BaFin

Bundesanstalt für
Finanzdienstleistungsaufsicht

Interpretative Guidance

on Article 2 of the German Act on Ringfencing and Recovery and Resolution Planning for Credit Institutions and Financial Groups (*Gesetz zur Abschirmung von Risiken und zur Planung der Sanierung und Abwicklung von Kreditinstituten und Finanzgruppen*) of 7 August 2013, Federal Law Gazette I p. 3090 (Bank Separation Act – *Abschirmungsgesetz*)

Last amended: 27 December 2018

Contents

A General

A 1 Preliminary remarks

1. The interpretative guidance on the Bank Separation Act, which has been jointly developed by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) and the Deutsche Bundesbank, is designed to provide guidance to the institutions falling under the scope of application of the Bank Separation Act on how to adjust their previously conducted risk analyses in the subsequent compliance process. Should an institution become subject to the Bank Separation Act's scope of application in future, such institution must already take this interpretative guidance into consideration in its risk analysis. This interpretative guidance also provides guidance for law enforcement agencies in terms of their legal assessment of matters covered by the Bank Separation Act. This interpretative guidance does not release the institutions from the obligation to provide comprehensive and plausible documentation of potentially prohibited types of business, as identified by them, and to independently subsume such business under the applicable prohibitions, taking into account their obligations of due diligence. Otherwise potential criminal liability still applies. The Federal Financial Supervisory Authority will amend this interpretative guidance, if necessary, in particular if the legal framework or supervisory standards change or if such amendments are required due to findings in supervisory practice.	

A 2 Scope of application

1. On which basis is the institutional scope of application under section 3 (2) sentence 1 of the Banking Act (*Kreditwesengesetz* – KWG) determined?	1.1 The institutional scope of application of Article 2 of the Bank Separation Act only covers companies which – also in accordance with the provisions of section 10a of the KWG – must be considered part of a group of institutions, a financial holding group or a mixed financial holding group. The wording used in section 3 (2) of the KWG "companies belonging to a group of institutions, a financial holding group or mixed financial holding group or a financial conglomerate to which a CRR credit institution belongs" has its meaning defined in section 10a (1) of the KWG. Under section 10a (1) of the KWG, a group of institutions, a financial holding group or a mixed financial holding group (group) consists of a superordinate company and one or more subordinate companies. Superordinate companies are CRR institutions required to carry out a consolidation under Article 11 of Regulation (EU) No 575/2013, as well as institutions that are responsible for the ~~required to carry out a~~ consolidation under section 1a of the KWG in conjunction with Article 11 of Regulation (EU) No 575/2013. Subordinate companies are companies which have to be consolidated under Article 18 of Regulation (EU) No 575/2013 or are consolidated on a voluntary basis; in this context, institutions that are considered CRR institutions under section 1a of the KWG are deemed to be institutions within the meaning of Article 18 of Regulation (EU) No 575/2013. 1.2 **Insurance undertakings** within the meaning of section 1 of the German Act on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz* – VAG) are not included in the scope of prudential consolidation. They are not considered to be "institutions and financial institutions" required to be consolidated under Article 18(1) of Regulation (EU) No 575/2013 (see EBA

	Single Rulebook Q&A under http://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2013_383). Nor are **insurance holding companies** or **mixed insurance holding companies** considered to be financial institutions. It would mean a breach of the system to extend the application of the prohibition of banking business under section 3 (2) of the KWG to a group of companies which are otherwise not subject to the requirements of banking supervision law. Therefore, a restrictive interpretation of the term "financial conglomerate" in section 3 (2), (3) and (4) of the KWG is appropriate. Accordingly, the prohibition provided for in section 3 (2) of the KWG does not apply to insurance undertakings which belong to a financial conglomerate. 1.3 According to Article 18(8) of Regulation (EU) No 575/2013, **asset management companies** of investment funds fall under the scope of prudential consolidation. Both **UCITS management companies** and **AIF management companies** are management companies within the meaning of Article 18(8) of Regulation (EU) No 575/2013. In contrast, the scope of consolidation does not include externally managed investment funds within the meaning of the German Investment Code (*Kapitalanlagegesetzbuch* – KAGB). Asset management companies within the meaning of section 17 of the KAGB, for example, as well as securitisation special purpose entities within the meaning of section 1 (19) no. 36 of the KAGB not requiring an authorisation according to section 2 (1) no. 7 of the KAGB that are subordinate companies of a group including a CRR credit institution are therefore subject to the aforementioned prohibitions. 1.4 The scope of prudential consolidation does not include an **investment fund** managed by an asset management company within the meaning of section 17 of the KAGB, or the special purpose entities or property holding companies held by it.

2. Are CRR credit institutions or companies domiciled abroad (European Economic Area (EEA) or third country), which belong to a group the superordinate company of which is domiciled in Germany, also covered by the scope of application of section 3 (2) to (4) of the KWG?	2.1 The Bank Separation Act covers all companies which fall under the scope of consolidation under section 10a of the KWG (see A 2 question 1). Accordingly, as well as German superordinate companies this includes, in particular, subsidiaries which have to be consolidated, such as CRR credit institutions and foreign branches. 2.2 Article 2 of t~~T~~he Bank Separation Act covers CRR credit institutions. The scope of application of the Bank Separation Act includes any CRR credit institution which is subject to the authorisation requirement pursuant to section 32 (1) of the KWG because of its business operations in Germany. This also includes – however, limited to business operations in Germany – CRR credit institutions which are domiciled abroad but maintain a branch or other physical presence in Germany or operate in Germany only by way of cross-border provision of services. Banking business and financial services are considered to be provided in Germany on a cross-border basis if the service provider is domiciled or habitually resident abroad and targets the German market in order to offer banking business or financial services to companies and/or persons domiciled or habitually resident in Germany (see BaFin's Notes regarding the licensing for conducting cross-border banking business and/or providing cross-border financial services (*Merkblatt zur Erlaubnispflicht von grenzüberschreitend betriebenen Geschäften*) pursuant to section 32 (1) of the KWG in conjunction with section 1 (1) and (1a) of the KWG for conducting cross-border banking business and/or providing cross-border financial services).
3. Are **domestic branches of institutions domiciled in another EEA member state** covered by the scope of application?	3.1 Only institutions domiciled in another EEA member state and falling under the scope of the **European passporting regime** are excluded from the scope of application of Article 2 of the Bank Separation Act; the authorisation granted by the competent authority in the other EEA member state and the application of the notification procedure required under the CRR apply in place of the authorisation requirement pursuant to section 32 (1) of the KWG (principle of

	single European authorisation and mutual recognition of supervision in the home member state). For those institutions, it may not be relevant whether they establish a legally dependent branch in Germany for their business operations in Germany and operate in Germany only by way of cross-border provision of services (in this regard, also see section 53b (3) sentence 1 no. 1 of the KWG, which imposes the requirement of public interest only for section 3 (1) of the KWG but not for the ~~bank separation~~provisions of section 3 (2) to (4) of the KWG). **Domestic branches** of foreign CRR institutions domiciled in another EEA member state are not subject to section 3 (2) to (4) of the KWG pursuant to section 53b (3) sentence 1 no. 1 of the KWG (see Bundestag printed paper 17/13523 pp. 3 and 32) for lack of a legal basis under European law.

A 3 Determining thresholds pursuant to section 3 (2) sentence 1 of the KWG

1. How are the **relevant thresholds determined for a group to which a CRR credit institution belongs**? May the thresholds at the level of individual institutions be determined on the basis of the data recognised for such individual institution in the IFRS consolidated financial statements before consolidation?	1.1 Thresholds for a group to which a CRR credit institution belongs must always be determined **at both the level of such CRR credit institution and at the group level**. A review of thresholds which is limited to the group level for the purpose of separating risk-bearing transactions would not be in line with the wording of the law. Moreover, such an interpretation would be inconsistent with the purpose of the law to separate risk-bearing or speculative transactions at the level of individual institutions and at the level of the scope of prudential consolidation in order to ensure the stability of financial markets. The phrase "for CRR credit institutions subject to IFRS accounting within the meaning of section 315a of the German Commercial Code (*Handelsgesetzbuch* – HGB)" is

	only meant to be a reference to the International Financial Reporting Standards (IFRS) for those CRR credit institutions using these standards. 1.2 The determination of thresholds at the level of an individual institution may not be based on the figures recognised in the IFRS consolidated financial statements before consolidation. At the individual institution level, the HGB is applicable, even if IFRS financial statements may be prepared on a voluntary basis. 1.3 The question of accounting standards for foreign subsidiaries is not relevant. Parent institutions are subject to either the IFRS requirements (for capital market-oriented companies) or the HGB, while individual institutions are only subject to the provisions of the HGB. Foreign subsidiaries are subject to local supervisory and accounting requirements in their respective home jurisdiction. Such foreign subsidiaries are subject to German supervision at a group level only, and the thresholds of the group are reviewed at a consolidated level, in accordance with section 3 (2) no. 1 of the KWG.
2. Are the liquidity reserves taken into account in the calculation of the threshold?	2.1 The calculation of the threshold is based on the balance sheet items outlined in the law. Therefore, the liquidity reserves of the CRR credit institution must be taken into account in the calculation of the thresholds. This applies irrespective of the fact that the liquidity reserve is based on regulatory provisions and that the institution therefore only has limited influence on its amount.
~~1. Up to what **point in time** may an institution – after initially breaching the threshold within the meaning of section 3 (2) sentence 1 of the KWG – **conduct new business** which is covered by the prohibition in section 3 (2) sentence 2 of the KWG? To what extent this is permitted?~~	~~1.1 Existing business and new business prohibited under section 3 (2) sentence 1 of the KWG, including the prolongation of existing business, may continue to be conducted until the end of the (if so extended) twelve-month period outlined in section 3 (2) sentence 1 of the KWG. Within the twelve-month period, beginning with exceeding the threshold within the meaning of section 3~~

	~~(2) sentence 1 of the KWG, the prolongation of exiting business and the start of new business is permitted, provided that the total existing business and new business does not exceed the total business prohibited under section 3 (2) sentence 1 of the KWG at the time exceeding the threshold.~~ ~~1.2 The extent to which new business may be conducted depends on the nominal extent of existing business at the time (point-in-time assessment) when risk analysis identified a transaction as being prohibited. Otherwise, there would be a risk that CRR credit institutions or groups to which a CRR belongs may be incentivised to increase the volume of business which will be prohibited in future, up to the expiry of the deadline as of which the relevant prohibition comes into effect, thus taking disproportionately high risks. Such behaviour would be contrary to the purpose of the law, i.e. to prevent or ring-fence high-risk transactions.~~ ~~1.3 The extent of new business may be aggregated in a reasonable manner, e.g. at a divisional or portfolio level. Institutions may use data for supervision which is appropriate for their purposes.~~ ~~1.4 In light of this, the CRR credit institution or the group to which a CRR credit institution belongs should be able to properly document the portfolio and development of transaction volumes, also to third parties such as, for instance, supervisory authorities or law enforcement agencies.~~

B Prohibitions

B 1 The prohibition of proprietary business pursuant to section 3 (2) sentence 2 no. 1 of the KWG

1. Is it permissible to refer to **business strategies or business purposes** ("offer on the market (*Angebot auf dem Markt*)") in order to distinguish between proprietary trading and proprietary business? (For the process of identifying prohibited business, see the comments under D question 2.)	1.1 The determination of prohibited activities under section 3 (2) sentence 2 no. 1 and no. 3 of the KWG is based on the **definitions** of "**proprietary trading**" in section 1 (1a) sentence 2 no. 4 of the KWG and of "**proprietary business**" in section 1 (1a) sentence 3 of the KWG. Transactions may be categorised in accordance with BaFin's Guidance Notice – Notes on proprietary trading and proprietary business (*Merkblatt – Hinweise zu den Tatbeständen des Eigenhandels und des Eigengeschäfts* (only available in German)), dated 22 March 2011, as amended on 15 May 2018. 1.2 According to section 3 (2) sentence 2 no. 1 of the KWG, **proprietary business** (*Eigengeschäft*) within the meaning of section 1 (1a) sentence 3 of the KWG is prohibited. Pursuant to section 1 (1a) sentence 3 of the KWG, "proprietary business" is defined as the purchase or sale of financial instruments within the meaning of section 1 (11) of the KWG on own account which does not constitute proprietary trading within the meaning of section 1 (1a) sentence 2 no. 4 of the KWG. Proprietary business within the meaning of section 1 (1a) sentence 3 of the KWG includes, for example, purchase and sale transactions of securities, money market instruments, foreign exchange or derivatives which are entered into on own account and do not have a service character. Such trades are typically exercised for the purpose of exploiting existing or expected short-term differences between purchase and sale prices or movements of market prices,

	market values or interest rates (see also BaFin's Guidance Notice – Notes on proprietary trading and proprietary business, dated 22 March 2011, as amended on 15 May 2018). 1.3 As opposed to proprietary business, "**proprietary trading**" (*Eigenhandel*) is characterised by its service character. 1.3.1 **Section 1 (1a) sentence 2 no. 4** (a) to (d) of the KWG lists four types of proprietary trading. Where an activity is of the first, second or fourth type, the service character does not have to be specifically demonstrated. The third type of proprietary trading includes any other purchase or sale of financial instruments on own account with a service character. Where a trade in financial instruments is exercised on own account, but has no service character and is therefore not considered proprietary trading within the meaning of section 1 (1a) sentence 2 no. 4 of the KWG, it is to be characterised as proprietary business. 1.3.2 The **service character** is **independent** of the **civil law structure** of the transaction. For instance, the service character of a transaction is missing where the transaction is executed without a corresponding client order and is not in any other way related to a potential client (see also no. 1.e of BaFin's Guidance Notice – Notes on proprietary trading and proprietary business, dated 22 March 2011, as amended on 15 May 2018). Proprietary trading is deemed to exist where a client order is received before the relevant transaction is entered into. 1.3.3 For the classification of a financial service as "proprietary trading" it is not necessary for the acquired and the sold **financial instrument to be one and the same**. This is important for structured products where the issuer buys a number of financial instruments, combines them – in a manner which is not

	always recognisable for third parties – and only issues the combined product, as an own issue. 1.4 As a result, CRR credit institutions and companies of a group to which a CRR credit institution belongs must develop **suitable processes** that enable them to **demonstrate** that transactions are correctly assigned to "proprietary trading" or "proprietary business". 1.4.1 It is not mandatorily required to demonstrate the service character of an overall transaction on the basis of individual transactions. For example, if an institution does not directly trade securities as an intermediary to a client, which makes it impossible to immediately book such transaction to the client for each product, the CRR credit institution or company of a group to which a CRR credit institution belongs may demonstrate the service character of the transaction on the basis of the transaction's business purpose ("offer on the market" ("*Angebot auf dem Markt*")) or on the basis of **business or trading strategies**. The magnitudes attributable to "proprietary trading" and "proprietary business" in the business/trading strategy may be used as an indication. 1.4.2 The same may apply where the CRR credit institution or company of a group to which a CRR credit institution belongs **holds an inventory** to be placed with clients. In this case, reference must also be made to the purpose of the transaction for which the institution must provide objectifiable evidence.
2. What is the scope of the prohibition of proprietary business, particularly with regard to promissory note loans (*Schuldscheindarlehen*), emission allowances (*Emissionsberechtigungen*) and **seeding and co-investment** activities?	2.1 The prohibition of proprietary business under section 3 (2) sentence 2 no. 1 of the KWG covers the acquisition and sale of financial instruments as defined in section 1 (11) of the KWG. 2.1.1 **Promissory note loans** (*Schuldscheindarlehen*) transferred in accordance with the legal principles applying to claims (sections 398 et seq. of the German

