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BaFin

Bundesanstalt für
Finanzdienstleistungsaufsicht

Official instructions

for private financial transactions

of BaFin employees under section 11a of the Act
Establishing the Federal Financial Supervisory
Authority (*Finanzdienstleistungsaufsichtsgesetz –
FinDAG*)

("DA PFG")

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Abbreviation:	DA PFG
Rules set out by:	the President
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Competent organisational unit:	Division ZC
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Introduction

(1) The public has particularly high expectations of the integrity of the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin). If doubts about this integrity arise in the public mind, this will lead to a loss of confidence in BaFin’s ability to properly fulfil its duties and in the impartiality of its governing bodies and employees.

In light of this, the lawmakers have enacted statutory provisions governing private financial transactions (PFTs) by BaFin employees in section 11a of the Act Establishing the Federal Financial Supervisory Authority (*Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht – FinDAG*). The objective of the statutory provisions is to establish whether a conflict of interest is suspected as a result of private financial transactions by BaFin employees. This principle is expressed in particular in the prohibitions on certain PFTs set out in section 11a (1) of the FinDAG.

(2) As before, the prohibitions set out in Article 14 of the MAR¹, which are directly applicable as part of a European Regulation, must be complied with. The following actions are prohibited under Article 14 of the MAR:

- a) engaging or attempting to engage in insider trading,
- b) recommending that another person engage in insider trading or inducing another person to engage in insider trading or
- c) unlawfully disclosing inside information.

The actions prohibited under Article 14 of the MAR apply alongside those prohibited under in section 11a of the FinDAG. Any violation of the provisions of Article 14 of the MAR may be punished by imprisonment or a fine.

In addition, the general obligations under civil service and labour law that require honest and trustworthy conduct (section 61 (1) sentence 3 of the German Civil Service Act (*Bundesbeamtengesetz – BBG*) and section 241 of the German Commercial Code (*Bundesgesetzbuch – BGB*) in conjunction with the contract of employment) and on disinterested performance of duties apply (section 61 (1) sentence 2 of the BBG, section 241 of the BGB in conjunction with the contract of employment).

(3) All BaFin employees must conduct themselves in such a manner that avoids potential conflicts of interest. This means in particular that BaFin employees may not violate the requirements of section 11a of the FinDAG, the provisions of these official instructions and the statutory prohibition on insider trading. In the interests of ensuring public acceptance of administrative activities, and because of the outstanding importance of BaFin and its duties, employees are required to avoid even the mere appearance of mixing official duties with personal interests or of exploiting the information obtained through their official activities in the sense of inside information for their private financial gain. It is every employee’s duty to become acquainted with the relevant provisions and regulations applicable.

(4) Avoiding conflicts of interest in connection with PFTs is not only a duty under the statutory provisions, but also an expression of a culture of practised integrity. Executives have a particular role model function in this respect.

(5) BaFin monitors employees’ compliance with the statutory requirements and provisions of these official instructions. The effectiveness of the monitoring system is reviewed again over time. This may result in the need for future adjustments. The same applies to any necessary adjustments when introducing new IT systems for monitoring employee PFTs.

¹ Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

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Section 1 Purpose and scope

(1) These official instructions govern how private financial transactions are handled. They also describe the appropriate internal control mechanisms to be established by BaFin (section 11a (3) of the FinDAG). This serves to counter possible violations of the relevant statutory provisions by employees². In addition, these official instructions make use of the power to issue provisions governing exceptions and further prohibitions as well as certain notification obligations (section 11a (2), (4) sentence 2 of the FinDAG).

(2) These official instructions apply to all BaFin employees, i.e. persons who are currently working at BaFin BaFin as civil servants or who are currently in a contract of employment or a training contract with BaFin.

(3) The provisions applicable to employees within the meaning of subsection (2) apply equally to the following groups of persons: trainees, legal interns, persons on a working visit, employees of other authorities who work for BaFin.

(4) For employees who are absent for more than one month and who do not have access to BaFin's premises and IT systems during this period, the provisions of section 11a of the FinDAG and of these official instructions generally continue to apply for one month, beginning with the first day of absence after access is suspended (cooling-off period).

