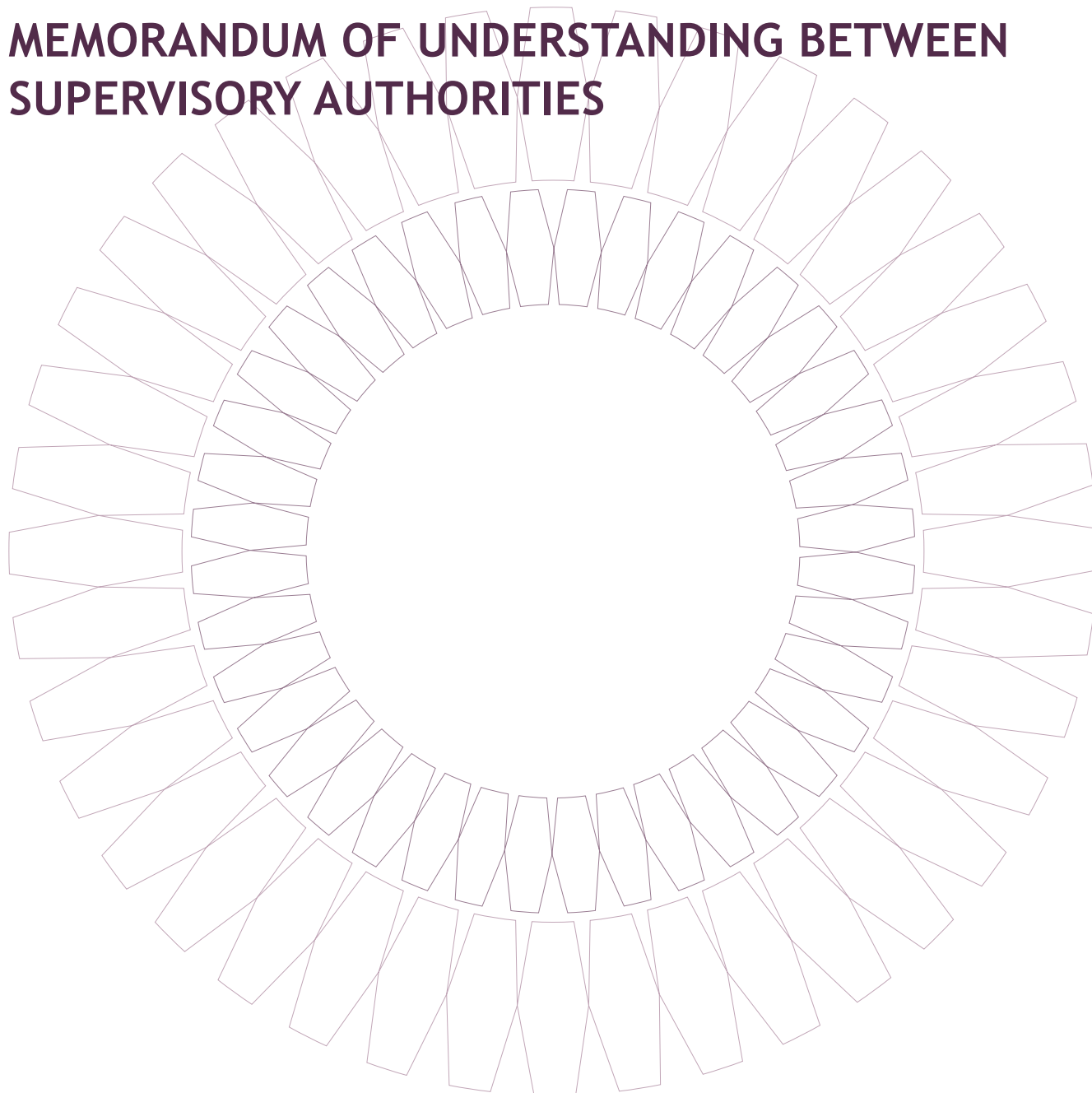
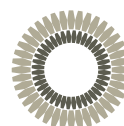