	Civil Code (*Bürgerliches Gesetzbuch* – BGB)) and, as a general rule, also **registered bonds** issued under German law do not generally qualify as financial instruments within the meaning of section 1 (11) of the KWG (see the official legislative intent to the Federal Government's draft of the Act Implementing the Directive on Markets in Financial Instruments and the Commission Implementing Directive (*Finanzmarktrichtlinie-Umsetzungsgesetz* – FRUG)). Promissory note loans with a maturity at issuance of 397 days at most ~~a residual maturity of not more than twelve months must~~may be qualified, however, as **money market instruments** within the meaning of section 1 (11) sentence 2 of the KWG and therefore as financial instruments. Registered bonds may have to be classified as financial instruments within the meaning of section 1 (11) sentence 1 no. 2 of the KWG in conjunction with section 1 (2) no. 6 of the German Capital Investment Act (*Vermögensanlagengesetz* – VermAnlG); registered bonds do not qualify as capital investments within the meaning of section 1 (2) no. 6 of the VermAnlG if the issuer is conducting deposit business within the meaning of section 1 (1) sentence 2 no. 1 of the KWG by accepting the funds. ~~With the entry into force of the German act on the implementation of the requirements of Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directives 2002/92/EC and 2011/61/EU (MiFID 2), the definition of "money market instruments" will be changed.~~ 2.1.2 Other forms of borrowings (e.g. **loans**, including non-performing loans) are generally not considered financial instruments unless they qualify as money market instruments pursuant to section 1 (11) sentence 1 no. 6 of the KWG. 2.2 Allowances, emission reduction units and certified emission reductions within the meaning of section 3 nos. 3, 6 and 16 of the German Greenhouse Gas Emissions Trading Act (*Treibhausgas-Emissionshandelsgesetz* – TEHG), provided that they may be kept in the EU Emissions Trading Registry, (**emission allowances**) are considered financial instruments under section 1 (11) sentence

	9 of the KWG and are thus subject to the prohibition of proprietary business. **Emission allowances** are not considered financial instruments and therefore not subject to the prohibition of proprietary business, unless they fall under the scope of application of section 1 (11) of the KWG. With the entry into force of the German act on the implementation of MiFID 2, emission allowances will qualify as financial instruments and therefore be subject to the prohibition of proprietary business. 2.3 Proprietary business, without regard to conducting banking business or providing financial services within the meaning of section 1 (1a) sentence 2 nos. 1 to 5 and no. 11 of the KWG, requires authorisation if such business is conducted by a member of or participant in an organised market or multilateral trading facility, or by means of direct electronic access to a trading venue, or with commodity derivatives (see section 1 (11) sentence 4 no. 2 of the KWG), emission allowances or derivatives on emission allowances (section 32 (1a) sentence 2 of the KWG). This, however, does not apply if the requirements for an exemption under section 32 (1a) sentence 3 of the KWG are met. In addition, until the act implementing the requirements of MiFID 2 enters into force, transactions on commodities on a spot or forward basis are also not subject to the prohibition of proprietary business, insofar as they require physical delivery. 2.4 The acquisition or holding of units of an investment fund relating to the establishment and management of alternative investment funds (AIFs) and the placement of units issued by them (**seeding and co-investment activities**) are generally not covered by the prohibition in section 3 (2) sentence 2 no. 1 of the KWG if the acquisition or holding of units is closely related to client-related management activities and does not aim at generating short-term profits.

B 2 The prohibition of lending and guarantee business pursuant to section 3 (2) sentence 2 no. 2 of the KWG

B 2.1 Definition and scope of lending and guarantee business pursuant to section 3 (2) sentence 2 no. 2 of the KWG

1. Is the definition of "**lending and guarantee business**" to be determined only on the basis of section 1 (1) sentence 2 no. 2 of the KWG (lending business) and section 1 (1) sentence 2 no. 8 of the KWG (guarantee business)??	1.1 The definition of "lending and guarantee business" is to be determined on the basis of the definitions in section 1 (1) sentence 2 no. 2 of the KWG (lending business) and section 1 (1) sentence 2 no. 8 of the KWG (guarantee business). Accordingly, the term "**lending business**" is to be understood in the sense of its **narrow interpretation** within the meaning of section 1 (1) sentence 2 no. 2 of the KWG, not its broad interpretation within the meaning of section 19 of the KWG. Section 1 (1) sentence 2 no. 2 of the KWG defines "lending business" as the granting of money loans (*Gelddarlehen*) and acceptance credits (*Akzeptkredite*). The term "lending business" within the meaning of this provision is generally defined in accordance with **German civil law**. Thus, for example, securities repurchase agreements do not qualify as "lending business" under current understanding. Section 1 (1) sentence 2 no. 8 of the KWG defines "guarantee business" as the assumption of sureties, guarantees and other warranties on behalf of others. BaFin's Guidance notice – Notes on lending business ("*Hinweise zum Tatbestand des Kreditgeschäftes*") of 8 January 2009, as amended in May 2016, and its Guidance Notice – Notes on guarantee business ("*Hinweise zum Tatbestand des Garantiegeschäfts*" (only available in German)) of 8 January 2009 provide further guidance on the application of the relevant provisions in supervisory practice. According to previous supervisory practice, the question whether a transaction is subject to the relevant provisions shall be determined on the basis of the objective content of the joint declarations of intent given by the parties to the transaction.

	1.2 For the term "lending and guarantee business", pursuant to section 3 (2) sentence 2 no. 2 of the KWG, the aspect of the **service character** which distinguishes proprietary trading from proprietary business shall not be taken into account. 1.3 In keeping with the meaning and purpose of the Act, the prohibition pursuant to section 3 (2) sentence 2 no. 2 of the KWG is to be teleologically reduced such that **fully collateralised lending and guarantee business** with hedge funds and AIFs does not fall under the scope of this prohibition, insofar as the collateral furnished in a legally valid manner is of sufficient quality. 1.3.1 These additional collateralisation requirements take into consideration the purpose of the Act, but significantly limit the leeway – determined according to internal risk criteria – which is normally available to institutions for collateralising their lending and guarantee business. In particular, this relates to the procedures for valuation and for the haircuts made (e.g. due to price fluctuation risks or risk concentrations if the institution is obliged to realise a large volume of the same type of collateral at short notice and price losses must be feared in this respect). The meaning and purpose of the Bank Separation Act is to prevent major institutions of systemic importance from entering into disproportionately high risks such as may jeopardise the existence of the CRR credit institution and thus also customers' deposits or taxpayers' money (Bundestag printed paper 17/12601, p. 2 and 27). However, fully collateralised lending and guarantee business with hedge funds and AIFs whose collateral is sufficiently valuable does not constitute a heightened risk for the CRR credit institution. In view of this, a prohibition would be contrary to the meaning of the Act and any resulting criminal liability would be inappropriate. The French legislator has approved similar measures (Loi no. 2013-672 du 26 juillet 2013 de séparation et de régulation des activités bancaires)~~, and they are also featured~~

	~~in the European Commission's proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions (Banking Structural Reforms – BSR) of 29 January 2014~~. 1.3.2 In the case of **fully collateralised lending and guarantee business**, even after objectively necessary haircuts the collateral furnished must be appropriate to cover fully and at all times, with a high level of probability, any claims arising from the lending and guarantee business – in particular, interest and repayment obligations – in the event of its realisation. Otherwise there is no adequate basis for such a teleologically reduction of the legal application command. The collateral furnished will be of **sufficient quality** if it is legally valid and enforceable in all relevant legal jurisdictions and, with a high level of probability, may be realised at short notice. Realisation of this collateral outside the corporate group, including any subsidiaries, within the meaning of section 25a (3) sentence 2 of the KWG must be assumed. 1.3.3 Meanwhile the regulatory requirements in relation to the legal validity and enforceability of collateral – including concretisations of these requirements in supervisory practice – must be complied with. There is no restriction on the range of collateral that can be considered eligible. Thus, the credit risk mitigation techniques do not provide an indicator for full collateralisation. The collateral which the CRR credit institution uses for its lending and guarantee business with hedge funds and AIFs is to be construed as collateral which is to be selected according to risk criteria within the meaning of the Minimum Requirements for Risk Management (*Mindestanforderungen an das Risikomanagement – MaRisk*), as amended. This collateral must be reviewed outside of the market division. The institution must formulate differentiated principles for processing collateralised lending and guarantee business with hedge funds and AIFs and must clearly document these principles. The types of collateral accepted by the CRR credit institution and the procedures for the

	valuation, administration and realisation of this collateral must be specified and clearly documented. The CRR credit institution must use ~~common~~suitable valuation procedures in specifying the procedures for valuation of this collateral. As a rule, the fair value and the legal status of the collateral must be reviewed and documented prior to lending. The carrying amount must be plausible in terms of the factors influencing its value and the underlying assumptions and parameters must be justified. The fair value and the legal status of collateral must be regularly reviewed and documented within the scope of ongoing administration of loans. Prior to any material changes in the procedures for valuation of collateral, the effects of planned changes must be analysed. The risk control, compliance and internal audit functions are to participate in these analyses within the scope of their respective tasks. 1.3.4 The above collateral requirements for lending and guarantee business with hedge funds and AIFs will be included in an audit of the annual financial statements and of interim financial statements. 1.3.5 Should the CRR credit institution or an entity within the group to which a CRR credit institution belongs, an auditor or the supervisory authority reach the conclusion that this collateralisation is not sufficient in terms of its scope or quality, due to the prohibition which would then apply the CRR credit institution or group entity would be obliged to take remedial action without delay. This CRR credit institution or group entity thus has an incentive to ensure a sufficiently high volume of collateral of sufficient quality. On the other hand, if this collateral is not sufficient in terms of its scope or quality, the prohibition would apply in principle unless a sufficiently high volume of collateral of sufficient quality is furnished without delay. In this context, no delays in the institution's processes may occur, there must be close monitoring of the client by the institution during the period in which sufficient collateralisation is being restored so that, for example, the business activities can be quickly terminated

	should the client's creditworthiness deteriorate, and, even under the aforementioned conditions, the restoration may not exceed a period of three months. In this context, no delays in the institution's processes may occur, there must be close monitoring of the client by the institution during the period in which sufficient collateralisation is being restored so that, for example, the business activities can be quickly terminated should the client's creditworthiness deteriorate, and, even under the aforementioned conditions, the restoration may not exceed a period of three months. This notwithstanding, the supervisor is entitled to prohibit this business in accordance with section 3 (4) of the KWG.
2. Does this interpretative guidance restrict the range of collateral that can be considered eligible in the statements provided in the interpretative guidance on fully collateralised lending and guarantee business (see B 2.1 question 1)?	2.1 The statements provided in the interpretative guidance on fully collateralised lending and guarantee business (B 2.1 item 1.3) neither restrict nor extend the range of collateral. The statements instead require that the CRR credit institution, on its own responsibility, has already clarified the question of which collateral is taken into consideration based on the relevant civil law and the principles developed in banking practice. The collateral eligible for full collateralisation is not limited to the range of collateral eligible for credit risk mitigation under the CRR. Therefore, essentially every type of collateral can be taken into consideration, e.g. security interests and personal securities (such as guarantees) as well as other types of security, provided that the requirements of the interpretative guidance on fully collateralised lending and guarantee business with collateral of sufficient quality have also been fulfilled. 2.2 The interpretative guidance does not entail the introduction of any new evaluation methods for collateral.
3. In the case of lending and guarantee business within the meaning of section 3 (2) sentence 2 no. 2 of the KWG, under what conditions **are lending subparticipations** to be valued as collateral of sufficient quality and quantity	3.1 Liability-based or funded subparticipations in lending and guarantee business with AIFs can only be valued as collateral of sufficient quality and quantity within the meaning of the statements in B 2.1 item 1.3 above if they

within the meaning of B 2.1 item 1.3 of BaFin's interpretative guidance on Article 2 of the Bank Separation Act?	can be classified as typical banking collateral for loans. In the case of a subparticipation, lenders, for the purpose of further risk diversification with regard to their lending quota, establish an (undisclosed) syndicate relationship in which the subparticipant internally takes on a certain share of the loan or of the part of the loan granted by the primary participant. From an economic standpoint, the subparticipant assumes the potential benefits and risks of the loan in proportion to their share of it. 3.2 The CRR credit institution, on its own responsibility, has to clarify the question of which collateral might be taken into consideration based on the relevant civil law and the principles developed in banking practice. Thus, the question of what "lending and guarantee business" means must take account of the definitions of terms set out in section 1 (1) sentence 2 no. 2 and no. 8 of the KWG (see B 2.1 item 1.1 above). Furthermore, the requirements specified in B 2.1 item 1.3 must also be fulfilled. 3.3 In order to prevent instances of circumvention, it should however also be noted that in accordance with supervisory practice in relation to the disclosure requirements pursuant to section 18 of the KWG (see Boos/Fischer/Schulte-Mattler/H.Bock, 5th ed. 2016, KWG section 18, marginal no. 38), from the standpoint of the subparticipant of a liquidity-based subparticipation in a lending or guarantee transaction with an AIF, a lending transaction with the AIF is entered into. In the case of a liability-based subparticipation, the subparticipant enters into a guarantee transaction with the AIF. The relevant addressee for the guarantee business prohibited pursuant to section 3 (2) sentence 2 no. 2 of the KWG is the person for whose default the guarantee-granting subparticipant must take responsibility, meaning, for example, the debtor of the guaranteed claim.