Section 2 Definitions

(1) "Financial instruments" within the meaning of these official instructions mean financial instruments within the meaning of section 2 (4) of the German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) and financial instruments within the meaning of Annex I section C of Directive 2014/65/EU.

(2) "Private financial transactions" within the meaning of these official instructions mean all transactions that employees enter into in financial instruments for their own or third-party account or on behalf of other persons, such as spouses, domestic partners, parents, children or friends. Private financial transactions are also those transactions in financial instruments that third parties enter into for account of a BaFin employee. Placing orders for transactions in financial instruments as well as amendments and cancellations are also considered to be transactions.

(3) The prohibitions on trading governed by these official instructions distinguish between two risk categories:

- a) Employees who possess or may possess insider information or may be exposed to a conflict of interest relating to financial instruments traded in the domestic regulated unofficial market (*Freiverkehr*) in the course of their official business are assigned to risk category 1.
- b) All other employees are assigned to risk category 2.

(4) "Possession of information in carrying out official duties" within the meaning of these official instructions is knowledge gained from official activities within the meaning of the schedule of responsibilities and the specific tasks and activities within the respective organisational units.

(5) "Legacy holdings" mean financial instruments that are subject to a prohibition on trading under section 11a of the FinDAG or these official instructions and that employees obtain or have obtained

² These relate in particular to the provisions of section 11a of the FinDAG and point (a) of Article 14 of the MAR.

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1. before the relevant prohibition on trading entered into force,
2. before the (initial) applicability of this provision to them or
3. during a longer absence (section 1 (4)).

(6) "Inherited or gifted holdings" mean financial instruments that are subject to a prohibition on trading under section 11a of the FinDAG or these official instructions and that employees have obtained without their own active involvement

1. after the relevant prohibition on trading entered into force or
2. after the (initial) applicability of this provision to them.

(7) "Authorised person" means the person authorised under section 11a of the FinDAG.

Section 3

Prohibitions relating to private financial transactions

(1) Employees may not enter into in private financial transactions that expose them to a conflict of interest. This is the case in particular if they have obtained relevant information in the course of their official activities that is not publicly available.

(2) The prohibitions of section 11a (1) sentence 1 of the FinDAG apply to all employees without exception. Furthermore, transactions in derivative financial instruments that relate to financial instruments under section 11a (1) sentence 1 nos. 1 – 3 of the FinDAG are prohibited for all employees. Finally, private financial transactions in units of investment funds whose main focus is on investing in the financial industry are prohibited for all employees, regardless of their risk category³.

(3) In addition, private financial transactions in financial instruments traded on the regulated unofficial market (*Freiverkehr*) or another multilateral trading facility (MTF) in Germany are prohibited for employees in risk category 1⁴. Further, private financial transactions in financial instruments traded in Germany in an organised trading facility (OTF) are prohibited⁵. Additionally, employees in risk category 1 are prohibited from entering into transactions in derivative financial instruments relating to financial instruments traded in Germany in a regulated unofficial market (*Freiverkehr*) or other multilateral trading facility (MTF), or in an organised trading facility (OTF).

(4) The statutory exceptions from the prohibitions on other investment funds whose main focus is not on investing in the financial sector and on portfolio management (section 11a (1) sentence 2 of the FinDAG) remain in force for all employees.

(5) Under section 11a (2) no. 1 second half-sentence of the FinDAG, the following financial instruments are exempt from the statutory prohibitions:

1. government bonds

³ This means units of investment funds within the meaning of section 1 (1) of the Investment Code (*Kapitalanlagegesetzbuch – KAGB*) whose main focus is on investing in the financial industry.

⁴ This means financial instruments that are traded in a multilateral trading facility (MTF) in Germany, are admitted to trading in a multilateral trading facility in Germany or for which an application for admission to trading in a multilateral trading facility in Germany has been submitted.

⁵ Organised trading facilities (OTFs) are platforms for trading in debt securities, structured financial products, emission certificates or derivatives ("non-equity instruments"), see point (23) of Article 4(1) of MiFID II.

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2. exchange traded commodities (ETCs), provided that

- the delivery claims are fully collateralised and
- they are held by way of direct participation.

