned by the ECB/SSM, for information on the SSMs policy towards annual and special audits please refer to the ECB.

d. Any areas for which substituted compliance has been requested where these processes are not applicable.

No areas

e. Note any major supervisory process differences between the Supervisory Groups.

No major differences, taking into account different scopes within the Supervisory Groups. Minor differences are flagged within the relevant questions.

4. Tailoring your responses to those institutions that will be registering as security-based swap entities in the U.S., and to the areas of regulation for which you are requesting substituted compliance, explain the enforcement processes over significant institutions' SBS activities by the Supervisory Groups.

Overview for the specific questions raised below: BaFin has a workflow for this issue which includes, among others, an electronic whistleblowing system, so BaFin receives disclosures about actual or suspected violations of supervisory provisions. The central contact point is also responsible for any subsequent, case-specific communication with whistleblowers in order to protect them and, if desired, to maintain their anonymity. More information is provided under the following link.[3] Moreover, it is also still possible to make disclosures by post, by telephone or in person.[4]

Please include the following information:

a. How BaFin processes and responds to tips, complaints and referrals.

b. BaFin has established a central contact point for so-called "whistleblowers". Whistleblowers may use this contact to report violations of supervisory provisions. Anonymity of whistleblowers is a top priority for BaFin.

Investors turn to BaFin and complain about a financial institution. BaFin primarily looks at whether the matter is significant for German supervisory law, and if so to what extent. Consumers can also address BaFin's consumer helpline to ask questions or to file a complaint about a financial institution.

In addition: Reference to Questionnaire section I, question 2 and 3.

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[3] Contact point for disclosures about violations of supervisory law: https://www.bafin.de/EN/Aufsicht/Uebergreifend/Hinweisgeberstelle/hinweisgeberstelle_node_en.html

[4] https://www.bafin.de/EN/Aufsicht/Uebergreifend/Hinweisgeberstelle/hinweisgeberstelle_node_en.html;jsessionid=A9E877DC%200E65C8C229513352A265FDD5.1_cid363

c. The role, if any, BaFin enforcement plays in detecting misconduct.

BaFin´s specialized divisions are responsible for the daily supervision of the markets. If they detect misconduct, they can initiate administrative procedures in order to end the objectionable behavior by a market participant (in case of a criminal offense the case will be referred to the state prosecutor (*Staatsanwalt*).

Additionally or alternatively, BaFin can conduct administrative offence proceedings in order to impose an administrative fine. BaFin´s specialized divisions would then refer the case to the Division for Administrative Offence Proceedings.

d. Any areas for which substituted compliance has been requested where these processes are not applicable.

No areas

e. Note any major enforcement process differences between the Supervisory Groups.

The general principle of the process described above under section 4c) applies to all Supervisory Groups.

5. With respect to the areas of regulation for which you are requesting substituted compliance, please describe how BaFin and the ECB work together as part of the joint supervisory teams ("JST"). Please include a list of the main reports reviewed by the JSTs that relate to areas where substituted compliance has been requested,[5] a brief summary of the general content of each report, how often the report is filed with the JSTs, and the process the JSTs undertake to review the report, including what happens when the team sees areas of concern within the report. Please include the following information:

    a. The approximate number of JST supervisors assigned to a credit institution.

[5] Our initial understanding is that the following areas where we have found comparable laws using the CRD and CRR are under the supervisory jurisdiction of the ECB:

- internal risk management under CRD articles 74 and 76-78;
- internal supervision and compliance systems and personnel under CRD articles 23, 74, 88, 91 and 92; and
- "know your counterparty" under CRD articles 74(1) and 85(1).

For each significant bank, the JST produces a Supervisory Examination Programme (SEP), which sets out the main supervisory tasks and activities for the following 12 months, their tentative schedules and objectives and the need for on-site inspections and internal model investigations.

SEP: https://www.bankingsupervision.europa.eu/.../ssm.supervisorymanual201803.en.pdf

Supervisory priorities 2019:
https://www.bankingsupervision.europa.eu/banking/priorities/pdf/ssm.supervisory_priorities2019.en.pdf

For more details, please refer to the ECB/SSM.

b. Describe the ways in which, and how often, the JST interacts with the significant institution (including weekly and quarterly meetings, etc.).

