

## **Memorandum of cooperation concerning consultation, cooperation and the exchange of information related to the supervision of funds and fund managers**

In view of the growing globalization of the world's financial markets and the increase in cross-border operations and activities of Managers of alternative investment funds, the Financial Services Agency of Japan (JFSA) and the Autorité des marchés financiers (France) have reached this Memorandum of cooperation (MoC) regarding mutual assistance in the supervision and oversight of Managers of alternative investment funds, its Delegates and Depositaries that operate on a cross-border basis in the jurisdictions of the participants of this MoC. The Authorities express, through this MoC, their willingness to cooperate with each other in the interest of fulfilling their respective regulatory mandates, particularly in the areas of investor protection, fostering market and financial integrity, and maintaining confidence and systemic stability.

### **1. Definitions**

For the purpose of this MoC:

- a) "Authority" means a participant to this MoC or any successor.
- b) "EU Authority" means any Authority of EU Member State<sup>1</sup>.
- c) "Requested Authority" means the Authority to whom a request is made under this MoC.
- d) "Requesting Authority" means the Authority making a request under this MoC.
- e) "AIFMD" means the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.
- f) "FIEA" means Financial Instruments and Exchange Act of Japan (Act No. 25 of 1948) and its related laws and regulations.
- g) "Manager" means a legal person whose regular business is managing one or more Covered Funds in accordance with the AIFMD, or a person who conducts Investment Management Business (Article 28(4) of the FIEA) or Investment Advisory and Agency Business (Article 28(3) of the FIEA) in accordance with the FIEA.
- h) "Covered Fund" means a collective investment undertaking, including investment compartments thereof, which: (i) raises capital from a number of investors, with a view to investing it in line with a defined investment policy for the benefit of those investors; and (ii) is not a UCITS or such collective investment undertaking established in Japan the securities or rights of which are not regulated under Article 2(1) or (2) of the FIEA.
- i) "UCITS" means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC.

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<sup>1</sup> The application of this MoC to the Authorities from the European Economic Area (EEA) countries (Iceland, Norway and Liechtenstein) will take effect when the relevant decision is made by the EEA Joint Committee in accordance with Article 7 of the Agreement on the European Economic Area, and thereby EU and European Union include EEA for the purpose of this MoC.

- j) “Delegate” means an entity to which a Manager delegates the tasks of carrying out the portfolio management or risk management of one or more Covered Funds under its management in accordance with Article 20 of the AIFMD or in accordance with Article 42-3 of the FIEA.
- k) “Depositary” means an entity appointed to perform the depositary functions of a Covered Fund in accordance with Article 21 of the AIFMD or in accordance with the FIEA.
- l) “Passport” means marketing and managing Covered Funds in more than one EU Member State in accordance with Articles 35, 37, 39, and 40 of the AIFMD. The application of these provisions is subject to the conditions established under Articles 67 and 68 of the AIFMD.
- m) “Operate on a cross-border basis” means the following situations: when
  - An EU Manager manages one or more Japanese Covered Funds.
  - A Japanese Manager manages one or more EU Covered Funds.
  - An EU Manager markets one or more Japanese Covered Funds in an EU Member State without the Passport, or in the European Union with the Passport.
  - A Japanese Manager markets one or more EU Covered Funds in Japan.
  - A Japanese Manager markets one or more EU and/or Japanese and/or other third country Covered Funds in an EU Member State without the Passport, or in the European Union with the Passport.
  - An EU Manager markets one or more EU and/or Japanese and/or other third country Covered Funds in Japan.
  - A third country Manager markets one or more EU Covered Funds in Japan or markets one or more Japanese Covered Funds in an EU Member State without the Passport, or in the European Union with the Passport.

The MoC also covers Delegates and Depositaries as defined in letters j) and k) insofar as there is a link to the activity of the Managers and the Covered Funds, and either (i) when a Manager or a Covered Fund is established, or a Covered Fund is marketed, in an EU Member State without the Passport, or in the European Union with the Passport and a Delegate or a Depositary is established in Japan or (ii) when a Manager or a Covered Fund is established, or a Covered Fund is marketed, in Japan and a Delegate or a Depositary is established in an EU Member State.