The aforementioned exemptions apply to all employees unless there is a conflict of interest or appearance of such conflict.

(6) Employees are prohibited from trading in financial instruments during working hours and from using BaFin facilities and equipment for this purpose.

Section 4 Potential extensions of prohibitions

(1) Based on the assessment of the evaluation by the management of a Sector regarding potential additional conflicts of interest, the authorised person may propose the extension of the trading prohibitions applicable under section 11a (1) of the FinDAG or these official instructions. If the circumstances for extending trading prohibitions no longer exist, the authorised person must submit a proposal to cancel the extension of the trading prohibitions after consulting the management of the Sectors concerned. The President is responsible for deciding on extending or cancelling trading prohibitions.

(2) Extensions to trading prohibitions are communicated to the employees affected by them.

Section 5 Prior approval for certain types of participation or the acquisition of certain rights to income

(1) For

1. participation in investment clubs or comparable associations that enter into transactions in financial instruments, derivatives or comparable investments, and
2. the acquisition of rights to income from foundations, fiduciary assets and similar constructs,

employees require the prior approval of the authorised person.

(2) An application for prior approval under subsection (1) must be submitted to the authorised person via the employee's immediate superior. The application must contain sufficient information to enable an assessment of the participation or the right to income, such as investment strategy, bylaws, etc. In the event of changes to the information underlying granted approval, these changes must be notified to the authorised person without delay.

(3) The authorised person may only give approval under subsection (1) if no conflicts of interest are to be expected as a result, in particular with regard to the obligations under civil service or labour law to perform duties impartially and without bias or the obligation to conduct oneself in an honest and trustworthy manner and to perform duties disinterestedly.

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Section 6 Obligations of employees

- (1) Employees are obliged to comply with the prohibitions on trading. To do this, they must themselves verify compliance with the statutory provisions and the requirements of these official instructions before entering into any private financial transaction.
- (2) When engaging in private financial transactions for their own account or for the account of a third party, the employees are required to employ utmost caution and care to safeguard BaFin's reputation and credibility as well as the public's confidence in the integrity and impartiality of BaFin's staff. All private financial transactions must be restrained and non-speculative and they must be in reasonable proportion to the employees' income and wealth such that the financial independence of the employees is not put at risk.
- (3) Employees are obliged to provide information on private financial transactions if required by the authorised person and to submit and, if not available, to obtain, related documents. The obligation to provide information and to submit documents also includes in particular the disclosure of securities accounts, securities account details and transactions, positions and contracts in financial instruments, and the results of the verification of transactions with regard to compliance with prohibitions and requirements. For verification purposes, the authorised person may also require the submission or provision of information over and above the documents or information referred to in these official instructions.
- (4) Information and the submission of documents may be required regardless of whether there are indications of a violation of section 11a of the FinDAG, these official instructions or the prohibition of insider trading (point (a) of Article 14 of the MAR).
- (5) The obligation to provide information and submit documents commences at the point in time at which a service, employment or training relationship or legal relationship of the employee with BaFin exists and ends when the employee leaves BaFin. The obligation to provide information and submit documents refers to the transactions in financial instruments covered by these official instructions.

Section 7 Notification requirements of the employees

- (1) Under section 11a of the FinDAG, employees are obliged to notify private financial transactions within the meaning of section 2 (2) of the official instructions without undue delay. Among other things, they must give the date and time of the order and information about the company⁶. Likewise, they must submit a notification without undue delay if a financial instrument was acquired through inheritance or as a gift. In this case, among other things, they must notify the date and necessary information on the securities account details. The notifications must be made using the notification procedures and forms provided by the department for this purpose.
- (2) If employees receive a power of attorney for a securities account from third parties or if they otherwise hold authorisation to operate a third-party securities account, they must notify this to the authorised person without being asked and without delay using the form specified by the department. The consent of the person granting the power of attorney to the disclosure of private financial transactions must be obtained by the employees and also provided together with the form.

In the event that powers of attorney have already been granted, the consent of the person granting the power of attorney to the disclosure of employee transactions must be obtained immediately and notified to the authorised person.

⁶ Companies within the meaning of section 11a (1) sentence 1 no. 3 of the FinDAG.