For each significant bank, the JST produces a Supervisory Examination Programme (SEP), which sets out the main supervisory tasks and activities for the following 12 months, their tentative schedules and objectives and the need for on-site inspections and internal model investigations.
SEP: https://www.bankingsupervision.europa.eu/.../ssm.supervisorymanual201803.en.pdf

Supervisory priorities 2019:
https://www.bankingsupervision.europa.eu/banking/priorities/pdf/ssm.supervisory_priorities2019.en.pdf

For more details, please refer to the ECB/SSM.

c. The supervisory tools the JST uses to correct red flags/violations of law (for example, operational acts and associated risk mitigation plans).

The JSTs use a variety of supervisory tools to address deficiencies, reinforce messages etc. and the SEC examples cover some of the potential tools. For example, special audits are often employed to further investigate where the supervisor sees reasons for concern. Such special audits typically result in a written communication.

- **Supervisory powers Article 9 ff, to 16 SSM Regulation (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R1024&from=EN)**

- **Article 18 on penalties**
- **Investigatory powers, especially**
- **request for information, Article 10**
- **onsite inspections Article 12**

d. Identify any areas for which substituted compliance has been requested where the JST supervisory process is not applicable.

No areas

e. A description of the onsite inspection process, including the independent onsite inspection team, deep dives, and thematic reviews.

In September 2018, the ECB has published a guide to on-site inspections and internal model investigations. Banks are inspected in order to provide an in-depth analysis of different risks, internal control systems, business models or governance. Inspections have a pre-defined scope and time frame and take place on the premises of the inspected bank or a related legal entity. The guide shall provide an overview on how inspections are conducted, describe the different inspection phases, and set out the principles for inspections to be followed by both banks and inspection teams
(link to guide:
https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180921.en.html).
As the JST is responsible for the on-going supervision of the institution, the Head of Mission (HoM) and the inspection team act independently of the JST, but in cooperation. The HoM is responsible for the organization of the inspection, the communication with the JST and the institution and is in charge of producing a report with the relevant findings. In order to secure this independence, the appointed HoM cannot be a member from the JST of the inspected institution but from ECB or an NCA. Nevertheless, in terms of the composition of the inspection team, both JST members, NCA inspectors and other ECB staff can participate in the inspection. In this way, NCAs can be involved in the inspection.
For further details in terms of the process and different steps of an on-site inspection, cf. chapter 2 "Inspection Process" of the ECB "Guide to on-site inspections and internal model investigations."
All findings of the on-site inspection are summarized in an inspection report with a categorization of severity of the finding (F1: low impact to F4 very high impact). This report includes an executive summary, a table of findings, a body of the report and if necessary appendices, which is shared with the ECB and relevant NCA for consistency checks and for further discussion with the HoM.

Afterwards draft report and feedback template is sent to the inspected institution for feedback. The draft report and the feedback template are the basis for the discussion for the exit meeting with the institution, ECB, HoM, JST, and inspection team in order to finalize the report.

f. Identify the primary regulator responsible for enforcement of breaches detected by the JST.

There are two aspects, the formal enforcement of breaches via administrative penalties and the response to deficiencies not remediated in a timely manner/persisting.
On the first, the ECB has the power to enforce breaches and to impose fines on supervised entities for breaches of directly applicable European Union law (including breaches of ECB decisions). The maximum fines that can be applied depends on whether the profits gained or losses avoided as a result of the breach can be determined. If this is the case, a fine of up to equate to twice the amount of the profits gained or losses avoided as a result of the breach where those can be issued. If profits gained or losses avoided cannot be determined, the maximum amount of a fine is or 10% of the bank's total annual turnover. The ECB can also ask national competent authorities (NCAs) to open proceedings that may lead to the imposition of:
▪ non-pecuniary penalties for breaches of directly applicable Union law;
▪ pecuniary and non-pecuniary penalties for breaches of national law transposing relevant directives (e.g. breaches of governance and remuneration requirements);
▪ pecuniary and non-pecuniary penalties against natural persons belonging to the entities concerned for breaches of relevant Union law.
So far, the ECB has focused its sanctioning activity on the following areas: Capital requirements, large exposures, liquidity, reporting obligations and governance.
On the second aspect, JSTs handle breaches themselves and can hereby select from a broad range of possible supervisory measures/actions (please refer to no. 5 c.). For instance in case a deficiency is not remediated in a timely manner, the JST resp. the ECB/SSM can impose a capital deduction until remediation. In case of persisting deficiencies, the JST would pass the matter to a dedicated enforcement and sanctions section within the ECB to assess formal administrative penalties (already mentioned above).
For more details please refer to the ECB.