- n) “Covered Entity” means a Manager, a Covered Fund, and, insofar as there is a link to the Manager and the Covered Fund, a Delegate and a Depositary as defined in letters j) and k) stated above, including the persons employed by such entities.
- o) “Cross-border on-site visit” means any regulatory visit by one Authority to the premises of a Covered Entity located in the other Authority’s jurisdiction, for the purposes of on-going supervision.
- p) “Governmental Entity” means the Ministry of Finance, the Central Bank, and any other national prudential authorities in the jurisdiction of the relevant Authority that are listed in the Appendix B.

- q) "Local Authority" means the Authority in whose jurisdiction a Covered Entity operates.
- r) "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a Covered Entity, investors of a Covered Fund or the markets, independently from a decision of the European Council within the meaning of Article 18 of the ESMA Regulation (Regulation 1095/2010/EU).

## 2. General matters

- 1) This MoC is a statement of intent to consult, cooperate and exchange information in connection with the supervision and oversight of Covered Entities that operate on a cross-border basis in the jurisdictions of the participants, in a manner consistent with, and permitted by, the laws and regulations that govern the Authorities. The Authorities anticipate that cooperation will be primarily achieved through on-going, informal, oral consultations, supplemented by more in-depth, ad hoc cooperation. This MoC is intended to support such informal and oral communication as well as to facilitate the written exchange of non-public information where necessary.
- 2) This MoC does not create any legally binding obligations, confer any rights, or supersede domestic laws. This MoC does not confer upon any person the right or ability directly or indirectly to obtain, suppress, or exclude any information or to challenge the execution of a request for assistance under this MoC.
- 3) This MoC does not intend to limit an Authority to taking solely those measures described herein in fulfilment of its supervisory or oversight functions. In particular, this MoC does not affect any right of any Authority to communicate with, or obtain information or documents from, any person or Covered Entity subject to its jurisdiction that is established in the territory of the other Authority.
- 4) This MoC complements, but does not alter the terms and conditions of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MMoU), to which the Authorities are signatories, which also covers information-sharing in the context of enforcement investigations; and any of the existing arrangements concerning cooperation in securities matters between the participants.
- 5) The Authorities will, within the framework of this MoC, provide one another with the fullest cooperation permissible under the laws and regulations in relation to the supervision and oversight of Covered Entities. A request for assistance may be denied by the Requested Authority:
  - a) Where the cooperation would require an Authority to act in a manner that would violate domestic law;
  - b) Where a request for assistance does not meet the terms of the MoC;
  - c) Where a criminal proceeding has already been initiated in the jurisdiction of the Requested Authority based upon the same facts and against the same Covered Entities, or the same Covered Entities have already been the subject of punitive sanctions on the same charges by the competent authorities of the jurisdiction of the Requested Authority; or
  - d) On grounds of public interest or essential national interest.

- 6) No domestic banking secrecy, blocking laws or regulations will prevent an Authority from providing assistance to other Authority.
- 7) The Authorities will periodically review the functioning and effectiveness of the cooperation arrangements between the Authorities with a view, inter alia, to expanding or altering the scope or operation of this MoC should that be judged necessary.
- 8) To facilitate cooperation under this MoC, the Authorities hereby designate contact persons as listed in Appendix A.