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Without this notification, employees may not make use of a power of attorney.

(3) Using the notification procedure specified by the department, employees must submit a declaration of completeness once a year by 31 January of the following year with regard to the notification of all private financial transactions they entered into in the previous year. They must use the form specified by the department. If they did not enter into any private financial transactions, they must submit a negative declaration relating to the previous year by 31 January of the following year.

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Section 8

Reservation of consent to dispose of legacy holdings or inherited and gifted holdings

(1) Before employees dispose of any financial instruments from legacy holdings within the meaning of section 2 (5) of these official instructions or inherited and gifted holdings within the meaning of section 2 (6) of these official instructions, they must obtain the consent of their immediate superior using the specified form (pre-clearance).

Consent is deemed to have been given if the employee's immediate superior confirms that, to their knowledge,

1. there is no threat to the impartial and disinterested performance of duties due to this specific disposal transaction and in relation to the employee's official duties, and
2. the employee does not possess inside information in carrying out the employees' official duties (Article 7 of the MAR) relating to this transaction as a result of their official duties.

As a general rule, the immediate superior must issue the confirmation within three working days after receipt of the pre-clearance form if the conditions under sentence 2 nos. 1 and 2 are met.

(2) The employee may only instruct the disposal of the financial instrument within three trading days after consent has been given (order placement) or enter into the transaction in this respect. All provisions of these official instructions apply to the disposal, in particular the notification obligations under section 8 of these official instructions and more far-reaching information and document submission obligations to the authorised person. The form referred to in subsection (1) must be attached to the notification.

(3) Consent under subsection (1) does not constitute a conclusive and fully comprehensive assessment as to a transaction prohibited by MAR has been implemented.

Section 9

Examination of the notifications by immediate superiors

(1) It may be necessary in individual cases for the notifications submitted by employees under section 7 (1) of these official instructions to be examined by their immediate superiors, based on their current knowledge, as to whether, with regard to the notified private financial transaction, the employees

1. were not obviously exposed to a conflict of interest and
2. did not possess inside information (Article 7 of the MAR) concerning this transaction on the basis of their official duties.

If it is necessary to involve immediate direct superiors, the authorised person will contact them accordingly.

(2) When PFTs are notified by employees who are involved in supervising investment funds, the immediate superiors must always be involved in accordance with subsection (1) in the examination of notifications submitted.

(3) The results of the advance examination described in subsection (1) must be documented by the immediate superior using the procedure specified by the department. In principle, the documentation should be completed at the latest within 10 working days after receipt of a notification to be examined by the direct superior.

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Section 10

Right to refuse to provide information

(1) Employees may refuse to provide information in response to questions whose answer would place them or one of their relatives specified in section 383 (1) nos. 1 to 3 of the German Code of Civil Procedure (*Zivilprozessordnung*) at risk of criminal prosecution or proceedings under the Act on Breaches of Administrative Regulations (*Gesetz über Ordnungswidrigkeiten*) (section 11a (4) sentence 4 of the FinDAG in conjunction with section 6 (15) of the WpHG).

(2) However, the right to refuse to provide information under section 11a (4) sentence 4 of the FinDAG in conjunction with section 6 (15) of the WpHG does not include obligation to report private financial transactions set out in section 11a (4) sentence 1 of the FinDAG (see section 7). Similarly, the right to refuse to provide information does not include the obligation to submit documents (section 11a (4) sentence 3 of the FinDAG).

(3) Persons obliged to provide information must be informed of their right to refuse to provide information when they are required to provide information.

Section 11

Duties of the authorised person

(1) The authorised person is obliged to receive the notifications by employees in accordance with section 11a of the FinDAG, including in conjunction with these official instructions, and the examination by the superiors in accordance with section 8 of these official instructions.

(2) The authorised person must examine the notifications by employees and the consents given by the immediate superiors for compliance with the statutory requirements of section 11a of the FinDAG and of these official instructions and, in accordance with section 11a (3) of the FinDAG, with regard to violations of the prohibition under point (a) of Article 14 of the MAR. If necessary, the authorised person must encourage employees or immediate superiors to comply with section 11a of the FinDAG and these official instructions as well as with the prohibition under point (a) of Article 14 of the MAR. The authorised person can require BaFin employees to provide information and to submit documents on transactions in financial instruments (section 11a (4) sentence 3 of the FinDAG). This may also be carried out within the framework of a random inspection.