4. Does the wording of section 3 (2) sentence 2 no. 2 of the KWG apply conclusively **to loans granted directly to, or guarantees granted directly on behalf of, the persons** specified in section 3 (2) sentence 2 no. 2 (a) and (b) of the KWG?	4.1 The prohibition is generally limited to cases where **lending and guarantee business** is conducted directly with the parties specified in section 3 (2) sentence 2 no. 2 (a) and (b) of the KWG. If the direct counterparty is already an investment fund, e.g. a closed-ended German **investment fund**, no further examination is required as to whether "indirect funding" is made within the meaning of the below statements on this (~~item~~ question 4) in addition to the examination of whether such counterparty qualifies as a person referred to in section 3 (2) sentence 2 of the KWG. 4.2 **Indirect lending and guarantee business** remains prohibited if its primary purpose is to **circumvent** prohibited business within the meaning of section 3 (2) sentence 2 no. 2 (a) and (b) of the KWG (see 4.2.1 below for further details). This applies to those legal structures where the **risk of default** of parties specified in section 3 (2) sentence 2 no. 2 (a) and (b) of the KWG **is attributed for economic purposes** to the direct counterparty of the CRR credit institution or company of a group to which a CRR credit institution belongs. This is because the purpose of the Bank Separation Act is, inter alia, to protect the CRR credit institutions and companies of such group against risks arising from lending or guarantee business with parties specified in section 3 (2) sentence 2 no. 2 (a) and (b) of the KWG. The inclusion of such indirect lending and guarantee business does not infringe the prohibition of analogy under criminal law. It rather constitutes a risk-based interpretation of the legal provision in accordance with supervisory practice. 4.2.1 If the lending or guarantee transaction is not finalised directly with an investment fund but rather with a property company/SPV held by an investment fund, ~~the following applies: **As a general rule**~~, the **default risk is, as a general rule, attributed** ~~in case of a direct lending or guarantee transaction to a special purpose vehicle (SPV)/property company~~ if both of the following conditions, (a) and (b), are **cumulatively** fulfilled:

	(a) The SPV/property company is a **financial or legal entity directly or indirectly controlled** by a person specified in section 3 (2) sentence 2 no. 2 of the KWG as provided for in Article 89(3) and Article 90(5) of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (AIFM Level 2 Regulation) (see also no. 3 of BaFin Circular 08/2015 (WA) – ("Tasks and duties of the depository according to chapter 1 part 3 of the German Investment Code" ("*Rundschreiben 08/2015 (WA) der BaFin – Aufgaben und Pflichten der Verwahrstelle nach Kapitel 1 Abschnitt 3 des Kapitalanlagegesetzbuches*")). As a rule, a directly or indirectly controlled financial or legal entity exists if the investment fund or the asset management company managing the investment fund may decide discretionarily on the activities of the SPV/property company ("look through" approach). The ability to make discretionary decisions can always be assumed if the investment fund has a majority participation in the SPV/property company and has a corresponding amount of voting rights. (b) The SPV/property company ~~is also an **SPV/property company within the meaning of no. 3 of BaFin Circular 08/2015 (WAQ)** ("Tasks and duties of the depositary according to chapter 1 part 3 of the German Investment Code" ("*Aufgaben und Pflichten der Verwahrstelle nach Kapitel 1 Abschnitt 3 des Kapitalanlagegesetzbuches*")) (**"look through" approach**). The direct counterparty of the CRR credit institution or company of a group to which a CRR credit institution belongs in a lending or guarantee transaction would have to meet the criteria outlined in no. 3 of BaFin's Circular 08/2015 (WAQ) "Tasks and duties of the depositary according to chapter 1 part 3 of the German Investment Code".~~

	~~Accordingly, such direct counterparty would have~~is to be used exclusively as a vehicle for implementing the portfolio manager's investment strategy, so that the portfolio management according to the investment strategy is implemented indirectly through the direct borrower and the activities of the SPV/property company are to be considered as activities and assets of the investment fund ~~or, as the case may be, the management company. Any operating activities of the direct counterparty prevent an exclusive use as a vehicle for implementing the portfolio manager's investment strategy. If such operating activities are present, there is no need for an examination of whether a person who controls the direct counterparty is one of the persons specified in section 3 (2) sentence 2 no. 2 of the KWG~~. 4.2.2 A **contagion risk**, and thus an **attribution of the lending or guarantee business** to the persons specified in section 3 (2) sentence 2 no. 2 of the KWG, is, **as a general rule**, to be deemed non-existent if the three following conditions, (a) to (c), are **cumulatively** fulfilled: (a) The direct borrower has **operational** activities as a real economy company. In the case of holding structures, the **operational activities** of the subsidiary/subsidiaries are sufficient. The criterion of the operational activities of the SPV/property company (or its subsidiaries) is generally fulfilled in the case of real economy companies. The CRR credit institution or the company of a group to which a CRR credit institution belongs providing a loan or guarantee must appropriately document the presence of operational activities when concluding the legally binding agreement on the credit or guarantee transaction and when conducting the regular review of the transaction in the normal course of further credit processing. The grounds for the loan decision must also be documented in an appropriate manner.

	(b) The loan decision by the CRR credit institution or the company of a group to which a CRR credit institution belongs does not focus on a person specified in section 3 (2) sentence 2 no. 2 of the KWG, but rather **primarily on the capacity** of the direct borrower with operating activities and their assets **to meet payments**, taking further relevant operational companies into account where required. A decision primarily focuses on the capacity of an SPV/property company to meet payments if, for example, the SPV/property company acts within a contractually agreed set of rules regulating a specific project funded with the direct lending or guarantee transaction entered into with the SPV/property company. In addition to the repayment of funding from the cash flow or income of the SPV/property company, such a set of rules should have other indicators, for example the use of the borrowings exclusively for the funded project (e.g. a specific wind farm, specific aircraft or specific ship) and the limitation of acquisitions and divestitures, the limitation of assuming financial liabilities, the limitation of granting collateral or the limitation of distributions. Distributions to a hedge fund/AIF, in the form of dividends for example, do not shift the risk of default to the hedge fund/AIF if the payment of dividends does not depend on profit or loss or does not result in any interference with the direct borrower's capacity to meet payments. (c) In addition, **no** investment fund belonging to the persons specified in section 3 (2) sentence 2 no. 2 of the KWG may have any **right to recourse** to the direct borrower so that it is possible to **rule out** any contamination risk resulting from the investment fund. It can, **for** example, be concluded that an investment fund **has no rights to recourse** to the assets of the direct borrower, if, due to the capital and liquidity protection instruments that exist under German law (sections 30, 31 and 64 of the German Act Concerning Limited Liability Companies (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* – GmbHG) and section 57 of the

	German Stock Corporation Act (*Aktiengesetz* – AktG)), recourse by a person specified in section 3 (2) sentence 2 no. 2 of the KWG to the assets of the direct counterparty of the CRR credit institution or the company of a group to which a CRR credit institution belongs is ruled out and this person has not been granted any contractual rights to recourse to the assets of the direct borrower either. A written confirmation by the direct counterparty of the institution under the lending or guarantee transaction that no recourse will be made is generally deemed sufficient. Capital and liquidity protection instruments which are subject to other legal systems are deemed equal to the German instruments if they are comparable with each other. The financial institutions must prove the comparability of foreign legal systems. 4.2.3 **Leveraged-buy-outs** (LBOs) and project financing which are commonplace on the market are generally not covered by the prohibition in section 3 (2) sentence 2 no. 2 of the KWG. LBOs and project financing are particularly characterised by the fact that the financing is provided to SPVs (acquisition vehicles) and not to an AIF/hedge fund. The funding is repaid solely out of the cash flow of the acquisition vehicle or its subsidiaries with relevant operating activities. Moreover, the contractual arrangements provide for no, or only limited, distributions being made to the AIF/hedge fund or subordination clauses for the loans of the AIF/hedge fund in favour of the financing banks. LBOs are also characterised by the fact that the material assets of the direct borrower and its operational subsidiaries are collateralised in the favour of the financing CRR credit institution or in the favour of the company of a group to which a CRR credit institution belongs and therefore no recourse by the AIF/hedge fund to the acquisition vehicle's assets is possible. If contractual arrangements provide for an order of priority in the repayment of financing liabilities, the liabilities to be repaid on a priority basis by comparison with those of the financing institution ("senior liabilities") are not taken into consideration in determining whether a recourse exists.

	4.2.4 Similar constellations exist in the area of infrastructure financing where **special purpose vehicle structures** (SPV structures) are established by infrastructure investment funds. Such SPV structures are also exempt from the prohibition if no contagion risks exist.
5. Are business relationships (lending, payment transactions etc.) allowed with a **real economy company** which is owned by an AIF, a management company or a hedge fund?	5.1 The business relationship to a real economy company which is a direct or indirect subsidiary of an AIF, a management company or a hedge fund is prohibited only if one of the prohibition requirements of section 3 (2) sentence 2 of the KWG, particularly those in section 3 (2) sentence 2 no. 2 of the KWG is met. Business relationships with a **real economy company** that are established before such company becomes a direct or indirect subsidiary of an AIF, a management company or a hedge fund are **not subject to the prohibitions**. In cases where a new loan decision is to be made, the statements made in the interpretative guidance must be observed, in particular those in B 2.1 question 4 of this section.
6. Are the statements in the interpretative guidance on fully collateralised lending and guarantee business (see B 2.1) also applicable to indirect lending and guarantee transactions?	6.1 The statements in the interpretative guidance on fully collateralised lending and guarantee business (see item 1.3 of this section) are also applicable to indirect lending and guarantee transactions. Therefore, depending on the meeting of the additional conditions stated in the interpretative guidance on fully collateralised lending and guarantee business, indirect financing to SPVs/property companies that are held by German hedge funds or AIFs with substantial leverage can also be exempt from the prohibitions pursuant to section 3 (2) sentence 2 no. 2 of the KWG.
7. Does **every form of guarantee, representation or other type of assumption of liability** constitute grounds for a circumvention resulting from a contamination risk within the meaning of B 2.1 item 4.2 of the interpretative guidance? How should subordinate collateralisations in the favour of AIFs and	7.1 The statements in B 2.1 item 4.2 are intended, among other things, to hinder any circumvention of the prohibitions pursuant to section 3 (2) sentence 2 no. 2 of the KWG. Accordingly, indirect lending and guarantee transactions that have the primary objective of circumventing the prohibition are also subject to this

"**bad boy" guarantees, non-recourse carve-out guarantees** or **environmental indemnities** be assessed in this context?	statutory prohibition. When conducting lending and guarantee transactions, CRR credit institutions and companies of a group to which a CRR credit institution belongs are to be protected from contamination risks in relation to the persons specified in section 3 (2) sentence 2 no. 2 of the KWG. 7.2 There is a particular danger of contamination risks if, when making a loan decision, the lender relies on the assumption of liability by a person specified in section 3 (2) sentence 2 no. 2 of the KWG with regard to the actual credit risk. The assessment must be made on a case-by-case basis. 7.3 From a supervisory standpoint, what is decisive is whether it is a lending or guarantee transaction with real economy companies and that, when making the loan decision, the lender or guarantor does not rely on the assumption of liability by a person specified in section 3 (2) sentence 2 no. 2 of the KWG, but rather primarily on the capacity of the direct borrower and its assets to meet payments, taking additional operational companies into account where necessary. In this regard, the assumption of liability by a person specified in section 3 (2) sentence 2 no. 2 of the KWG constitutes additional collateral. The CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan or guarantee should be able to appropriately document the reasons for the loan decision. 7.4 Against this background, the statements in B 2.1 item 4.2.2 on contamination risks do not generally affect representations by shareholders where, for example, in relation to property financing, they promise the financing bank that in the event of certain specifically defined circumstances arising, they will provide the SPV with only a small amount of money in comparison to the total facility or with financing for only a short time in the initial period. Subordinate collateralisations of third parties, in particular those in favour of AIFs/hedge funds as shareholders in an SPV, also do not constitute a recourse

	to the assets of the SPV if the financing bank(s) are furnished with first-rank collateral in the financed object or project which fulfils the regulatory requirements for legal effectiveness and enforceability. 7.5 Similarly, for the aforementioned reasons, a circumvention does not normally exist if the assumption of liability covers all claims from the collateralised transaction, but these are only applicable if specific liability or claim criteria are fulfilled so that they do not reduce the original credit risk. Depending on the specific arrangement in each individual case, this applies to representations primarily intended to have a disciplinary effect, i.e. the prevention of certain detrimental behaviours by the personnel of the SPV or the AIF, for example, "bad boy" guarantees and non-recourse carve-out guarantees and indemnification agreements for lender liability due to a breach of environmental regulations in relation to the collateral object (environmental indemnity).
8. Are there any **other examples** for activities which are subject and for activities which are not subject to the prohibition in section 3 (2) sentence 2 no. 2 of the KWG?	8.1 Other examples which are **generally not** subject to the prohibition in section 3 (2) sentence 2 no. 2 of the KWG are the loan and guarantee transactions granted to a **holding company** within the meaning of section 2 (1) no. 1 of the KAGB or a **securitisation special purpose vehicle** (section 2 (1) no. 7 in conjunction with section 1 (19) no. 36 of the KAGB). 8.2 **The same** applies to loans or guarantees granted to an AIF's management company whose sole purpose is to fund the management company's working capital or other administrative expenditure (**"working capital"**)~~, insofar as contagion from the risks resulting from investment capital is excluded.~~ This applies both for so-called external management companies and for internally managed investment funds considered as a management company under section 17 of the KAGB.