# GENERAL CONSIDERATIONS FOR A CROSS-BORDER MEMORANDUM OF UNDERSTANDING BETWEEN SUPERVISORY AUTHORITIES



*“Strengthening banking regulation  
and supervision in the Americas”*



**A S B A**

ASSOCIATION OF SUPERVISORS  
OF BANKS OF THE AMERICAS

**GENERAL CONSIDERATIONS FOR A CROSS-BORDER  
MEMORANDUM OF UNDERSTANDING BETWEEN  
SUPERVISORY AUTHORITIES**

May 2022

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# INTRODUCTION

The existence of financial groups operating in more than one jurisdiction and the interrelationships between financial firms established in different jurisdictions have led several financial authorities to sign various forms of cooperative arrangements, namely “cooperation agreements,” “memoranda of understanding (MoU),” or “declarations of cooperation.” Some countries prefer different form of cooperation, such as the Exchange of Letters (EoL)<sup>1</sup>.

To ensure simplicity in this document, we will generally refer to those cooperative arrangements as MoUs which will be understood as an agreement between two or more parties outlined in a formal document. MOUs are not legally binding but communicate the mutually accepted expectations of the signing parties.

The increase in the number and scale of financial groups operating in various jurisdictions in the Americas region, the recent changes in financial institutions’ resolution frameworks, and the emergence of new risks, including cyber risks, suggest the convenience of reviewing of the content of the existing cooperative arrangements with a view to updating them.

In addition, some members from the Association of Supervisors of Banks of the Americas (ASBA) also noted that their agreements vary significantly in scope and objectives and, as they were signed several years ago, may not address all the relevant aspects of the current risk landscape.

In this context, the ASBA Technical Committee considered it to be appropriate to develop a series of principles and recommendations that could serve as a reference for ASBA members when updating their MoUs or signing new ones with other jurisdictions with which they have not yet done so.

To this end, a specific working group was convened to identify the core elements that should be considered for inclusion in an arrangement between financial supervisory agencies, in line with the latest developments at international level and needs of ASBA members. The purpose is to procure that ASBA members consider the use and/or adaptation of these guidelines in accordance with their legal frameworks and particular circumstances for the negotiation of bilateral or multilateral agreements.

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<sup>1</sup> Basically, this exchange of letters can have a more summarized or principled text, but it must contain the essentials, especially regarding the confidentiality issues. Under U.S. law, an MoU is the same as a letter of intent. In fact, arguably a memorandum of understanding, a memorandum of agreement, and a letter of intent are virtually indistinguishable. All communicate an agreement on a mutually beneficial goal.

Not all of the guidelines herein will be relevant or appropriate for all of ASBA's membership but will hopefully provide a useful starting point for the discussion and identification of shared priorities and concerns.

The document covers the following topics: information sharing, confidentiality, and data protection; licensing and authorizations; ongoing supervision; on-site inspections; and cooperation during crisis situations. Additionally, depending on the scope and mandates, the participating authorities may evaluate including the supplemental principles and recommendations that address specific elements regarding cybersecurity, anti-money laundering and countering the financing of terrorism (AML/CFT), and resolution planning and resolvability assessment.

# CORE ELEMENTS

## 1

### INTRODUCTORY STATEMENT ON THE MOU

#### KEY PROVISIONS

##### *Objectives and scope*

This introductory subtopic should be able to describe the MoU in question as well as the qualifications of the parties (credentials, form of constitution, supervisory powers, laws that constituted it and that it is required to follow, etc.).

#### ***SUGGESTED WORDING: Introductory statement***

Authority A and Authority B, hereinafter referred to jointly as “the Authorities”, express their willingness to co-operate on the basis of mutual trust and understanding and agree to base their cooperation in the field of supervision and resolution of supervised institutions on the principles and procedures outlined in this Memorandum of Understanding (MoU). Both recognize the Basic Principles for Effective Supervision issued by the Basel Committee on Banking Supervision (BCBS).

#### ***SUGGESTED WORDING: Qualifications of the authorities***

**AUTHORITY A** is entrusted with the regulation, supervision, and resolution of financial entities and payment institutions falling under **JURISDICTION A** pursuant to Articles XXa and YYa of Law WWa of ZZa (the Banking Law).