### **3. Scope of cooperation**

- 1) The Authorities recognize the importance of close communication concerning Covered Entities, and intend to consult at the staff level where appropriate regarding: (i) general supervisory issues, including with respect to regulatory, oversight or other program developments; (ii) issues relevant to the operations, activities, and regulations of Covered Entities; and (iii) any other areas of mutual supervisory interest.
- 2) Cooperation will be most useful in, but is not limited to, the following circumstances where issues of regulatory concern may arise:
  - a) The initial application of a Covered Entity for authorization, registration or exemption from registration in another jurisdiction;
  - b) The on-going oversight of a Covered Entity;
  - c) Regulatory approvals or supervisory actions taken in relation to a Covered Entity by one Authority that may impact the operations of the entity in the other jurisdiction; or
  - d) Enforcement actions taken against a Covered Entity.
- 3) *Notification.* Each Authority will inform the other Authority as soon as practicable of:
  - a) Any known material event that could adversely impact a Covered Entity; and
  - b) Enforcement or regulatory actions or sanctions, including the revocation, suspension or modification of relevant licenses or registration, concerning or related to a Covered Entity which may have, in its reasonable opinion, material effect on the Covered Entity.
- 4) *Exchange of Information.* To supplement informal consultations, each Authority intends to provide the other Authority, upon written request, with assistance in obtaining information not otherwise available to the Requesting Authority, and, where needed, interpreting such information so as to enable the Requesting Authority to assess compliance with its laws and regulations. The information covered by this paragraph includes, without limitation, information such as:
  - a) Information that would permit the Requesting Authority to verify that the Covered Entities covered by this MoC comply with the relevant obligations and requirements of the national laws and regulations of the Requesting Authority;
  - b) Information relevant for monitoring and responding to the potential implications of the activities of an individual Manager, or Managers collectively, for the stability

of systemically relevant financial institutions and the orderly functioning of markets in which Managers are active;

- c) Information relevant to the financial and operational condition of a Covered Entity, including, for example, reports of capital reserves, liquidity or other prudential measures, and internal control procedures;
- d) Relevant regulatory information and filings that a Covered Entity is required to submit to an Authority including, for example: interim and annual financial statements and early warning notices; and
- e) Regulatory reports prepared by an Authority, including for example: core inferences drawn from examination, findings, or information drawn from such reports regarding Covered Entities.

#### **4. Cross-border on-site visits**

- 1) Authorities will discuss and reach common recognition on the terms regarding cross-border on-site visits, taking into full account each other's sovereignty, legal framework and statutory obligations, in particular, in determining the respective roles and responsibilities of the Authorities. The Authorities will act in line with the following procedures before conducting a cross-border on-site visit.
  - a) The Authorities will consult with a view to reaching common recognition on the intended timeframe for and scope of any cross-border on-site visit. The Local Authority will decide whether the visiting officials will be accompanied by its officials during the visit.
  - b) When establishing the scope of any proposed visit, the Authority seeking to conduct the visit will give due and full consideration to the supervisory activities of the other Authority and any information that was made available or is capable of being made available by that Authority.
  - c) The Authorities will assist each other in reviewing, interpreting and analysing the contents of public and non-public documents and obtaining information from directors and senior management of Covered Entities or any other relevant person.

#### **5. Execution of requests for assistance**

- 1) To the extent possible, a request for written information pursuant to 3., paragraph 4 will be made in writing, and addressed to the relevant contact person identified in Appendix A. A request generally will specify the following:
  - a) The information sought by the Requesting Authority, including specific questions to be asked and an indication of any sensitivity about the request;
  - b) A concise description of the facts underlying the request and the supervisory purpose for which the information is sought, including the applicable regulations and relevant provisions behind the supervisory activity; and
  - c) The desired time period for reply and, where appropriate, the urgency thereof.

- 2) In Emergency Situations, the Authorities will endeavour to notify each other of the Emergency Situation and communicate information to the other as would be appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During Emergency Situations, requests for information may be made in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.