6. Explain how external auditors play a role in BaFin's supervision, including BaFin's approval of the auditor and BaFin's ability to influence the auditor selection (e.g., BaFin can change the auditor or take over the audit). If the role of external auditors is different for the Supervisory Groups, please describe any differences.

In Germany, compliance of investment firms with the investor protection and organizational rules of MiFID II and under the German Banking Act is examined by public sworn auditors on BaFin's behalf. These audits are generally carried out on an annual basis. BaFin receives a notification of the appointed auditor beforehand and may demand appointment of different auditor or may - in the field of securities supervision - take over the audit. Specific audit key areas may be set by BaFin.

For information regarding the prudential part of the supervision, please refer to the ECB/SSM, since the ECB owns the information and the competence for prudential supervision lies with the ECB. Regarding EMIR there is no influence on the auditor foreseen as this area is part of the yearly report provided to the banking supervisor.

7. Explain the use of thematic reviews for significant institutions. Explain how these thematic reviews relate to the development of priorities and the supervision process in the areas of law where substituted compliance has been requested.

   In order to get a broader overview on the implementation of certain regulatory obligations, BaFin conducts thematic reviews on a regular basis as far as MiFID is concerned. As part of such a thematic review, a representative group of institutions are required to provide BaFin with relevant documents and information for review. The thematic review provides BaFin with information on the market wide application of certain regulatory obligations and on the development of market standards. In the past, the results of such a thematic reviews were discussed with industry representatives as well as particular institutions, which took part in the review. The results might also serve as a starting point for further measures as part of BaFin's ongoing supervision.

   In the banking supervision, we are not aware of a recent thematic review specifically in the substituted compliance space although thematic reviews in the risk governance space are likely to also touch on substituted compliance topics. Typically, thematic reviews are a tool to operationalize a supervisory strategy/supervisory priorities. For example, the ECB/SSM has focused on IT and cyber risk since the early days of the SSM and has addressed it from various angles. The ECB/SSM conducted thematic reviews on the topic in 2015, 2016 and 2017 to gain a more detailed understanding of the scope of the problem. For more details on thematic reviews please refer to the ECB.

8. If BaFin establishes annual priorities, identify how BaFin's annual priorities are used to ensure compliance with and enforcement of the areas of law where substituted compliance has been requested. If there are differences in the priorities for the Supervisory Groups, please explain.

BaFin in general pursues a risk-based approach with regard to supervisory priorities. Usually large institutions are in the focus of BaFin's ongoing supervision, since these institutions most often have a high risk-profile and are of particular importance.

BaFin understands that this form should relate to those institutions that are planning to register as security-based swap entities. The institutions in question qualify as significant institutions (SIs) and are thus under the direct supervision of the ECB. The ECB sets annual supervisory priorities for the SSM. More information is available here: https://www.bankingsupervision.europa.eu/banking/priorities/html/ssm.supervisory_priorities2019.en.html#toc1

Please refer to the ECB for more detailed information.

9. Explain BaFin and the JST's authority to obtain records from significant institutions through the supervisory process in the areas of law where substituted compliance has been requested.

   In general, there is no limitation on books and records that can be requested by BaFin for review within its mandate. However, statutory rights to provide or refuse to provide information as well as statutory obligations of confidentiality remain unaffected. Beyond that, as a general principle, the specific request needs to be proportionate.

   Please see above, no. 5 c. Article 10 of the SSM Regulation empowers the SSM to request all relevant information/records, also in the market risk and compliance area.

10. If self-regulatory organizations or exchanges have any supervisory or enforcement role over the areas substituted compliance is requested please explain that role, including a discussion of their competence, their powers to investigate and sanction, any tools available to them, who may be subject to their authority, and any limitations on their authority.