**AUTHORITY A** is a special nature agency characterized by... [example: absence of ties or hierarchical subordination to any Ministry based on its technical, operational, administrative, and financial autonomy provided by Law XXXX, etc.]

**AUTHORITY B** is entrusted with the regulation, supervision, and resolution of the financial entities and payment institutions falling under **JURISDICTION B** pursuant to Articles XXb and YYb of Law WWb of ZZb (the Banking Law).

**AUTHORITY B** is a special nature agency characterized by... [example: absence of ties or hierarchical subordination to any Ministry based on its technical, operational, administrative, and financial autonomy provided by Law XXXX, etc.]

# 2

## SCOPE OF THE AGREEMENT

### GENERAL CONSIDERATIONS

1. The MoU should follow the basic principles and recommendations set by international standards. The MoU wording should be guided by the principles and recommendations issued by international organizations, such as BCBS and the Financial Action Task Force (FATF).
2. The MoU often covers, at the least, the following topics: information sharing, confidentiality, and data protection; licensing and authorizations; ongoing supervision; on-site inspections; and cooperation during crisis situations. The Authorities may also consider the inclusion of supplemental provisions that address specific elements regarding cybersecurity, AML/CFT, and/or resolution planning and resolvability assessment.
3. The MoU wording establishes a shared understanding of a process through which information can flow and cross-border supervisory cooperation can be facilitated.
4. When assessing another authority's invitation to engage in the negotiations of an MoU, and if there are concerns regarding the differences in the supervisory scope (types of institutions supervised by one authority and not by the other), authorities take into account that there is always an "intersection set" between these scopes, in which the cooperation may take place.

### *SUGGESTED WORDING: Principles for governing the agreement*

1. The purpose of the MoU is to formalize cooperation and information sharing mechanisms between the Authorities, promoting the integrity, stability and financial soundness of supervised institutions and financial system.
2. The scope of this document encompasses information sharing, licensing (both issuance and revocation) of cross-border establishments, ongoing supervision, on-site inspections, and cooperation during crisis situations<sup>2</sup>.

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<sup>2</sup> The Authorities, where appropriate, may also consider the inclusion of other matters such as cooperation in resolution planning and implementation of the resolution measures in cross-border establishments; the sharing of information related to cyber security and information regarding the relevant third-party technology service providers for the financial sector; and financial crimes issues, if available.



3. The Authorities intend to advise each other on cross-border establishments operating in their respective jurisdictions, upon specific request, to the extent allowed under the law and on any other relevant issues that might be required to assist with the supervisory process.
4. The MoU should not be considered as an international agreement and should not establish legally binding obligations, nor should it delegate any provision of national, international, or supranational legislation in relevant jurisdictions. Therefore, neither of the Authorities should bear any liability when it comes to their eventual failure to comply with it.
5. The MoU should not override national laws, each supervisor should inform the other of the existence of any legislative or administrative restrictions on information exchange, the caveats should be disclosed.
6. The Authorities intend to advise each other on any aspect of their regulatory systems and notify each other about any major change in their domestic rules and regulations within their jurisdiction. In particular, changes that can have a significant bearing on the activities of the cross-border establishments or that may require renegotiation and/or update of the MoU should be informed.
7. References to the proportionality considerations in the MoU include the consideration of the materiality of the supervised entity or its cross-border establishments to the group and systemic importance and impact on financial stability. The Authorities acknowledge that the level of cooperation sought and provided is likely to be greater in relation to the supervised entities or their cross-border establishments in situations where these are materially or systemically important to one or both of the Authorities.
8. The MoU becomes effective on the date of the last signature and should remain in existence until either of the Authorities notify the other in writing of its wish to revise, amend, or withdraw from the MoU. The Authorities should agree on the appropriate timing for notifications, e.g., one month's notice might be given before carrying out any such actions.
9. Authorities should periodically review the MoU in light of the subsequent developments in the participating jurisdictions' legislation and the experience gained in the supervision of the respective institutions and revise the MoU if appropriate.