## **6. Cooperation on enforcement**

- 1) The Requested Authority will, as far as its national laws and regulations permit, assist the Requesting Authority where it is necessary to enforce the AIFMD, its implementing measures or the national legislation of an EU Member State or the FIEA breached by a Covered Entity established in its jurisdiction. In particular, at the request of the Requesting Authority, the Requested Authority will, as far as its national laws and regulations permit, assist and provide information that would allow the Requesting Authority to verify that the Covered Entity complies with the orders, requests or measures adopted by the Requesting Authority in, at least, the following situations:
  - a) when the Requesting Authority has required a Covered Entity established in the jurisdiction of the Requested Authority to cease any practice that is contrary to the provisions adopted in the implementation of the AIFMD and its implementing measures or the FIEA;
  - b) when the Requesting Authority has requested the freezing or the sequestration of assets of a Covered Fund that is established in the jurisdiction of the Requested Authority;
  - c) when the Requesting Authority has requested the temporary prohibition of professional activity in relation to a Covered Entity established in the jurisdiction of the Requested Authority;
  - d) when the Requesting Authority has adopted any type of measure to ensure that Covered Entities established in the jurisdiction of the Requested Authority continue to comply with the requirements of the AIFMD and its implementing measures or of the FIEA; and
  - e) when, in the interest of the investors or of the public, the Requesting Authority has required the suspension of the issue, repurchase or redemption of units or shares of Covered Funds established in the jurisdiction of the Requested Authority.
- 2) The assistance referred to in 6. will be provided in line with the provisions of the IOSCO MMoU.

## **7. Permissible uses of information.**

- 1) The Requesting Authority may use non-public information obtained under this MoC solely for the purpose of supervising Covered Entities and seeking to ensure compliance with the laws or regulations of the Requesting Authority, including assessing and identifying systemic risk in the financial markets or the risk of disorderly markets.
- 2) Information obtained under this MoC will not be used for purposes not mentioned above, including criminal proceedings carried out by a court or judge. In the case that such use is needed, an additional request must be made in accordance with procedures for the Requested Authority's provision of mutual legal assistance in criminal matters to foreign

countries, which are set out in the Law for International Assistance in Investigation and Other Related Matters of Japan (Act No. 69 of 1980) and the relevant European legislation or relevant international agreements.

- 3) This MoC is intended to complement, but will not alter the terms and conditions of the existing arrangements between Authorities concerning cooperation in securities matters, including the IOSCO MMoU. The Authorities recognize that while information is not to be obtained under this MoC for enforcement purposes, subsequently the Authorities may want to use the information for enforcement purposes. In such cases, the Requesting Authority will notify the Requested Authority of that change of purposes together with relevant information on the facts underlying that change of purposes, including the applicable regulations and relevant provisions behind the enforcement. Further use of the information will be governed by, in addition to paragraph 2, the terms and conditions of the IOSCO MMoU or another instrument providing an equivalent degree of cooperation in enforcement matters.

## **8. Confidentiality and onward sharing of information.**

- 1) Except for disclosures in line with the MoC, including permissible uses of information under the previous points, each Authority will keep confidential to the extent permitted by laws and regulations, information shared under this MoC, requests made under this MoC, the contents of such requests, and any other matters arising under this MoC. The terms of this MoC are not confidential.
- 2) To the extent legally permissible, the Requesting Authority will notify the Requested Authority of any legally enforceable demand for non-public information that has been provided under this MoC. Prior to compliance with the demand, the Requesting Authority intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.
- 3) In certain circumstances, and as required by law, it may become necessary for the Requesting Authority to share information obtained under this MoC with other Governmental Entities in its jurisdiction. In these circumstances and to the extent permitted by law:
  - a) Prior to passing on the information, the Requesting Authority will notify the Requested Authority; and
  - b) Prior to passing on the information, the Requested Authority will receive adequate assurances concerning the Governmental Entity's use and confidential treatment of the information, including, as necessary, assurances that the information will not be shared with any other entities without getting the prior consent of the Requested Authority.
- 4) Except as provided in paragraph 2, the Requesting Authority must obtain the prior consent of the Requested Authority before disclosing non-public information obtained under this MoC to any entity other than those mentioned in paragraph 3. If consent is not obtained from the Requested Authority, the Authorities will discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.
- 5) The Authorities intend that the sharing or disclosure of non-public information, including but not limited to deliberative and consultative materials, pursuant to the terms of this MoC, will not constitute a waiver of privilege or confidentiality of such information.

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## 9. Special rules on onward sharing of information in the EU internal market.