	The CRR credit institution or company of a group to which a CRR credit institution belongs may obtain representations from the management company that the loans or guarantees are used to finance working capital. The CRR credit institution or company of such group is not obliged to verify such representation. It may rely on the correctness of the representation as long as the competent body within the CRR credit institution or company of such group has no evidence indicating that the management company's representation is not correct. The prohibition does not cover loans or guarantees to management companies whose exclusive purpose is to finance persons who are not subject to section 3 (2) sentence 2 no. 2 of the KWG. 8.3 Furthermore, the prohibition in section 3 (2) sentence 2 no. 2 of the KWG **also does not** cover loans or guarantees granted to **family offices** if the criteria outlined for family offices not covered by the substantive investment fund concept in ESMA's Guidelines on key concepts of the Alternative Investment Fund Managers Directive (AIFMD) (ESMA/2013/611) of 13 August 2013 and in BaFin's interpretative note on the scope of the KAGB and the term investment fund (*Auslegungsschreiben zum Anwendungsbereich des KAGB und zum Begriff des Investmentvermögens*) of 14 June 2013, as amended on 9 March 2015, are met. 8.4 Bridging financing in the form of **capital calls** is **not** subject to the prohibition if the bridging financing is temporary in nature and is fully covered by binding capital commitments from investors in an AIF which must also be met at the request of the CRR credit institution or company of a group to which a CRR credit institution belongs which provides the bridging financing. Furthermore, the CRR credit institution or company of a group to which a CRR credit institution belongs which provides the bridging financing must ensure by adequate collateralisation that it will be able to enforce its claims under the

	capital commitments against the investor and that the collateral can be realised in a timely manner. The term "temporary bridging financing" shall be interpreted in accordance with Article 6(4) of Regulation (EU) No 231/2013 (AIFM Implementation Regulation) and section 263 (5) of the KAGB. However, if these criteria for an bridging financing of capital calls are not fulfilled, these transactions are generally subject to section 3 (2) sentence 2 no. 2 of the KWG to the extent that such bridging financing meets the criteria for lending or guarantee business within the meaning of section 3 (2) sentence 2 no. 2 of the KWG. 8.4.1 The term **"temporary bridging financing"** comprises, on the one hand, bridging financing in the **initiation or start-up period** of 18 months following the start of distribution within the meaning of section 263 (5) of the KAGB, in particular of AIFs raising capital for investment, which are provided by the CRR credit institution or company of a group to which a CRR credit institution belongs to an AIF and which are used by the AIF to bridge the period between the subscription of units by investors and capital calls. 8.4.2 On the other hand, a **temporary bridging financing** within the meaning of item 8.4 above may also exist **after the end of the start-up period** if, within the meaning of Article 6(4) of the AIFM Implementation Regulation, a period of 3 months is not exceeded (see Recital (7) of the AIFM Implementation Regulation). In the case of credit line commitments for capital call financings to the group of persons specified in section 3 (2) sentence 2 no. 2 of the KWG, the permitted period for the credit line commitment may be up to five years if the drawdown under the credit line commitment is made for the purpose of bridging financing of a specific investor, the funds are repaid within three months and it is ensured by binding terms that the bridging financing is not drawn again for the same investor.

	8.5 The **prohibition** in section 3 (2) sentence 2 no. 2 of the KWG generally **covers**, in particular, the following types of business: (a) lending and guarantee business with the persons specified in section 3 (2) sentence 2 no. 2 of the KWG which results from the CRR credit institution or a company of the group to which a CRR credit institution belongs assuming guarantees for the benefit of central counterparties (**CCP**) or central securities depositories (**CSD**) or for the benefit of payment systems or securities delivery and settlement systems which the CRR credit institution or a company of such group assumes in its function as a **clearing member** or **prime broker** in connection with the settlement of orders from clients. However, lending and guarantee transactions are, **by way of an exception, not covered** by the prohibition if, due to regulatory requirements also recognised in Germany (equivalence decision), the clearing member assumes a guarantee for the benefit of the CCP or CSD, which serves to hedge an underlying transaction between the client of the clearing member and the CCP/CSD and is a condition for the ability of a person within the meaning of section 3 (2) sentence 2 no. 2 of the KWG to settle its derivative transactions. No blanket supervisory recognition is provided for because the equivalence decisions to date have not addressed guarantees from clearing members for the benefit of CCPs. Therefore, it is always necessary to make decisions on a case-by-case basis subject to the proviso that the decision about the exception always aims not to prevent the equivalence decision from being applied. Therefore, the question of a more extensive

	exception cannot be answered abstractly and must instead be answered on a case-by-case basis for each legal system. It is necessary to differentiate between equivalence decisions concerning EU Member States and other third countries. As regards the comparison of Germany with other national regulations in EU Member States, it should be noted that this is uniformly regulated throughout Europe by 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 (European Market Infrastructure Regulation – EMIR) in the area of CCPs and by Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories (CSDR) in the area of CSDs. In the case of third countries, f~~F~~or example, the Futures Commission Merchant (FCM) clearing model of the United States of America requires, on the basis of the requirements made by the Dodd-Frank Act and the Commodity Futures Trading Commission (CFTC), in particular CFTC Rule 39.12(b)(6), that the clearing member acts, in relation to the CCP, as an agent of the clients in case of client transactions and that the clearing member necessarily guarantees, in relation to the CCP, the clients' obligations. In such cases, there is no option to carry out the transactions without such guarantee. An application of the prohibition of guarantees pursuant to section 3 (2) sentence 2 no. 2 of the KWG to all guarantees to central counterparties would therefore have the consequence that a person within the meaning of section 3 (2) sentence 2 no. 2 of the KWG, which must settle its derivatives through US CCPs under the Dodd-Frank Act, could not use German clearing members. This would be contrary to

	the G20 decisions of Pittsburgh and the European implementation of such decisions through the ~~European Market Infrastructure Regulation (~~EMIR~~)~~. (b) **advances** which are granted by the CRR credit institution or the company of a group to which a CRR credit institution belongs, in its function as a clearing member or prime broker when providing purchase price payments, fees and expenses or margins (e.g. variation margins) to a broker, CCP or securities delivery and settlement system and which are refunded by the AIF on whose behalf it enters into or settles transactions at a later point in time only, or which are not matched by sufficient cash balances on the cash accounts maintained with the CRR credit institution or company, also in other currencies (if applicable), and, therefore, must be considered under civil law as a loan. These claims of CRR credit institutions or companies of a group to which a CRR credit institution belongs do not constitute claims to the CCP, CSD, payment system, securities delivery or settlement system or prime broker, but rather claims to the client itself on whose behalf the CRR credit institution or company of such group makes the advance performance. The prohibition in section 3 (2) sentence 2 no. 2 of the KWG makes no distinction between different types of lending and guarantee transactions to the group of persons specified therein, but prohibits such transactions generally. 8.6 Guarantees for the benefit of custody clients granted by the CRR credit institution in its function as securities lending intermediary when ~~transferring~~lending securities of its custody clients to ~~AIFs~~third parties (so-called **agency lending**) are not subject to the prohibition unless ~~the AIFs~~ those involved belong to the group of persons referred to in section 3 (2) sentence 2 no. 2 of the KWG.

	8.6.1 Cases where the CRR credit institution has an obligation towards its custody clients to be held liable for the negative difference between the liquidation proceeds from the collateral held and the market values of the securities involved in the relevant lending transactions should the securities borrower become insolvent and the securities on loan be under-collateralised (*Schadloshaltung* – **indemnity**) are deemed prohibited business under section 3 (2) sentence 2 no. 2 (b) of the KWG if the securities borrower is an AIF within the meaning of section 3 (2) sentence 2 no. 2 of the KWG. The same applies if the custody client is an AIF within the meaning of section 3 (2) sentence 2 no. 2 of the KWG and the CRR credit institution and the custody client have agreed on an authorised group of counterparties. It cannot be ruled out that the AIF, as the custody client, will take increased risks with such transactions due to the AIF's business model, even if the third party with which a contract may be entered into is not an AIF itself. These risks can then have an impact on the CRR credit institution due to the agreed indemnity of the custody client and are to be attributed to the institution.

B 2.2 Hedge funds, funds of hedge funds and AIFs as well as their management companies within the meaning of section 3 (2) sentence 2 no. 2 of the KWG

1. May section 3 (2) sentence 2 no. 2 of the KWG be interpreted such that it excludes lending and guarantee transactions that are used to fund investment types aiming at a **long-term investment** in assets?	1.1 The prohibition in section 3 (2) sentence 2 no. 2 of the KWG cannot be interpreted such that it excludes lending or guarantee transactions that are used to fund investment types aiming at a **long-term investment** in assets. 1.2 Such a restriction of the scope of application would not be consistent with the purpose of the law. A differentiation based on the assets held by an investment fund or the average holding period of such assets would be arbitrary. The purpose of the Bank Separation Act is to protect CRR credit institutions or companies of a group to which a CRR credit institution belongs against risks arising from borrowers using leverage on a substantial basis. Neither the risk structure nor the investment horizon, but rather the leverage used by the parties specified in section 3 (2) sentence 2 no. 2 of the KWG is the decisive criterion. Therefore, also investment funds which do not primarily invest in financial instruments (e.g. real estate funds, shipping funds and other long-term asset financing) qualifying as a person specified in section 3 (2) sentence 2 no. 2 of the KWG may generally be covered by the wording of the law. Insofar as private equity funds or real estate funds do not use leverage on a substantial basis, they are not subject to the prohibition provided for in section 3 (2) sentence 2 no. 2 (b) of the KWG. 1.3 ~~In case of AIFs domiciled in Germany, in a member state of the European Union or in another country that is a party to the Agreement on the European Economic Area (EEA),~~ CRR credit institutions or companies of a group to which a CRR credit institution belongs may rely on a self-declaration that they have properly verified that the requirements of section 3 (2) sentence 2 no. 2 (a) or

	(b) of the KWG are not met, unless the CRR credit institution or company of such group has knowledge that such self-declaration is not correct.
2. Do investment funds using leverage on a substantial basis within the meaning of section 3 (2) sentence 2 no. 2 (b) of the KWG benefit from **grandfathering** if they were launched before 22 July 2013 (entry into force of the KAGB) and made no additional investments after 21 July 2013, as these "old funds" are not subject to the KAGB and do therefore not qualify as AIFs?	2.1 No grandfathering is legally intended. Rather, it is decisive whether the investment fund qualifies as an AIF within the meaning of the KAGB. If an investment fund is not covered by the definition of an AIF in the KAGB, nor is such investment fund subject to the scope of application of the KWG. If, however, the fund qualifies as an investment fund according to the substantive investment fund concept in section 1 (1) sentence 1 of the KAGB without being an undertaking for collective investment in transferable securities (UCITS), it also qualifies as an AIF. 2.2 Grandfathering pursuant to section 353 of the KAGB relates to management companies and the question of whether they must adjust their investment funds in line with the regulations in the KAGB. As regards investment funds of foreign or EU management companies, this provision provides no indication for the scope of application of the prohibition in section 3 (2) sentence 2 no. 2 (b) of the KWG.
3. Are all investment funds that are governed by the laws of a third country outside the EU automatically considered **"foreign AIFs" within the meaning of the KAGB** and, consequently, also within the meaning of section 3 (2) sentence 2 no. 2 of the KWG, unless such investment funds demonstrably use leverage below the relevant thresholds in Article 8 of Regulation (EU) No 231/2013?	3.1 According to the definitions in the KAGB, all funds which meet the substantive definition of an investment fund and are not domiciled in the EU are considered to be ~~an~~ "foreign AIFs" (see section 1 (9) of the KAGB). Whether such funds fulfil the criterion of "using leverage on a substantial basis" is, as a rule, ~~initially~~ determined on the basis of their fund rules (for US 1940 Act funds see B 2.2 question 4 below). From a supervisory perspective, fund rules should always contain information on the extent to which an AIF may use leverage. 3.2 In addition, the CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan or guarantee must conclude an

	agreement with the AIF on the permitted level of leverage and on relevant termination rights. 3.3 If the CRR credit institution or the company of such group has **knowledge** that an AIF is using leverage on a substantial basis, the CRR credit institution or the company of the group to which a CRR credit institution belongs must consult with the AIF manager as to whether the excess above the significance threshold can be reversed within an appropriate period of time. If the AIF continues to use leverage or **again uses leverage** on a substantial basis within twelve months of this knowledge first being gained, the CRR credit institution or company of such group must **terminate the lending or guarantee transaction**, irrespective of whether termination rights exist (for details see B 2.3 question~~item~~ 2~~14~~ ~~above~~below).
4. Is **lending and guarantee business with investment companies** that are registered with the US Securities and Exchange Commission (SEC) under the Investment Company Act of 1940 (US 1940 Act) (**US 1940 Act funds**) and investment companies that are regulated as business development companies (**BDCs**) under the 1940 Act subject to the prohibition of section 3 (2) sentence 2 no. 2 (b) of the KWG? May US 1940 Act funds and BDCs be generally exempted from the scope of section 3 (2) sentence 2 no. 2 (b) of the KWG with reference to a risk profile comparable to "undertakings for collective investments in transferable securities" (UCITS) and an equivalent supervisory regime?	4.1 Due to the current legal restrictions, investment companies that are registered as US 1940 Act funds with the SEC and investment companies that are regulated as BDCs under the 1940 Act may **not use leverage on a substantial basis** within the meaning of Article 111 of Delegated Regulation (EU) No 231/2013. Accordingly, for supervisory administrative practices, the CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan or guarantee can generally rely on the US 1940 Act funds and BDCs **not being subject** to the **prohibition** of section 3 (2) no. 2 (b) of the KWG. This is not the case if the CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan or guarantee has knowledge that the AIF with which such CRR credit institution or the company of such group has a lending or guarantee business relationship uses, possibly even in contravention of the legal restrictions, leverage on a substantial basis within the meaning of Article 111 of Delegated Regulation (EU) No 231/2013.