    Not in the area of substituted compliance

11. Describe any limits on the Supervisory Groups' ability to share information with other German regulatory or criminal authorities. Please tailor your responses to information regarding those institutions that will be registering as security-based swap entities in the U.S., and the areas of regulation for which you are requesting substituted compliance.

BaFin´s employees are subject to an obligation of confidentiality according to section 21 of the Securities Trading Act and to section 9 of the German Banking Act (Gesetz über das Kreditwesen – KWG). Provided that certain authorities need information for the purpose of performing their functions, BaFin staff may share knowledge with e.g. the ECB and law enforcement agencies or courts with jurisdiction in criminal and administrative offence cases. With regards to, among others, the exchange supervisory authorities and the trading surveillance units, please refer also to section 17 of the Securities Trading Act which governs BaFin´s cooperation with other German supervisory authorities.

Section 55 (1) of the Money Laundering Act (GwG) requires supervisory authorities to cooperate fully with each other and with law enforcement agencies (section 54 (3) no 1 of the Money Laundering Act (GwG)) as well as with other institutions tasked with investigating and preventing ML/TF (section 54 (3) no 2 of the Money Laundering Act (GwG)), with the German FIU (section 54 (3) no 3 of the Money Laundering Act (GwG)) and with other (prudential) supervisors (section 54 (3) no 4 of the Money Laundering Act (GwG)), in the context of which the supervisory authorities are obliged to share information, including personal data, both ex officio and on request.

12. For each Supervisory Group, please describe the enforceable tools and remedies the BaFin has to deter misconduct, including administrative fines, remediation, license revocation, or suspension of individuals associated with significant institutions. Please provide data indicating how frequently such sanctions are imposed and, if possible, indicate the number of investigations that have been conducted or sanctions imposed. Please tailor your responses to those institutions that will be registering as security-based swap entities in the U.S., and to the areas of regulation for which you are requesting substituted compliance.

BaFin´s Securities Supervision/Asset Management:

Financial penalties are one of the main enforcement tools of BaFin´s Securities Supervision/Asset Management. BaFin´s specialized divisions undertake administrative procedures which involve the use of coercion, for example by imposing a coercive fine. Alternatively or in addition, the case can be transferred to the Division for Administrative Offence Proceedings. Please refer to the Administrative Fine Guidelines for further details regarding the calculation of administrative fines.

Since the competence for prudential supervison lies with the ECB/SSM please refer to the ECB for information on the ECBs/SSMS approach towards enforcement and sanctioning.

Examples of additional administrative sanctioning tools (according to section 6 of the Securities Trading Act):

- **publish warnings on BaFin´s website**
- **temporarily prohibit trading in financial instruments or order the suspension of trading in financial instruments**
- **require the cessation of the acts or conduct underlying an infringement**
- **prevent a natural person who is responsible for an infringement of Regulation (EU) No. 596/2014 (MAR), for a period of up to two years, from conducting transactions for their own account in financial instruments and products**
- **impose a prohibition on the exercise of professional activity for a period of up to two years on a person who works at an undertaking supervised by BaFin**
- **prohibit an investment services enterprise from participating in trading on a trading venue for a period of up to three months**

Financial penalties are also important sanctions in other areas such as banking or insurance supervision. For its solvency supervision purposes, BaFin has all regulatory decision-making powers. Measures to avert threats range from written warnings – known as serious objections – to withdrawal of a bank's authorisation to conduct banking business and closure of its business premises ("Moratorium"). If senior management lack the sufficient qualifications or personal reliability, BaFin may require of the supervisory board that they be removed from office and may replace them with a special commissioner. Moreover, BaFin has the right to order special inspections.

For statistical data on the work of BaFin´s specialized divisions and the Division for Administrative Offence Proceedings, please refer to BaFins Annual Report.

13. For each Supervisory Group, please describe the investigative powers at its disposal and any limitations on those powers, including the ability to obtain voluntary interviews with caution, listen into calls, etc. In particular, please confirm each Supervisory Group's ability to (i) require documents and interviews of significant institutions and their related individuals; (ii) obtain records from third parties; and (iii) conduct on-site reviews of records. Please tailor your responses to those institutions that will be registering as security-based swap entities in the U.S., and to the areas of regulation for which you are requesting substituted compliance.