- 1) Paragraph 4 of 8. does not apply in the following cases where the Requesting Authority of an EU Member State is required to share information with other EU Authorities that have signed this MoC, the European Systemic Risk Board (ESRB) and European Securities and Markets Authority (ESMA) under the AIFMD:
  - a. In accordance with Article 25(2) of the AIFMD, the Requesting Authority of an EU Member State needs to share information received from the JFSA with other EU Authorities where a Manager under its responsibility or a Covered Fund managed by that Manager could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other EU Member States.
  - b. In accordance with Article 50(4) of the AIFMD, the Requesting Authority of an EU Member State of reference of a Japan Manager<sup>2</sup> needs to forward the information received from the JFSA in relation to that Japan Manager to the EU Authority of the host Member States, as defined in Article 4(1)(r) of the AIFMD.
  - c. In accordance with Article 53 of the AIFMD, the Requesting Authority of an EU Member State needs to communicate information to other EU Authorities, the ESRB or ESMA, where this is relevant for monitoring and responding to the potential implications of the activities of individual Manager or Managers collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which the Managers are active.
- 2) In the cases mentioned in paragraph 1, the following conditions would apply:
  - a. All the information exchanged between the EU Authorities, the ESRB and ESMA will be considered confidential.
  - b. The EU Authorities, the ESRB and ESMA will only use the information in line with 7. However, paragraph 3 of 7. does not apply to the ESRB or ESMA.
  - c. The EU Authority will notify the JFSA within one week after passing the information of the identity of the entities mentioned in paragraph 1 that receive the information. If, regarding the situations described in paragraph 1, the recipient of the information has to further share it with other participants to this MoC, the ESRB or ESMA, it will notify the JFSA within one week after passing the information.
  - d. The information will not be further shared with any other entities beyond those mentioned in paragraph 1 without getting the prior consent of the JFSA.

## 10. Termination of the MoC; Successor authorities

- 1) If a participant wishes to terminate the MoC, it will give written notice to its counterparty. ESMA would coordinate the action of EU authorities in this regard. Cooperation under this MoC will continue until the expiration of 30 days after an Authority gives written notice to the others. If either Authority gives such notice, cooperation will continue with respect to

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<sup>2</sup> The Member State of reference is the EU Member State in charge of the authorization of a Japan Manager in accordance with Article 37 of the AIFMD.

all requests for assistance that were made under the MoC before the effective date of notification until the Requesting Authority terminates the matter for which assistance was requested. In the event of termination of this MoC, information obtained under this MoC will continue to be treated in a manner prescribed under 7., 8. and 9.

- 2) Where the relevant functions of a participant to this MoC are transferred or assigned to another authority or authorities, the terms of this MoC will apply to the successor authority or authorities performing those relevant functions without the need for any further modification to this MoC or for the successor to become a participant to the MoC. This will not affect the right of the successor authority and its counterparty to terminate the MoC as provided hereunder if it wishes to do so.
- 3) Other EU competent authorities, designated as such in accordance with Article 44 of the AIFMD, may become participants to this MoC, by obtaining the written consent of the JFSA.

### Signatures

Financial Services Agency of Japan

Autorité des marchés financiers (France)

河野正道 M.L.

19/7/2013

## Appendix A. Contact person

The contact persons are the following:

Authority	Name of the contact person	Contact details
Financial Services Agency of Japan	Yasuto Watanabe Director for International Financial Markets, Office of International Affairs	Phone: +81 3 3506 6206 Email: yasuto.watanabe@fsa.go.jp
Autorité des marchés financiers (France)	Managing Director, Investigations and Inspections Divison	Autorité des marchés financiers 17, place de la Bourse, 75082 PARIS Cedex 2 E-mail: celluleinternationale@amf- france.org

**Appendix B. National Prudential Authority other than the Ministry of Finance and the Central Bank**

The national prudential authorities other than the Ministry of Finance and the Central Bank are the following:

Authority	National Prudential Authority other than the Ministry of Finance and the Central Bank
Financial Services Agency of Japan	None
Autorité des marchés financiers (France)	Autorité de contrôle prudentiel