	4.2 For determining the leverage, the CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan or guarantee may, pursuant to B 2.3 item 3.1.3 (a) of the interpretative guidance, rely on the information about the supervisory regime to which the AIF is subject. The determination of leverage to be carried out by the CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan or guarantee must be documented for supervisory audit purposes in a comprehensible and appropriate manner based on the information of the foreign supervisory regime. This applies in regard both to the time of conclusion of the legally binding agreement on lending and guarantee business which is relevant to the determination of leverage (B 2.3 item 2.1 of the interpretative guidance) and to the obligation to carry out regular examinations throughout the duration of the lending or guarantee business pursuant to B 2.3 item 2.3. By contrast, the CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan or guarantee may not rely on information about the supervisory regime if it has knowledge that the AIF uses leverage on a substantial basis within the meaning of Article 111 of Delegated Regulation (EU) No 231/2013. 4.3 If the CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan or guarantee gains knowledge that the investment company uses leverage on a substantial basis, such CRR credit institution or the company of such group granting a loan or guarantee must take the measures described in B 2.3 item 2.4 of the interpretative guidance. In practice, instead of terminating the credit or guarantee business, this could be achieved, for example, by selling the loan or by sufficiently collateralising the loan subsequently. 4.4 From a supervisory perspective, it is not possible to generally exempt US 1940 Act funds and BDCs from the scope of section 3 (2) sentence 2 no 2 (b) of

	the KWG with reference to a risk profile comparable to "undertakings for collective investments in transferable securities" (UCITS) and an equivalent supervisory regime. Due to the differences in the way content is structured, neither the German Bank Separation Act and the part of the US **Dodd-Frank Act** known as the **Volcker Rule** (see Sec. 615 of the Dodd-Frank Act, codified in 12 U.S.C § 1851 Bank Holding Company Act of 1956) nor the US 1940 Act funds and the KAGB are comparable with each other. In addition, a teleological reduction of the term "foreign AIFs" used in section 3 (2) sentence 2 no 2 (b) of the KWG cannot be reconciled with the intention and purpose of Article 2 of the Bank Separation Act. Therefore, US 1940 Act funds and BDCs are not to be considered UCITS.
5. Are **closed-ended German AIFs** also subject to the prohibition in section 3 (2) sentence 2 no. 2 (a) of the KWG?	5.1 Section 3 (2) sentence 2 no. 2 (a) of the KWG covers only hedge funds within the meaning of section 283 (1) of the KAGB, i.e. open-ended German special AIFs within the meaning of section 282 of the KAGB (however, B 2.2 question 6 must also be observed). Closed-ended German AIFs are not subject to this prohibition.
6. Is lending and guarantee business with **open-ended German special AIFs** with fixed investment rules within the meaning of section 284 of the KAGB subject to the prohibition in section 3 (2) sentence 2 no. 2 (a) of the KWG?	6.1 For the purposes of section 3 (2) sentence 2 no. 2 (a) of the KWG, an open-ended German special AIF which fulfils the requirements of section 284 of the KAGB is to be considered a hedge fund within the meaning of section 283 of the KAGB if its investment rules or other documents which are legally binding for its relationship to the investor (e.g. side letters) provide for the possibility of using leverage without limiting the use of leverage (measured according to the commitment method) to a ratio of 3 or less (within the meaning of Article 111(1) of Delegated Regulation (EU) No 231/2013). 6.2 Such special AIFs may use leverage on a substantial basis. Lending or guarantee transactions concluded for the account of such an AIF are thus exposed to a greater default risk. In keeping with the meaning and purpose of

	the Bank Separation Act, such lending and guarantee business is therefore subject to the prohibition. 6.3 By contrast, the prohibition in section 3 of the KWG does not apply if, at the time the lending or guarantee transaction is concluded, the special AIF's investment rules or other legally binding documents (e.g. side letters or the document pursuant to section 307 of the KAGB) provide for a corresponding restriction of the use of leverage. 6.4 Such a side letter or the passage in such an information document within the meaning of section 307 of the KAGB may contain the following wording: "The company expects that the AIF shall have a maximum leverage ratio of 3 in accordance with the commitment method. Depending on market conditions, the leverage may fluctuate so that despite ongoing monitoring, this ratio may be briefly exceeded". 6.5 Lending or guarantee contracts which have been concluded for the special AIF's account, despite its relevant documents not providing for a restriction of the leverage to a maximum ratio of 3 in accordance with the commitment method, are subject to the prohibition in section 3 of the KWG. These contracts must be terminated pursuant to the statements of the interpretative guidance in B 2.3 item 2.4 or transferred to another financial trading institution unless the asset management company that manages the special AIF rectifies the limitation of leverage in the fund documentation without delay and pursuant to B 2.3 item 2.4 of the interpretative guidance reduces the actual leverage used for the special AIF to a maximum ratio of 3 in accordance with the commitment method. 6.6 Additionally, it should be noted that the prohibition in section 3 of the KWG also does not apply if the lending and guarantee business with a hedge fund or

	AIF fulfils the requirements in B 2.1 item 1.3 of the interpretative guidance on fully collateralised lending and guarantee business.
7. Are **German AIFs** subject to the prohibition in section 3 (2) sentence 2 no. 2 (b) of the KWG?	7.1 As a consequence of the definition of an "EU investment fund" in section 1 (8) of the KAGB, section 3 (2) sentence 2 no. 2 (b) of the KWG covers only investment funds that are governed by the law of "another Member State". Therefore, German investment funds are exhaustively covered by section 3 (2) sentence 2 no. 2 (a) of the KWG.
8. Do **acquisition vehicles** (*Akquisitionsvehikel*) that are launched by an AIF qualify as AIFs themselves?	8.1 The extent to which acquisition vehicles qualify as an AIF depends on the substantive definition of an investment fund and the other definitions in the KAGB. As regards the question of whether transactions with financial or legal entities that are controlled by the management company or the investment fund are covered, please refer to B 2.1 questionitem 49 above.
9. To what extent must CRR credit institutions and companies of a group to which a CRR credit institution belongs clarify whether an investment fund managed by an **external management company within the meaning of section 17 (2) no. 1 of the KAGB** qualifies as an "AIF using leverage on a substantial basis" pursuant to section 3 (2) sentence 2 no. 2 (b) of the KWG or as a "hedge fund or a fund of hedge funds" pursuant to section 3 (2) sentence 2 no. 2 (a) of the KWG? Does a single non-compliant investment fund within the meaning of the law result in a general prohibition of the lending relationship with the management company as a whole?	9.1 Lending and guarantee business is also prohibited with management companies of hedge funds and of EU AIFs or with foreign AIFs if such transactions are undertaken in the management of substantially leveraged AIFs, hedge funds or funds of hedge funds. The wording of the law ("in the management of the EU AIF or foreign AIF (*im Rahmen der Verwaltung des EU-AIF oder ausländischen AIF*)") does **not provide** for a **general prohibition** of a lending or guarantee relationship with a management company, but only where it benefits a substantially leveraged AIF, hedge fund or fund of hedge funds. A management company acting as an external management company pursuant to section 17 (2) no. 1 of the KAGB may manage a larger number of investment funds. If the management company acts as a counterparty to the CRR credit institution or company of a group to which a CRR credit institution belongs in lending or guarantee transactions, then the credit risk assessment of the CRR credit institution or company of such group will not necessarily include an assessment of all investment funds managed, because the assets of the

	investment funds may not be used for the management company's debt service. 9.2 The CRR credit institutions and companies of a group to which a CRR credit institution belongs should develop **suitable procedures** in order to be able to properly **document** compliance with the requirements. The management company should internally document the funds for whose account the management company concludes the transactions. These documentation requirements are fulfilled, for example, where the CRR credit institution or the company of such group contractually excludes transactions concluded for the account of funds that use leverage on a substantial basis. This means that existing contractual agreements are generally considered relevant. It would be impractical to require that CRR credit institutions and companies of a group to which a CRR credit institution belongs must generally check the management company's compliance with contractual commitments. No additional arrangement is necessary that the management company must provide to BaFin, upon request, internal documentation showing the fund for whose account the management company concludes the transactions.

B 2.3 The term “leverage” within the meaning of section 3 (2) sentence 2 no. 2 (b) of the KWG

1. May the leverage of persons within the meaning of section 3 (2) sentence 2 no. 2 (b) of the KWG be determined on the basis of the specific investment fund's notified leverage? When, how and by whom is the specific investment fund's **leverage notified** to BaFin?	1.1 For AIFs subject to the reporting obligation pursuant to Directive 2011/61/EU on Alternative Investment Fund Managers/ Alternative Investment Fund Manager Directive – AIFMD – the CRR credit institutions and companies of a group to which a CRR credit institution belongs may rely on

	such information unless they have knowledge that such information is not correct (see also B 2.3 questions~~items~~ 2~~14~~ and 3~~15~~). 1.2 Only management companies domiciled in Germany and management companies from third countries distributing their funds in Germany have to provide reports to BaFin pursuant to section 35 of the KAGB on a quarterly to annual basis (**AIFM reporting**). BaFin cannot disclose these reports to persons within the meaning of section 3 (2) sentence 2 no. 2 of the KWG, particularly where the relevant data is not publicly available. In addition, BaFin receives no such reports in respect of EU AIFs or foreign AIFs which are managed by EU management companies or are not distributed in Germany.
2. When is **"leverage on a substantial basis"** pursuant to section 3 (2) sentence 2 no. 2 (b) of the KWG to be determined? How and at which intervals is leverage to be monitored? What is the procedure if an AIF is using leverage on a substantial basis?	2.1 When **determining leverage**, reference must be made to the AIF's **fund rules** at the **time of conclusion of the legally binding agreement** on the lending or guarantee transaction. As a general rule, t~~T~~he prohibition in section 3 (2) sentence 2 no. 2 (b) of the KWG covers all AIFs whose fund rules allow or do not exclude the use of leverage on a substantial basis or which use leverage on a substantial basis contrary to their fund rules. Based on the relevant wording in Article 111(1) of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012, the term "leverage on a substantial basis" only applies when the exposure exceeds three times its net asset value. 2.1.1 If the **fund rules** of the AIF which is subject to the reporting obligations under Directive 2011/61/EU on Alternative Investment Fund Managers – **AIFMD** – **exclude** the use of leverage on a substantial basis within the meaning of Article 111 of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012, institutions can rely on this information unless they are aware of other facts.

	2.1.2 If the **fund rules** allow the use of leverage on a substantial basis or if they **do not exclude** the use of leverage on a substantial basis, the AIF is, in principle, subject to the prohibition. However, the AIF is not subject to the prohibition, by way of exception, if leverage is never used on a substantial basis and it is ensured that the leverage is subject to ongoing monitoring.~~reference is made to the *actual* leverage at the time of conclusion of the legally binding agreement on the lending or guarantee transaction.~~ When determining the actual leverage, ~~reference may be made to the reporting of AIFs under the AIFMD.~~ AIFs may rely on the AIF reporting pursuant to the AIFMD or suitable alternative processes for determining or estimating the leverage (for further details on alternative methods for determining leverage, see B 2.3 items 3.1 and 3.2). 2.1.3 For AIFs **not** subject to the reporting obligation under the **AIFMD** and on which the CRR credit institutions or companies of a group to which a CRR credit institution belongs, therefore, have no information on leverage, institutions may refer to suitable alternative processes for determining or estimating leverage at the time of conclusion of the legally binding agreement on the lending or guarantee transaction (for further details on alternative methods for determining leverage, see B 2.3 ~~item~~ question 3~~15 below~~). 2.2 Furthermore, a CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan should ensure, at least when credit or guarantee agreements are newly entered into or extended, that **leverage** on a substantial basis is contractually **excluded** and that the CRR credit institution or company of such group granting the credit has **a termination right** in the event of an infringement of the prohibition. 2.3 The CRR credit institution or company of a group to which a CRR credit institution belongs must **check leverage** when and as long as it **transacts**

	lending and guarantee business with the relevant client, in addition to the initial determination at the time of conclusion of the legally binding agreement on the lending or guarantee transaction. 2.3.1 When determining the relevant leverage for the prohibition in section 3 (2) sentence 2 no. 2 (b) of the KWG, reference must be made to the wording of the law. This refers to the "use" of leverage on a substantial basis. Therefore, leverage must be considered not only on conclusion of a lending or guarantee transaction, but throughout the duration of the transaction. 2.3.2 For AIFs which are subject to the **regular reporting obligation** under the **AIFMD** and whose fund rules **exclude** the use of leverage on a substantial basis, CRR credit institutions and companies of a group to which a CRR credit institution belongs may rely on this information even after conclusion of the agreement, unless they are aware of other facts. 2.3.3 For AIFs which are subject to the **regular reporting obligation** under the AIFMD and whose fund rules do **not exclude** the use of leverage on a substantial basis within the meaning of Article 111 of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012, the CRR credit institution or company of a group to which a CRR credit institution belongs must regularly check the leverage actually used, **by sample checks among these AIFs**, on the basis of appropriate processes. This requirement is considered to be fulfilled if the CRR credit institution or the company of a group to which a CRR credit institution belongs is regularly assured by the AIF that it is (unvaryingly) not using leverage on a substantial basis. These checks must be made at least on an annual basis. 2.3.4 For AIFs which are **not subject to the reporting obligation** under the AIFMD, the CRR credit institutions or companies of a group to which a CRR