BaFin´s Securities Supervision/Asset Management:

a) General information regarding BaFin´s investigative powers according to section 6 of the Securities Trading Act

Section 6 subsection 3 WpHG empowers BaFin to require any person to provide information, submit documents or other data, provide copies, and to summon and question persons. Statutory rights to provide or refuse to provide information as well as statutory obligations of confidentiality remain unaffected. In general the information can be accessed by issuing a formal request for information and submission (*Auskunfts- und Vorlageersuchen*). Moreover, access could be obtained e. g. by way of special investigations or audits which do not require a specific cause (*Sonderprüfung*); however this kind of audit would only be applied for major issues and based on reasonable suspicion (proportionality).

Banking Supervision:

Sections 44 et seq. KWG grant the supervisory authorities a number of information and audit rights which they can make use of at any time either routinely or for specific reasons.

According to Section 44 (1) sentence 1 KWG, information and audit rights are directed to the institution itself as well as the members of its governing bodies and its employees. The institutions have to provide information and submit documents concerning all business activities upon request. BaFin can also send representatives to the general meetings and to the meetings of the supervisory board. In addition, Section 24c KWG gives BaFin automated access to the customer account information of individuals and institutions.

Section 25a (1) KWG requires an appropriate risk management, which also covers cross-border activities (this includes foreign branches or subsidiaries); the basic principle is that a parent undertaking has to manage all its material risks regardless where they arise. Moreover, the audit right includes enterprises to which an institution has outsourced major operational units within the meaning of Section 25b KWG, and the holders of qualified participating interests are also required to provide information. This duty applies both to information relating to business activities and to the submission of documentation. Section 44 (2) KWG grants the supervisory authorities information rights vis-à-vis subordinated enterprises that are included in the banking supervisory consolidation, as well as financial holding companies. These information rights are, however, limited to verifying the accuracy of information or data submitted that are necessary for consolidated supervision.

Where the German supervisory authorities are responsible for the consolidated supervision of a group of institutions, a financial holding group or a mixed financial holding group within the meaning of Section 10a KWG which is headed by an EU parent institution, an EU parent financial holding company or an EU parent mixed financial holding company, they will be responsible e.g. for cross-border inspections (Section 8a (1) no. 2 KWG). Apart from this, the process regarding cross-border information and audits is governed by Section 44a KWG.

b) Further information regarding interviews conducted by BaFin´s Division for Administrative Offence Proceedings:

The Division has the same powers as the public prosecution department pursuant to the Criminal Procedures Act (according to section 46 subsection 2 of the Act on Breaches of Administrative Regulations).

In administrative fine proceedings, BaFin can compel the attendance of a person who is a witness as well as of a person who is the subject of an investigation. The latter is not required to answer questions about the accusation (general principle of the German law). A person who is a witness is required to answer and a witness who has been duly summoned and does not attend an interview without an orderly reason could, inter alia, receive a fine of up to 1.000 Euros. This has to be ordered by a judge on BaFins request. A witness has the right to remain silent under specific circumstances, e.g. if answering a question could incriminate the witness or a close relative of the witness. However if a witness refuses to answer questions at a compelled interview without a legitimate reason (e.g. without the specific reasons for the right to remain silent), the witness can again receive a fine of up to 1.000 Euros.

14. For each Supervisory Group, and using an example of a rule for which substituted compliance is sought, please describe the steps of an investigation or sanction process from the initial identification of misconduct through final resolution. If applicable, please provide an example of an infringement under rules for which substituted compliance is sought that could result in a criminal referral to a prosecuting authority. To the extent there are differences among Supervisory Groups, please identify the distinctions.

BaFin´s Securities Supervision/Asset Management:

BaFin´s specialized divisions undertake the day to day supervision of the securities market. If they detect a possible offense, which merits administrative fine proceedings, they refer the case to the Division for Administrative Offence Proceedings. The process is the same for every offence, whether it falls under MiFID, EMIR or another legal basis within the Securities Supervision Directorate´s area of supervision.