# 3

## INFORMATION SHARING, CONFIDENTIALITY, AND DATA PROTECTION

### KEY PROVISIONS

#### *Objectives and scope*

1. The information exchange between authorities is key for the complete and thorough supervision of institutions belonging to cross-border banking groups.
2. Authorities often enter into agreements providing information exchanges only if the information disclosed is subjected to the guaranteeing of professional secrecy and the exchange of information is used exclusively for the purpose of performing the supervisory task of the authorities.
3. In order to facilitate smooth communication, the authorities can nominate relevant contact points who represent them in the activities covered in the MoU. The contact points may be specific people or positions.
4. Given that experience shows some difficulty in keeping contact details on persons up-to-date due to agency turnover, it is suggested that Authorities use position descriptions instead of the names of specific persons to ensure greater permanence and ease of updating.
5. The Authorities intend to maintain up-to-date contact lists and review the contact lists periodically. The Authorities intend to inform each other of any of the changes in those contacts without undue delay.
6. Given that experience shows some difficulty in keeping contact details on persons up-to-date due to agency turnover, it is suggested that Authorities use position descriptions instead of the names of specific persons to ensure greater permanence and ease of updating.

#### ***SUGGESTED WORDING: Exchange of information***

1. Each Authority intends to share and provide the other Authority, on a best-effort basis, upon request, where appropriate and insofar as it is feasible to the extent permitted by their applicable legal framework, with any information under its supervisory remit that is useful for the exercise of the other authority's supervisory tasks or responsibilities.

2. Authorities intend to share information as soon as practically possible and without undue delay following the determination of relevant events by the Authorities. The Authorities provide information to the relevant contact person identified in the contact list of the MoU in written or electronic form unless specified otherwise in the request made for such information.
3. A request for information includes at minimum the following elements<sup>3</sup>:
  - a. a description of the facts underlying the request including the reasons why the information is likely to be relevant for the proper performance of the requesting Authority's tasks in light of the requesting Authority's legal framework This also may include a specification of the supervisory tasks that are connected with the subject matter of the request;
  - b. if the information is provided by the requesting Authority for confirmation or verification, the requesting Authority should submit the subject information, and the type of confirmation or verification sought;
  - a. if it is anticipated that the requesting Authority will or must share the information received, a description of to whom, if already known, onward disclosure of information provided to the requesting Authority is likely to be necessary as well as the need-to-know and the purpose that such a disclosure would serve;
  - b. any information known to, or in possession of, the requesting authority that might assist the receiving authority to fulfill the request; and
  - c. the reasonable time by which the response is requested must be provided, taking into account the nature and urgency of the information requested.
4. Following the consultation between the Authorities, the request may be denied in the following situations:
  - a. where the cooperation requires an authority to act in a manner that would violate applicable legislation.
  - b. where the request does not fall within the scope of the MoU or is not made in accordance with the terms of the MoU;
  - c. where the provision of information is disproportionate or significantly disrupts the functioning of the authority receiving the request; or
  - d. for reasons for public interest or national security.

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<sup>3</sup> Note that this will ultimately be determined by the providing authority's disclosure regulations if applicable. For instance, the FDIC would need the information required by 12 CFR Part 309 before it could share information, even if an MoU existed.

5. If the request for information cannot be fulfilled in part or whole, the authority receiving the request may consider other ways of assisting the requesting authority, including whether the information can be provided by another authority within its jurisdiction.
6. In cases where a request for information is denied, or the information requested is not available, if possible, the receiving authority should provide the reasons for not sharing the information.
7. For any circumstances that can be classified as an urgent or a crisis situation (see Section 7), information may be exchanged/requested via telephone or a physical meeting between the Authorities. Unless otherwise agreed, such requests will be subsequently confirmed in writing within an agreed span of time.
8. The Authorities intend to advise each other, upon request or on their own initiative, of any aspect of their regulatory and supervisory systems and to the other Authority notify any major changes in their domestic rules and regulations within their jurisdiction, whenever those changes are likely to have a significant bearing on the activities of cross-border establishments.