	credit institution belongs may refer to appropriate **alternative processes** to regularly **determine, by sample checks**, or estimate the level of leverage (for further details on alternative processes to determine leverage, see B 2.3 question~~item~~ 3~~15~~). These checks must be made on a quarterly basis, if possible, and at least on an annual basis. 2.4 If the CRR credit institution or the company of a group to which a CRR credit institution belongs granting a loan or guarantee gains **knowledge** that an AIF is using leverage on a substantial basis, the CRR credit institution or company of such group must consult with the AIF manager as to whether the excess above the significance threshold can be reversed within an appropriate period of time, which is normally three months in accordance with Article 4(4) of Regulation (EU) No 231/2013. 2.4.1 If the AIF continues to use leverage after the expiry of this period specified in item 2.4 above or **again uses leverage** on a substantial basis within twelve months, the CRR credit institution or company of a group to which a CRR credit institution belongs must **terminate the lending or guarantee transaction**, irrespective of whether termination rights exist, or transfer the transaction to a financial trading institution. If no relevant termination rights exist and the transactions were agreed in a legally binding manner before finalising the risk analysis under section 3 (3) sentence 1 no. 1 of the KWG, it would be inappropriate from a supervisory perspective to request their immediate termination. The CRR credit institution or company of such group has the option, according to the provisions of section 3 (3) no. 1 of the KWG on existing business, to terminate the prohibited activities within six months or transfer the prohibited activities to a financial trading institution. The six-month deadline starts from the time at which the AIF, even after the expiry of the deadline specified in item 2.4 above, continues to use leverage on a substantial basis or uses leverage on a substantial basis again within twelve months.

	2.4.2 BaFin has developed guidance notices in relation to business requiring authorisation, providing basic information on the specific provisions. Due to the differing statutory intent of the provisions, the supervisory practice developed in relation to business conducted without permission cannot be applied to the supervisory practice in relation to prohibited business under section 3 (2) of the KWG. For the protection and in the interest of the borrower or the person guaranteed, supervisory practice winds up lending or guarantee business being conducted without permission by requesting that loans or guarantees are terminated upon expiry or that contractually agreed termination rights are exercised. However, an AIF acting as counterparty of the CRR credit institution granting a loan or guarantee is not worthy of protection in the same way as the borrower or person guaranteed in a business conducted without permission, in particular in view of the protective purpose of the Bank Separation Act, i.e. ensuring the CRR credit institution's solvency.
3. What processes should be implemented by CRR credit institutions and companies of a group to which a CRR credit institution belongs to **determine leverage** on a substantial basis within the meaning of Article 111 of Commission Delegated Regulation (EU) No 231/2013 for AIFs which are **not** subject to the reporting obligation under Directive 2011/61/EU (**AIFMD**)?	3.1 The verification process to determine "leverage on a substantial basis" pursuant to Article 111 of Commission Delegated Regulation (EU) No 231/2013 for AIFs which are not subject to the reporting obligation under the AIFMD, must comply with the following principles (see B 2.3 question~~item~~ 2~~14~~ above, in particular in relation to the exercise of termination rights which may exist in the relevant jurisdictions): 3.1.1 Generally, if available, the leverage as disclosed by the AIF must be used. As of today, only European AIFs have to disclose their leverage (Article 23(5) of the AIFMD). 3.1.2 If no disclosed information on leverage is available, the CRR credit institution or company of a group to which a CRR credit institution belongs may

	obtain representations from the relevant AIF detailing the AIF's leverage determined in accordance with Article 8 of Regulation (EU) No 231/2013. 3.1.3 Otherwise, the CRR credit institution or company of a group to which a CRR credit institution belongs may use other information to determine the leverage used by the AIF. Such information may include, in particular: (a) information on the supervisory regime under which a foreign investment fund may invest in ~~assets~~capital investments (*Vermögensanlagen*), and (b) information on the AIF's assets, including information on liabilities, derivatives used, off-balance sheet liabilities and other items that are relevant for calculating leverage under Article 8 of Regulation (EU) No 231/2013. The determination carried out by the CRR credit institution or company of a group to which a CRR credit institution belongs granting a loan must be documented for supervisory audit purposes in a comprehensible and appropriate manner. 3.1.4 If the CRR credit institution or company of a group to which a CRR credit institution belongs cannot use any of the methods outlined in ~~nos.~~items 3.1.1 to 3.1.3, it is assumed that the AIF uses leverage higher than three. 3.2 When determining the leverage of (i) a fund of funds, or (ii) an investment fund investing in other companies, the CRR credit institution or company of a group to which a CRR credit institution belongs applies Article 6 of Regulation (EU) No 231/2013. In accordance with Article 6(3) of Regulation (EU) No 231/2013, the CRR credit institution or company of such group will consider in its determination only those underlying investment funds or companies which

	were specifically established for increasing the leverage of the investing (i) fund of funds or (ii) investment fund. In addition, the fund of funds or the investment fund investing in companies must exercise control or have dominating influence.
4. What are the requirements on the **treatment of current loan or guarantee exposures** where **the leverage is changing over time** at the level of the investment fund within the meaning of section 3 (2) sentence 2 no. 2 (b) of the KWG?	4.1 For the timing of the determination of leverage and the treatment of current loan or guarantee exposures, please refer to B 2.3 question~~item~~ ~~2~~14 above.
5. Is the relevant measure the actual **leverage at the time of the loan commitment** or may the determination be based on the target leverage? If the target leverage may be used, under what conditions may this figure be used?	5.1 The determination may not be based on the assets or their average holding period in the investment fund or on any higher initial leverage, but on the permitted level of leverage according to the fund rules (target leverage). If there is evidence indicating that such contractual limitations for leverage are not complied with, the determination of leverage must be based on the actual level of leverage. In this regard, it is irrelevant whether AIFs have a high leverage level in the investment stage only, e.g. because equity commitments of investors are only called successively after investments have been made.

B 3 Prohibition of high frequency trading pursuant to section 3 (2) sentence 2 no. 3 of the KWG

1. In its guidelines 2013/74 of 2 April 2013, the **European Securities and Markets Authority (ESMA)** provided a more detailed interpretation of the term "market making activities" including anticipatory hedging (as opposed to	1.1 The European Securities and Markets Authority's interpretation on market making of 2 April 2013 (ESMA/2013/74) is relevant **only for the scope of application of the prohibition of high-frequency trading** pursuant to section

"inventory") for the scope of application of Regulation (EU) No 236/2012 of 14 March 2012 on short selling and certain aspects of credit default swaps. Does this interpretation also apply to the prohibition in section 3 (2) sentence 2 no. 3 of the KWG?	3 (2) sentence 2 no. 3 of the KWG and for the assessment of high-frequency activities for the purposes of the **exemptions in section 3 (2) sentence 3 nos. 1 and 2 of the KWG**, but not for a differentiation between permitted market making and prohibited proprietary business pursuant to section 3 (2) sentence 2 no. 1 of the KWG. 1.2 Anticipatory hedging within the meaning of the ESMA guidelines on market making of 2 April 2013 (ESMA/2013/74) is also permitted within the scope of application of the prohibition of high-frequency trading pursuant to section 3 (2) sentence 2 no. 3 of the KWG and for the assessment of high-frequency activities for the purposes of the exemptions in section 3 (2) sentence 3 nos. 1 and 2 of the KWG, but what is not permitted is additional "stockpiling" or an "inventory" by which the CRR credit institution or company of a group to which a CRR credit institution belongs maintains a holding in financial instruments and hedges such holding against market risk through appropriate transactions. These activities are not accepted or referred to as a form of market making in Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps (EU Short Selling Regulation) or in the ESMA guidelines (ESMA/2013/74). Although anticipatory hedging is recognised as a form of market-making in the guidelines, this is only the case if specific requirements are met. A general or regular holding of financial instruments resulting from uncovered short sales is not considered as a form of market making. There exists no relationship to client-driven activities or crediting, particularly since the definition of market making as a permitted exemption is to be interpreted in the narrow sense. 1.2.1 Section 3 (2) sentence 2 no. 3 of the KWG directly refers to the EU Short Selling Regulation. The concept of market making in the EU Short Selling Regulation is specified in more detail in the ESMA Guidelines (ESMA/2013/74). As stated in Article 16 of the ESMA Regulation (Regulation (EU) No 1095/2010),

	guidelines aim at establishing consistent, efficient and effective supervisory practices within the European System of Financial Supervision (ESFS) and ensuring the common, uniform and consistent application of Union law. Only if and to the extent that the Guidelines are in conflict with the provisions of the KWG does the question arise of whether and to what extent the Guidelines must also be considered in respect of the exemption provisions of the KWG. However, no such conflict is apparent. 1.2.2 In particular, no conflict exists with regard to the following issues since the below understanding is also supported by the interpretation of the market making concept in the EU Short Selling Regulation (also in connection with the ESMA Guidelines (ESMA/2013/74)): (a) To the extent that high-frequency trading activities are used to hedge client transactions, it is not necessary that the financial instruments underlying the client transaction are traded on the same exchange or trading system. For example, it is permitted that the CRR credit institution is the writer of an OTC share option contract with its client and hedges the consequent position through a high-frequency transaction in the underlying or another derivative of the underlying on the exchange. (b) The concept of market making activities also covers financial instruments for which the CRR credit institution notified no exemption under Article 17 of the EU Short Selling Regulation, for example because the CRR credit institution has generally made no notification to use the market maker exemption under the EU Short Selling Regulation or because the issuer of the financial instrument is not subject to the scope of application of the EU Short Selling Regulation.

	Section 3 (2) sentence 2 no. 3 of the KWG refers to Article 2(1)(k) of the EU Short Selling Regulation, which defines a market maker. Companies which fall within the definition are market makers within the meaning of the EU Short Selling Regulation. In order to be exempt from the short selling prohibitions and transparency requirements in the EU Short Selling Regulation, market makers must notify their activities (Article 17 of the EU Short Selling Regulation). Since section 3 (2) sentence 2 no. 3 of the KWG only refers to Article 2(1)(k) of the EU Short Selling Regulation, but particularly not to the notification requirements in Article 17 of the EU Short Selling Regulation, no notification is required in order to be subject to the application of section 3 (2) sentence 2 no. 3 of the KWG. Therefore, there are market makers with activities in Germany (or the EU) which fall under the definition in Article 2(1)(k) of the EU Short Selling Regulation without having made a notification under Article 17 of the EU Short Selling Regulation. Accordingly, they continue to be market makers within the meaning of the EU Short Selling Regulation and section 3 (2) sentence 2 no. 3 of the KWG. This does not mean, however, that they would be exempt from the prohibitions or transparency requirements. (c) The concept of market making-activities also covers the hedging of transactions with clients through which future client transactions are anticipated (anticipatory hedging), to the extent that the other requirements outlined in nos. 56 and 57 of the ESMA Guidelines (ESMA/2013/74) are met (e.g. quick reduction of open positions etc.).

C Exemptions from the prohibition pursuant to section 3 (2) sentence 3 of the KWG

C 1 Hedging transactions pursuant to section 3 (2) sentence 3 no. 1 of the KWG

1. Is proprietary trading with AIFs subject to stricter requirements on the determination of leverage of AIFs? Does the exception pursuant to section 3 (2) sentence 3 no. 1 of the KWG expand the scope of the prohibition?	1.1 The exception to the exception under section 3 (2) sentence 3 no. 1 of the KWG **does not expand the scope of the prohibition** in section 3 (2) sentence 2 no. 2 of the KWG. The exception in section 3 (2) sentence 3 no. 1 of the KWG ~~therefore only~~ applies to ~~cases of proprietary business and proprietary trading within the meaning of section 1 (1) (a) sentence 2 no. 4 (d) of the KWG~~all transactions subject to the prohibition in section 3 (2) sentence 2, even if these transactions are generally to be classified as proprietary business within the meaning of section 1 (1a) sentence 3 of the KWG, unless it is lending or guarantee business conducted with AIFs or their management companies within the meaning of section 3 (2) sentence 2 no. 2 (b) of the KWG. 1.2 Transactions to hedge other transactions which are **prohibited transactions** under section 3 (2) sentence 2 no. 2 (b) of the KWG do **not** fall within the **exception** in section 3 (2) sentence 3 no. 1 of the KWG. All other hedging transactions are permitted transactions.
2. Which **hedging transactions** may continue to be conducted?	In particular the following hedging transactions are permitted:

	(a) hedging transactions with AIFs if they do not constitute prohibited lending or guarantee business within the meaning of section 3 (3) sentence 2 no. 2 of the KWG and are used to hedge positions resulting from transactions not prohibited under section 3 (2) sentence 2 of the KWG; (b) hedging transactions that replace or change an existing hedging transaction to the extent that the existing hedging transaction is not prohibited lending or guarantee business.