Administrative fine proceedings are subject to the so called principle of discretionary prosecution according to section 47 subsection 1 of the Act on Breaches of Administrative Regulations. Therefore, the Division for Administrative Offence Proceedings decides, inter alia, whether or not to initiate proceedings, which investigative measures to take and how to conclude the proceedings. Proceedings could be terminated or an administrative fine order setting out a financial penalty could be ordered. The Division also decides about a settlement of the case. For further information on settlements, please refer to BaFin´s website:

https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/WA/dl_wa_infoblatt_settlement_in_bussgeldsachen_en.html

Should the Division for Administrative Offence Proceedings conclude, that an offense is of a criminal rather than an administrative nature, the case is referred to the public prosecutors´ office. One example is market manipulation, under certain circumstances and if a person commits market mainpulation with intent, this could substitute a criminal rather than an administrative offense.

Deficiencies are typically identified in the course of ongoing engagement with the banks, or on-site inspections (OSIs) or internal model investigations (IMIs). When findings (misconduct in SEC language) are identified, the typical action is to confront the bank with the finding, i.e. send out a letter to the bank, stating findings and recommendations to resolve the findings, ask the banks for submission of a detailed remediation plan and follow up on said plan until full remediation. The findings are also considered in the annual SREP and the respective SREP decision, often lead to a higher supervisory capital demand. For more details please refer to the ECB.

Investigations conducted by BaFin do not always result in a sanction process. The general focus is on ensuring compliance with the applicable regulatory framework. Depending on the severity of the offence, enforcement and/or criminal proceedings are initiated.

The following example should serve as an illustration from the Securities Supervision: In one instance the annual WpHG-report of an investment firm showed deficiencies regarding the segregation of client's investment accounts. After discussion with the auditors, a special investigation was conducted, accompanied by a search of the firms premises, administrative offence proceedings as well as a notification of the prosecutor's office, which initiated criminal proceedings.

BaFin orders measures to prevent money laundering and terrorist financing:

Since 2015, a major German bank had been found to exhibit shortcomings when it comes to updating customer data, especially in one particular business area.

The auditor had repeatedly issued F4 (severe shortcomings) findings in this area. Various initiatives to remedy the shortcomings and a new "Remediation Process" launched in the fourth quarter of 2017 were unsuccessful.

The results of the focal audit ordered by BaFin in December 2017 were available in May 2018, revealing an unsatisfactory assessment of the quality of the KYC update and the off-boarding process.

In September 2018, BaFin ordered the bank to implement appropriate internal safeguards and to comply with general due diligence duties. The order was issued on the basis of section 51 (2) sentence 1 of the Money Laundering Act. BaFin appointed a special representative to monitor the implementation of the measures set out in the order. The special representative was instructed to report on, and evaluate, the progress made in the implementation process on a quarterly basis.

15. Please describe what enforcement investigations, sanction proceedings, and/or other final resolutions in the areas for which substituted compliance is requested are made public and what information is included in such public notice. To the extent that there are different practices among Supervisory Groups, please identify the differences.

Measures and sanctions by BaFin´s Securities Supervision Directorate are published on BaFin´s website:
https://www.bafin.de/EN/Aufsicht/BoersenMaerkte/Massnahmen/massnahmen_sanktionen_node.html
The legal basis for the publications are sections 124 to 126 of the Securities Trading Act. These publications state the provision that was infringed and the natural or legal person that is responsible for the infringement. In case of natural persons, the publication is usually anonymized. BaFin´s Securities Supervision does not publish the complete administrative fine order.
In the supervision of banks and financial service providers BaFin's measures against institutions and senior managers are published on BaFin's website here:
https://www.bafin.de/EN/Aufsicht/BankenFinanzdienstleister/Massnahmen/Mitteilungen/mitteilungen_node_en.html
The legal basis for this publications are section 60b of the Banking Act and section 57 of the German Money Laundering Act (Geldwäschegesetz – GwG).
Measures BaFin imposes on undertakings subject to supervision under the Insurance Supervision Act (Versicherungsaufsichtsgesetz – VAG) and their senior management are published here:
https://www.bafin.de/EN/Aufsicht/AufsichtlicheOffenlegung/Versicherungsaufsicht/Massnahmen/bekanntmachung_von_massnahmen_artikel_en.html
The basis for publication is section 319 (1) of the VAG.