(3) As part of the internal control mechanism, the authorised person must arrange for random inspections to be carried out. Requiring the provision of information and the submission of documents does not require any indications of a violation of section 11a of the FinDAG, of official instructions issued by BaFin or a person authorised by BaFin in accordance with section 11a (2) of the FinDAG, or of the prohibition of insider trading (point (a) of Article 14 of the MAR).

(4) The authorised person may carry out additional checks as required. Checks on an event-driven basis may be carried out, for example, in particular in the event of possible misconduct of employees, investigations by law enforcement agencies and inquiries by the Executive Board, from the political sphere or the Federal Ministry of Finance.

(5) In order to perform his or her duties in accordance with section 11a of the FinDAG and these official instructions, the authorised person may obtain statements from all BaFin organisational units on the assessment of facts relevant to monitoring, in particular regarding Chapter 2 of the MAR, whereby in particular the data protection requirements for the protection of employees' personal data must be observed.

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(6) The authorised person must report to the Executive Board on all relevant issues and matters relating to section 11a of the FinDAG, including all requirements of these official instructions, as well as point (a) of Article 14 of the MAR.

(7) The authorised person has the right to report directly to the Executive Board.

Section 12

Violations of the obligations under section 11a of the FinDAG and these official instructions

A breach of the obligations under section 11a of the FinDAG, the provisions of Article 14 of the MAR or these official instructions may have disciplinary or labour law consequences for employees.

Section 13

Data protection information

(1) Under Article 13 of the GDPR, BaFin is obliged to inform the data subjects affected by data processing by BaFin of their rights if BaFin collects personal data. In addition to the information already listed in these official instructions, the following additional information is provided to the employees.

(2) Data is collected in accordance with Article 6(1)(e) of the GDPR in connection with the tasks arising from section 11a (3) of the FinDAG for the monitoring of employee transactions. The data processing serves the purposes specified in section 11a (3) of the FinDAG and section 1 (1) of these official instructions.

(3) Personal data is destroyed two years after the end the monitoring year in which the notifications are made (cut-off date 31 December) unless proceedings are pending due to a violation of these official instructions, of section 11a of the FinDAG, including in conjunction with these official instructions, or of the MAR, or evaluations or investigations have not been completed. Notifications concerning powers of attorney for securities accounts, information on regular savings plans as well as information in connection with participation rights and rights to income under section 5 of these official instructions must be destroyed at the end of one year after the expiry of the power of attorney for the securities account and the termination of regular savings plans as well as participation rights and rights to income under section 5 of these official instructions, provided that the employee has brought this to the attention of the authorised person. Notifications of powers of attorney for securities accounts, information on regular savings plans as well as information in connection with participation rights and rights to income under section 5 of these official instructions must be deleted at the end of one year (31 December) after the termination of the employment relationship. Personal data collected during an examination under section 11 (3) and (4) of these official instructions must be deleted no later than two months after the conclusion of the examination, provided that it is not followed by any further procedure based on that examination.

(4) Personal data must be processed exclusively within BaFin.

(5) As a matter of principle, data subjects have a right of access to the personal data stored, a right to rectification or to erasure or to restriction of processing or a right to object to processing and the right to data portability. Furthermore, they have a right to lodge a complaint with the competent data protection authority.

Contact information:

Responsible organisational unit: email: PrivateFinanzgeschaefte@bafin.de

Official data protection officer: email: Datenschutz@bafin.de

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Data protection authority:
Federal Commissioner for Data Protection and Freedom of Information
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Tel.: +49 (0)228-997799-0
email: poststelle@bfdi.bund.de

Section 14 Entry into force

These official instructions enter into force on their publication and announcement. The previous "Official instructions on employee transactions under section 28a of the WpHG" of 14 May 2019 and the "Official instructions on employee transactions under 28a of the WPHG – Addendum" of 16 October 2020 will cease to apply at such time.

Mark Branson

President