C 2 Transactions for risk management pursuant to section 3 (2) sentence 3 no. 2 of the KWG

1. Are all transactions conducted for **managing interest rate, FX, liquidity or credit risks of an association** (*Verbund*) excluded from the prohibition in section 3 (2) sentence 2 of the KWG?	1.1 **Transactions of an association** for the interest rate, FX or liquidity management between primary institutions (*Primärinstitute*) and their central institutions (*Zentralinstitute*) are **not** subject to the **prohibition** in section 3 (2) sentence 2 no. 1 of the KWG. Therefore there is no need to clarify that these transactions are excluded from the prohibition under section 3 (2) sentence 3 no. 2 of the KWG. These transactions are not to be considered as "proprietary business" because such transactions with primary institutions always have a service character. 1.2 Transactions conducted by the central institution for **its own interest rate, FX or liquidity management** are covered by the exception in section 3 (2) sentence 3 no. 2 of the KWG and are therefore not prohibited.

2. May the **risks of the institution or of the group** be managed by different units?	2.1 Yes, transactions for the purpose of managing the risks of a CRR credit institution or a company of a group to which a CRR credit institution belongs may be managed by a **central unit** or by **departments** (e.g. treasury). 2.2 **Interbank transactions** for short-term liquidity management which are traded on the money market (including also repurchase agreements for liquidity management purposes) ensure the liquidity of the CRR credit institution or company of a group to which a CRR credit institution belongs on the money market and are therefore covered by the exception for liquidity management under section 3 (2) sentence 3 no. 2 of the KWG.
3. Does the exception under section 3 (2) sentence 3 no. 2 of the KWG relate to **all transactions** conducted **for managing interest rate, FX, liquidity or credit risks**?	3.1 Beyond the wording of this provision, it covers by conclusion of analogy **all risk types**, also addressed within the meaning of Special Part 2 of BaFin's **Circular Minimum Requirements for Risk Management** (*Rundschreiben Mindestanforderungen an das Risikomanagement – MaRisk*). This also applies, in particular, in relation to the price risk if these transactions are not aimed at generating profits by exploiting market movements in the short term.
4. May transactions for hedging client transactions within the meaning of section 3 (2) sentence 3 no. 1 of the KWG or for managing interest rate, FX, liquidity or credit risks of the institution or the group/association within the meaning of section 3 (2) sentence 3 no. 2 of the KWG be delimited at the **macro level (management at portfolio level)**?	4.1 Yes, since all risk positions of an institution are normally not hedged at a position level, transactions may be delimited at a macro level (**management at portfolio level**). This corresponds to the actual management and a holistic view on economic risks. The credit institutions and companies of a group to which a CRR credit institution belongs must develop comprehensible procedures allowing the supervisory authority to verify whether the conditions for the exemption are met (for details, see B 1 questionitem 16 above).

C 3 Investment transactions pursuant to section 3 (2) sentence 3 no. 3 of the KWG

1. **Which positions** are covered by the exception in section 3 (2) sentence 3 no. 3 half-sentence 2 of the KWG?	1.1 Whether positions are held with the aim to benefit from actual or expected short-term differences between buying and selling prices or other price or interest rate movements, i.e. whether they constitute proprietary business, must be determined by the CRR credit institution or company of a group to which a CRR credit institution belongs. Section 3 (2) sentence 3 no. 3 of the KWG cannot be applied to lending or guarantee transactions with AIFs pursuant to section 3 (2) sentence 2 no. 2 of the KWG.

D Risk analysis and termination or transfer of transactions pursuant to section 3 (3) of the KWG and transitional periods

1. What is the basic **schedule** for implementing the prohibitions? Which **analysis activities** should be performed in connection with section 3 of the KWG and when should they be performed?	1.1 When determining thresholds, reference must be made to the reporting date of the preceding financial year. This provision not only applies to the introduction phase of the law, but rather applies continuously. Within twelve months of exceeding the threshold (due to the transitional provision in section 64s (2) of the KWG, at the earliest from 1 July 2016), prohibited activities identified in a risk analysis must be discontinued or transferred to a legally, economically and organisationally independent company within the meaning of

	section 25f of the KWG. The calculation of the threshold is based on the balance sheet items outlined in the law. 1.2 Differentiation must be made between the determination of thresholds and the identification of prohibited business within the meaning of section 3 (2) sentence 2 of the KWG by way of risk analysis. Within six months of exceeding a threshold (due to the transitional provision in section 64s (2) of the KWG, starting from 1 July 2015 with completion of the risk analysis by 31 December 2015), a risk analysis must be performed to identify prohibited business. 1.3 For example, if the balance sheet date is 31 December of a year, the threshold is to be determined on 1 July 2015 on the basis of the figures as of 31 December 2014. If the threshold is exceeded, a risk analysis must be conducted within six months, i.e. by 31 December 2015. Based on this risk analysis, the CRR credit institution or company of a group to which a CRR credit institution belongs must identify prohibited business. Prohibited business must be discontinued or transferred to a financial trading institution within twelve months of the exceedance of a threshold being determined, i.e. in the present case by 1 July 2016. A financial trading institution must be established by the transfer date at the latest.
2. How should the required **risk analysis** be performed by the CRR credit institutions? What is the underlying system according to which the extent of prohibited business is determined? What should the components of a risk analysis be?	2.1 The risk analysis required under section 3 (3) sentence 1 of the KWG depends on the business activities of the CRR credit institution or company of a group to which a CRR credit institution belongs. In its risk analysis, the CRR credit institution or company of such group should examine whether the business model defined for the relevant business area or trading book includes prohibited business. BaFin considers it appropriate to use the wording of the law and, where relevant, the notes on interpretation published by BaFin as a guideline for the examination. Additionally, the internal policies of the CRR credit institution or company of a group to which a CRR credit institution

Must a risk analysis be made in the case of a merger of companies, the acquisition of a company or the acquisition of a portfolio?	belongs should also be considered. As regards new business, for example, the operating instructions or trading and risk strategies of the CRR credit institution or company of such group may ensure compliance with the provisions on prohibited business. 2.2 A clear distinction must be made between the risk analysis and the compliance process. The CRR credit institution or company of a group to which a CRR credit institution belongs applies its compliance process to ensure that statutory prohibitions are complied with and that permitted trading and hedging activities do not disguise any prohibited proprietary business. The CRR credit institution or company of such group must implement a compliance process to identify and prevent any prohibited proprietary business and any prohibited high-frequency trading. 2.3 If a CRR credit institution or company of a group to which a CRR credit institution belongs which is already covered by the scope of application of the Bank Separation Act merges with another CRR credit institution or company which has previously not exceeded the thresholds set out in section 3 (2) sentence 1 of the KWG, then the reorganised CRR credit institution or company of a group to which a CRR credit institution belongs must, within six months of the closing of the merger, carry out a risk analysis pursuant to section 3 (3) sentence 1 no. 1 of the KWG with regard to the business which had been operated before the merger by the other CRR credit institution or company and thus had not been subject to a risk analysis, and must terminate the prohibited transactions so determined within twelve months of the closing of the merger or transfer them to a financial trading institution. The identification and, as necessary, termination or transfer of transactions prohibited as from the closing of the merger requires a period of time which is comparable to that required by a CRR credit institution or company of a group to which a CRR credit institution belongs which exceeds any of the thresholds for the first time. The same applies

	to the acquisition of a portfolio or where a CRR credit institution or company of a group to which a CRR credit institution belongs acquires another CRR credit institution or company which must be included in the scope of prudential consolidation pursuant to section 10a of the KWG.
3. Is it necessary to **repeat the risk analysis** (annually)?	3.1 No, see ~~item 33 para. 2 and item 38 para. 3~~D items 2.2 and 8.3.
4. **Does the six-month period for the risk analysis start** at the earliest when thresholds are exceeded, i.e. not before 1 July 2015?	4.1 Yes. Provided that the annual report of a CRR credit institution or company of a group to which a CRR credit institution belongs for 2014 records figures which exceed the thresholds specified in section 3 (2) sentence 1 no. 1 or 2 of the KWG, and due to the transitional provisions in section 64s (2) sentence 1 of the KWG, the period for preparing a risk analysis starts on 1 July 2015 at the earliest and ends no earlier than 31 December 2015.
5. Is a risk analysis audited by the auditor in connection with the audit of regular financial statements?	5.1 No, the risk analysis is not audited in the regular audit of annual financial statements. It cannot be ruled out, however, that the competent supervisory authority might order the audit to focus on the risk analysis.
6. Are CRR credit institutions required to notify the competent supervisory authority in writing of the **results of the risk analysis**?	6.1 No formal notification obligation exists. There is no general obligation to submit the risk analysis to the competent supervisory authority. The supervisory authority has the right, however, to request at any time that the risk analysis be submitted and explained to it. This is one of the reasons why the risk analysis should be plausible and documented in writing, in a manner which is comprehensible to third parties.
7 Up to what **point in time** may an institution – after initially breaching the threshold within the meaning of section 3 (2) sentence 1 of the KWG – **conduct new business** which is covered by the prohibition in section 3 (2) sentence 2 of the KWG? To what extent this is permitted?	7.1 **Existing business and new business** prohibited under section 3 (2) sentence 1 of the KWG, **including the prolongation of existing business**, may continue to be conducted until the end of the (if so extended) twelve-month period outlined in section 3 (2) sentence 1 of the KWG. Within the twelve-month period, beginning with the exceeding of the threshold within the

	meaning of section 3 (2) sentence 1 of the KWG, the prolongation of exiting business and the start of new business is permitted, provided that the total existing business and new business does not exceed the total business prohibited under section 3 (2) of the KWG at the time of exceeding the threshold. 7.2 The extent to which new business may be conducted depends on the nominal extent of existing business at the time (**point-in-time assessment**) when risk analysis identified a transaction as being prohibited. Otherwise, there would be a risk that CRR credit institutions or groups to which a CRR belongs may be incentivised to increase the volume of business which will be prohibited in future, up to the expiry of the deadline as of which the relevant prohibition comes into effect, thus taking disproportionately high risks. Such behaviour would be contrary to the purpose of the law, i.e. to prevent or ring-fence high-risk transactions. 7.3 The extent of new business may be **aggregated** in a reasonable manner, e.g. at a divisional or portfolio level. Institutions may use data for supervision which is appropriate for their purposes. 7.4 In light of this, the CRR credit institution or the group to which a CRR credit institution belongs should be able to **properly document** the portfolio and development of transaction volumes, also to third parties such as, for instance, supervisory authorities or law enforcement agencies.
8. How is the phrase "**prohibited business already being conducted**" (*bereits betriebenen verbotenen Geschäfte*) to be interpreted in connection with section 3 (2) sentence 1 of the KWG, which stipulates that conducting such business is prohibited after the expiry of the twelve months from exceeding the threshold only?	8.1 Both existing business and new business prohibited under section 3 (2) sentence 2 of the KWG may continue to be conducted until the expiry of the twelve-month period specified in section 3 (2) sentence 1 of the KWG. In the case of an extension application under section 3 (3) sentence 3 of the KWG

	being approved, the extended period applies (for details, see D questionitem 75 above). 8.2 Due to the transitional provision of section 64s (2) sentence 1 of the KWG, the twelve-month period pursuant to section 3 (2) sentence 1 of the KWG starts at the earliest on 1 July 2015 and ends at the earliest on 30 June 2016. 8.3 If the threshold was already exceeded and the transitional periods provided for in section 3 (3) sentence 1 no. 2 of the KWG have already expired, the CRR credit institution or company of a group to which a CRR credit institution belongs must ensure through its compliance process on an ongoing basis that the statutory prohibitions are complied with and that permitted trading and hedging activities do not disguise any prohibited proprietary business (see D item 2.233 para. 2 above).
9. What are the requirements in this context for the "**termination**" and "**transfer**" of prohibited transactions?	9.1 Section 3 (3) sentence 1 no. 2 of the KWG provides for the relevant institution's obligation to terminate such transactions or transfer them to a financial trading institution. This supervisory requirement is **independent of** how the transactions are **structured under civil law**. Accordingly, the prohibition under section 3 (2) sentence 2 of the KWG does not result in a nullity of a transaction within the meaning of section 134 of the BGB. The prohibition under section 3 (2) sentence 2 of the KWG only applies to CRR credit institutions and companies of a group to which a CRR credit institution belongs. A nullity of the individual legal transactions would also prejudice the interests of the institution's counterparty. Therefore, the prohibition may only apply to those persons who wish to conduct such transactions. However, in order to sufficiently emphasise the purpose of the Act, the termination obligation applies to the CRR credit institution or company of a group to which a CRR credit institution belongs, irrespective of any reasons for termination under civil law and threatening claims for damages asserted by clients. The

	contractual agreements are considered secondary insofar as they get in the way of the legal requirements under section 3 (2) to (4) of the KWG (the civil court may decide to what extent they remained valid). This ensures that the protective purpose of the Bank Separation Act is achieved, without unreasonably prejudicing the interests of the clients whose deposits must be protected. The CRR credit institution or company of a group to which a CRR credit institution belongs must ensure that relevant conditions under civil law are established already when entering into the relevant transaction. Particularly with respect to an institution's existing business, an application may be made for an extension of the period under section 3 (3) sentence 3 of the KWG.
10. Would a **subparticipation** or **loan sale** where the original lender remains the contractual partner of the borrower be sufficient for the **termination of prohibited business** within the meaning of section 3 (3) sentence 1 no. 2 of the KWG?	10.1 No. For the termination of the prohibited business, it is civil law –and therefore the termination of the legal relationship with the borrower – that is decisive and not economic considerations. For the prohibition in section 3 (2) sentence 2 no. 2 of the KWG, what is therefore decisive is which person is the contractual partner by legal definition based on the loan or guarantee agreement. The external legal relationship is independent of economic considerations. This corresponds to supervisory practice to date regarding business subject to an authorisation requirement. In relation the authorisation requirement pursuant to section 32 of the KWG, it depends on the external legal relationship with the borrower. Any far-reaching possibilities to exercise influence on the loan agreement or other powers granted within the internal relationship are, even if these are very extensive, irrelevant under supervisory law. This applies to both subparticipations in a loan and loan purchases/sales. The statements of the interpretative guidance regarding circumvention remain unaffected by this.
11. How **does the period allowed for transferring** or terminating prohibited transactions **change** if the period granted for preparing the risk analysis was extended?	11.1 An extension may only be applied for and granted in respect of the period specified in section 3 (3) no. 2 of the KWG.