16. Please confirm that the relevant statute of limitations for violations in the areas of regulation for which you are requesting substituted compliance is six years, with three years to complete an investigation from the time of the referral and three years to complete the sanctioning process.

With regard to the supervision of regulatory obligations of investment firms, no statute of limitation limits BaFin's ability to investigate and to institute remedial actions by issuing administrative acts.
Further clarification to the statement above:
The statute of limitations in administrative offence proceedings is six years.
The statute of limitation begins to run as soon as the act is completed. If a result constituting a factual element of the offence occurs only later, the period of limitation begins to run at that time. BaFin has an initial period of three years to detect the offence and officially initiate administrative fine proceedings by the Division for Administrative Offence Proceedings. This initiation is usually done by notifying the offender that they are suspected to have committed an administrative offence in the course of a written hearing. The Proceedings then have to be concluded within another three years.

German implementation of certain CRD provisions

CRD provision	General topic	Preliminary mapping
CRD 74(1)-(2)	Internal governance	KWG 25a, 25b, 25c, 25d
CRD 76(1)	Management body oversight of risk policies	KWG 25a, 25c(3)(3), 25c(3)(4), 25c(4a), 25d(6)
CRD 76(2)	Management body attention and resources devoted to risk issues	KWG 25a(1), 25c(1), 25c(3)(3), 25c(3)(4), 25c(4a), 25d(1), (6)
CRD 76(3)	Risk committee establishment and duties	KWG 25a(1), 25d(7), (8), (10)
CRD 76(4)	Management body/risk committee access to risk-related information	KWG 25a(1), 25c(4a), 25d(8)
CRD 76(5)	Independent risk management function	KWG 25a(1), 25c(3), (4a)
CRD 77-78	Internal credit risk assessment and supervisory benchmarking	KWG 25a(1), 25c(4a)
CRD 79-87	Specific risk factors (e.g., credit and counterparty risk, residual risk, concentration risk)	KWG 25a(1), 25c(4a)
CRD 88(1)	Management body responsibility over governance	KWG 15, 25a(1), 25c(3), (4a), 25d(3)
CRD 88(2)	Nomination committee	KWG 25d(7), (11)
CRD 91(1)	Management body repute, knowledge and skills	KWG 25c(1), 25d(1), 36
CRD 91(2)	Management body sufficient time	KWG 25c(1), 25d(1)
CRD 91(3)-(6)	Management body outside directorships	KWG 25c(2) 25d(3)
CRD 91(7)	Management body collective knowledge and skills	KWG 25c(1), (3), 25d(2)
CRD 91(8)	Management body honesty, integrity and independence	KWG 25c(1), (2), (3), 25d(1), (3)
CRD 91(9)	Management body induction and training	KWG 25c(4), 25d(4)
CRD 91(10)	Management board qualities, competencies and diversity	KWG 25d(11)
CRD 92	Remuneration policies	KWG 25a(1)(6), 25a(5)-(6)
CRD 93-94	Remuneration variable elements	KWG 25a(5)-(6), 45(5)
CRD 95	Remuneration committee	KWG 25d(12)

German implementation of the Investment Firm Directive

- The IFD subsumes certain requirements that appear relevant to comparisons of the US and German frameworks related to supervision and compliance (e.g., IFD 26 regarding internal governance, IFD 28 regarding the management body's role in risk management, IFD 29 regarding treatment of risks, IFD 30-33 regarding remuneration). What actions are planned in connection with the German implementation of the IFD, and what is the expected timetable for those actions?

  The IFD has to be implemented in national law. The IFR, on the other hand, will be directly applicable law in Germany, once in force. In Germany, the first drafts of the implementation Act are already consulted with the public. The consultation of the affected ministries will start soon. After this, parliamentary procedures will start end of year/beginning next year. The implementing act shall come into force end of June 2021.

- Will the IFD be implemented in the banking act (KWG)? Will there be material changes to the banks due to IFD?

  No, there will be a separate law for investment firms. As far as some greater investment firms have to comply with Titel VII and Title VIII of CRD instead of Title IV and Title V of IFD, the new law (the draft is currently called Wertpapierfirmengesetz –WpFG) refers to the relevant rules of German Banking Act where the CRD-titles are implemented.

  No, there will be no changes for banks.