12. Are there special requirements for the **plausibility and comprehensibility** parameters? What are the requirements for the extent of written documentation and the notification of results of the risk analysis?	12.1 Section 3 (3) sentence 2 of the KWG only stipulates that a risk analysis must be plausible, comprehensive and comprehensible and be documented in writing. Accordingly, while CRR credit institutions and companies of a group to which a CRR credit institution belongs are **free to choose their respective methods** for identifying potentially prohibited business in the **most efficient manner**, they are responsible for identifying such business comprehensively. This applies to their entire business, including minor or even marginal business areas. It is up to each CRR credit institution and company of a group to which a CRR credit institution belongs to decide itself whether it initially applies rough screening to exclude specific business areas and then only considers business activities with higher prohibition potential. However, potential criminal liability (*potenzielle Strafbewehrung*) remains if the approach is too cursory. Accordingly, the risk analysis also serves to protect the CRR credit institutions and companies of a group to which a CRR credit institution belongs and their responsible managers as the risk analysis aims at thoroughly considering their own business and helps to reduce the probability of committing a criminal offence. 12.2 CRR credit institutions and companies of a group to which a CRR credit institution belongs should **prove** in their risk analysis that it is comprehensive, i.e. considers their entire business. It is further expected that prohibited business and borderline cases are thoroughly described in a statement of the facts and a legal assessment. The statements must be comprehensible to an external third party, in particular external auditors, the supervisory authority and, ultimately, prosecution authorities. 12.3 Furthermore, it is understood that a risk analysis carried out in advance – with a view to observing the provisions of section 3 (2) and (3) of the KWG, which became effective on 1 July 2015 – **will remain valid** and that an analysis as of or after 1 July 2015 is confined to an update of the original risk analysis.

	12.4 No formal **reporting obligation** exists to notify the supervisory authority of the results of a risk analysis. However, the supervisory authority has the right to request that a risk analysis be submitted and explained to it.

E Expansion of the prohibitions by means of an administrative act pursuant to section 3 (4) of the KWG

1. Within which **period** must activities be terminated or transferred to a financial trading institution if BaFin orders a prohibition under section 3 (4) of the KWG?	1.1 There are **no** specific statutory provisions regarding the relevant periods. BaFin decides on the relevant period in consideration of the circumstances of each individual case.
2. At what **point in time** should the risk structure of the transactions be assessed?	2.1 The risk structure is assessed in a **continuous consideration** and evaluation by BaFin. This process is not primarily based on the short to medium-term performance of individual products/asset classes.
3. May BaFin order a prohibition within the meaning of section 3 (4) sentence 1 no. 1 of the KWG irrespective of whether substantiality thresholds within the meaning of section 3 (2) sentence 1 of the KWG are exceeded?	3.1 Yes.
4. Does this authority also cover **market making activities** notified to BaFin in accordance with the Short Selling Regulation? Or does the exception only relate	4.1 The authority granted in section 3 (3) of the KWG applies independently of the prohibitions specified in section 3 (2) of the KWG.

to high-frequency market activities pursuant to section 3 (2) sentence 2 no. 3 of the KWG?	

F Financial trading institutions within the meaning of section 25f of the KWG

1. May the **financial trading institution** belong to a group of institutions, financial holding group or mixed financial holding group?	1.1 Yes, the financial trading institution may belong to a group of institutions, financial holding group or mixed financial holding group (section 10a (1) sentence 1 of the KWG) if it is economically, organisationally and legally independent. However, no exceptions apply for group companies within the meaning of section 2a of the KWG (see section 25f (2) of the KWG).
2. May the financial trading institution use **services provided by group companies** or use their infrastructure?	2.1 Yes, the financial trading institution may generally use the infrastructure of the parent company or group companies or their services, to the extent that this does not result in **operational** or **reputational risks** for the CRR credit institution or company of a group to which a CRR credit institution belongs and for the other group companies, and such services may be **outsourced in accordance with the provisions of the KWG**.
3. Are there specific requirements for the independence of a financial trading institution within the meaning of section 25f (1) sentence 1 of the KWG?	3.1 With regard to the required independence of a financial trading institution, the following must **be observed**:

	(a) A financial trading institution may outsource activities or processes in accordance with section 25b of the KWG. (b) Appropriate staffing is required. The financial trading institution must comply with the MaRisk requirements for appropriate risk management. Pursuant to AT 7.1 item 1 of the MaRisk, the quantity and quality of staffing must be commensurate, in particular, with its internal operational needs, business activities and risk situation. Furthermore, the financial trading institution must comply with the requirements of section 25a (1) sentence 3 of the KWG in conjunction with the MaRisk requirements for establishing and providing resources to the control functions and their specific tasks. This also includes the compliance function as referred to under AT 4.4.2 of the MaRisk. The organisational structure must ensure that the front office and trading are clearly separated, up to and including the management board level, from the back office and the functions for risk control and for the settling and monitoring of trading. (c) Furthermore, the financial trading institution is a significant institution within the meaning of section 17 of the Remuneration Ordinance for Institutions (*Institutsvergütungsverordnung* – InstitutsVergV). (d) Since the financial trading institution is a credit institution, the requirements for management board members under section 25c of the KWG and for supervisory board members under section 25d of the KWG are applicable. The requirements as to the professional qualifications of a management board member are essentially determined on the basis of the size and structure of the institution as well as the nature and variety of the business activities pursued by this institution and have to be assessed on a case-by-case basis. The requirements for the expertise of the supervisory

	board members are dealt with in a similar manner. The financial trading institution may not be an "empty shell" and must, in particular, have an appropriate and effective risk management system. As a financial trading institution is to be considered a significant institution (see section 25c (2) sentence 6 no. 3 and section 25d (3) sentence 8 no. 3 of the KWG), it cannot be ruled out that the supervisory authority might require that there be more than just two management board members and, where necessary, full-time (i.e. not part-time) management board members. ~~(d)~~(e) In order to avoid conflicts of interest, the managers of the CRR credit institution or company of a group to which a CRR credit institution belongs must not at the same time be managers of the financial trading institution. (f) Furthermore, the financial trading institution must possess the necessary resources for business operations. The financial trading institution must be resourced and organised in such a way that it can continue operating in the event of a crisis affecting the superordinate company. ~~(f)~~(g) The CRR credit institution or company of a group to which a CRR credit institution belongs may not guarantee the financial trading institution's liabilities. However, the CRR credit institution or company of such group may act – subject to the prohibition in section 3 (2) of the KWG – as (a) a clearing member or (b) a collateral trustee for the financial trading institution at customary market terms (*zu marktüblichen Konditionen*). 3.2 A **secondary liability** of the CRR credit institution or company of a group to which a CRR credit institution belongs as may be provided for in section 133 of the German Transformation Act (*Umwandlungsgesetz* – UmwG) in respect of the liabilities outsourced to the financial trading institution does not conflict with

	the required independence under section 25f (1) sentence 1 of the KWG. This is because such secondary liability is not based on contractual agreements, but is based on statutory provisions.
4. Does the excluded application of section 2a of the KWG (**waiver provision**) to the financial trading institution prevent an application of section 2a of the KWG to the parent institution by way of a parent waiver?	4.1 Pursuant to section 25f (2) of the KWG, section 2a of the KWG does not apply to the financial trading institution so that the latter **may not** make an **application** under Article 7 or Article 8 of Regulation (EU) No 575/2013 (**waiver**). 4.2 However, this does not prevent the CRR credit institution as **parent company** from using a **parent waiver**. As a result, transactions concluded by the CRR credit institution or company of a group to which a CRR credit institution belongs with the financial trading institution are not subject, in particular, to the large exposure restrictions to the extent that the requirements are complied with on a consolidated basis. The financial trading institution must not benefit from cost savings that may be achieved by the CRR credit institution or company of such group, in particular in connection with the intragroup zero balancing pursuant to Article 113(6) of Regulation (EU) No 575/2013.
5. Does the requirement of an **independent refinancing** of the financial trading institution in section 25f (3) sentence 1 of the KWG exclude an intragroup refinancing?	5.1 The requirement of an independent refinancing **does not prohibit** the provision of financial means by the CRR credit institution or company of a group to which a CRR credit institution belongs to its financial trading institution. However, the provision requires that the refinancing, e.g. by way of loans, occurs at arm's length or in line with general market conditions and at risk-adequate terms (*markt- und risikogerecht*).
6. Which services is the financial trading institution permitted to provide in view of the **prohibition to provide payment services**?	6.1 The financial trading institution must not provide payment services within the meaning of the German Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz* – ZAG) and must not conduct e-money business. A financial trading institution is not a payment service provider within

	the meaning of section 1 (1) of the ZAG. Accordingly, a financial trading institution is, for example, not permitted to operate a "payment account" pursuant to section 1 (2) no. 1 alt. 3 of the ZAG as a payment service or to execute payment transactions through payment accounts on behalf of clients. A distinction must be made, however, between the operating of payment accounts and the operating of accounts for accounting purposes by the financial trading institution in order to account for the fees due to the financial trading institution from its clients for the services which the financial trading institution is permitted to provide, and to receive such fees on own "money accounts". 6.2 To the extent that the financial trading institution provides payment transactions outside the group to which a CRR credit institution belongs, which are directly related to the permitted services provided by financial trading institutions (transactions within the meaning of section 3 (2) and (4) of the KWG) and are exclusively provided to the clients for such services, these payment services are subject to the authorisation requirement pursuant to section 8 (1) of the ZAG. For example, the financial trading institution is permitted to held in custody the clients' credit balances from the prime brokerage business in the payment accounts, serving at the same time as collateral for the securities business, without infringement of the authorisation right (*Erlaubnisvorbehalt*) pursuant to section 8 (1) ZAG.

G Authorisation pursuant to section 32 et seq. of the KWG

1. Do companies of a group to which a CRR credit institution belongs, which conduct proprietary business commercially or on a commercial business scale, require **an authorisation pursuant to section 32 (1)** in conjunction with section 1 (1a) sentence 3 of the KWG if they limit their proprietary business to transactions not entered into for speculative purposes within the meaning of section 3 (2) sentence 3 no. 3 of the KWG?	1.1 The purchase or sale of financial instruments for own account does not require an authorisation, provided that such purchase or sale does not qualify as proprietary trading within the meaning of section 1 (1a) sentence 2 no. 4 of the KWG and is not provided in addition to the conduct of banking business or the provision of financial services. Only where a company conducts such proprietary business (a) commercially or on a scale which requires commercially organised business operations, and at the same time (b) belongs to a group to which a CRR credit institution belongs, is such proprietary business considered a financial service within the meaning of section 1 (1a) sentences 3 and 4 of the KWG and the company conducting such proprietary business is considered a financial services institution. This means that section 1 (1a) sentence 3 of the KWG also covers, according to its wording, but not according to its purpose and intent, such proprietary business which falls under the scope of application of the exemption in section 3 (2) sentence 3 no. 3 of the KWG. Section 1 (1a) sentence 3 of the KWG was only created to back up the prohibition in section 3 (2) sentence 1 of the KWG. Pursuant to section 3 (2) sentence 1 of the KWG, certain speculative transactions within a group to which a CRR credit institution belongs, which exceed, when considered on the basis of the CRR credit institution or the group as a whole, any of the thresholds defined in section 3 (2) sentence 1 of the KWG, are either prohibited and must, therefore, be terminated, or must be concentrated in a financial trading institution which holds an authorisation for such transactions pursuant to section 32 (1) in conjunction with section 1 (1a) sentence 3 of the KWG.

	However, section 3 (2) sentence 3 no. 3 of the KWG exempts certain transactions from this prohibition. Accordingly, where a company limits its proprietary business to such transactions which are not subject to the prohibition pursuant to section 3 (2) sentence 1 of the KWG, such company, notwithstanding the fact that it belongs to the group to which a CRR credit institution belongs, does not require an authorisation pursuant to section 32 (1) in conjunction with section 1 (1a) sentence 3 of the KWG.
2. Does a financial trading institution require an ~~licence~~**authorisation** which covers, as appropriate, any or all of the following activities: section 1 (1) sentence 2 no. 2 of the KWG (lending business), section 1 (1) sentence 2 no. 5 of the KWG or section 1 (1a) sentence 2 no. 12 of the KWG (deposit business), section 1 (1) sentence 2 no. 8 of the KWG (guarantee business), section 1 (1a) sentence 2 no. 3 of the KWG (portfolio management), section 1 (1) sentence 2 no. 4 of the KWG (proprietary trading) and section 1 (1) sentence 3 of the KWG (proprietary business)? Can the head office of a financial trading institution (see section 33 (1) sentence 1 no. 6 of the KWG) be located abroad to some extent?	2.1 **BaFin does not agree** that it would be possible for the financial trading institution for an appropriate transitional period to continue to use the authorisations granted to the CRR credit institution for transferred business. Depending on the business model, the financial trading institution requires an authorisation for the business conducted in the financial trading institution. The issuing of an authorisation and also any adjustments to the scope of authorisations already used must be consulted upon with the ECB with the involvement of BaFin. The company and the company purpose must correspond to the future corporate purpose of the financial trading institution. Therefore, from a supervisory point of view, the sphere of activity should, in addition to the positive individualisation required pursuant to section 3 of the GmbHG, also contain a negative statement that the financial trading institution may neither accept deposits or other repayable funds from the public nor provide payment services within the meaning of the ZAG. 2.2 **"Head office"** means the place where the management board is located and where the main business is conducted and decisions regarding risk policies are taken. BaFin has no general concerns where, for example, one of the four management board members or the main business and back office would be located abroad. It is recommended, however, to clarify such a proceeding with the competent foreign supervisory authority. Furthermore, the financial trading institution must have a sufficient minimum number of employees.