***SUGGESTED WORDING: Collection and exchange of supervisory and other information from the supervised Institutions***

1. Subject to the proportionality considerations and applicable laws and regulations, the Authorities intend to share information needed for the performance of their ongoing supervisory tasks and responsibilities in relation to the specific supervised entities and their cross-border establishments.
2. Subject to the proportionality considerations and the Authorities' agreement, in addition to the applicable laws and regulations, such information may include include, but is not limited, to the following:
  - a. capital and liquidity position;
  - b. internal controls and corporate governance, including major changes in the structure of the group, operational incidents, operational losses, or IT system disruption, where relevant, for its cross-border establishments;
  - c. communications and transmissions of information within the Authorities, and between the Authorities and supervised entities, and all the other information contained in non-public statements or communications made by the Authorities;

- d. material findings from a supervised entity's internal risk or audit functions relevant to the cross-border establishment;
  - e. if applicable, material findings from external auditor reviews, where relevant for the cross-border establishment; and
  - f. to the extent to which it is compatible with the specific competencies conferred upon each Authority, information on AML/CFT systems, and controls, where relevant for the cross-border establishment (See Section 9).
- 3. An Authority seeking information that does not originally stem from the other Authority may request the information directly from the supervised entity or its cross-border establishment.

### ***SUGGESTED WORDING: Principles regarding confidentiality***

- 1. The Authorities acknowledge that all information exchanged on the basis of the MoU, or obtained through an on-site inspection, is confidential information within the Authorities' applicable legal framework, unless specified otherwise.
- 2. The Authorities preserve the confidentiality of the information received to the extent permitted by the applicable legal framework. Any confidential information received by the Authorities will be used exclusively within the responsibilities of the respective Authority for lawful supervisory purposes and will not be disclosed to third parties except as specifically set forth in the MoU.
- 3. The Authorities will ensure that all the persons dealing with, or having access to the confidential information provided by the other authority (including the members of the authority, employees, and any authorized external providers having access to confidential information), are bound by the obligations of professional secrecy, in compliance with the applicable legal frameworks, even after the termination of their duties.
- 4. By providing confidential information via an electronic format or transferring the electronic documents through the Internet, the Authorities ensure an adequate level of data security.
- 5. The Authorities will have appropriate arrangements in place to store, transfer, and control the scope of confidential information internally.

6. Except for what is provided in paragraph 7, before a receiving authority discloses any confidential information received from another authority to a third party, the receiving authority will request and obtain prior written consent, which will not be unreasonably withheld from the authority that provided the information. Before disclosing the confidential information to such a third party, the receiving authority will obtain a commitment from the respective party that the information will be kept confidential.
7. If the receiving authority is required by statute or legal process to disclose the confidential information received under the MoU to a third party, it will, to the extent permitted by law, inform the authority that provided the information about the possible onward sharing. If the authority that provided the information does not consent to such a disclosure, the receiving authority should take all the available and appropriate steps to resist disclosure, including the employment of legal means to challenge the order and advising the third party requiring such information of the possible negative consequences that such a disclosure might have on the future exchanges of confidential information between the Authorities.
8. No privileges or confidentiality associated with the information provided by an authority are to be waived as a result of the sharing of such information pursuant to the MoU.
9. In the event of the termination of the MoU, the aforementioned principles regarding confidentiality will continue to apply to any confidential information provided under the MoU prior to termination.

### *SUGGESTED WORDING: Principles regarding data protection*

1. Authorities are bound by the applicable legal framework to protect the personal data contained in the information they exchanged under the terms of the MoU.
2. Information should not contain any individualized information unless it is of particular relevance to the home supervisor. In this case, the home supervisor may request the assistance of the host supervisor, who will endeavor to provide the information to the extent permitted by the jurisdictional legislation.

## OTHER CONSIDERATIONS

- » Professional secrecy and confidentiality standards are a precondition for cooperation agreements. Legal regimes of each supervisory authority country should include at least the following:
  - Ensure that the concepts of confidential information, professional secrecy, and restrictions on the use and transfer of confidential information are clearly stated in the legal regimes. In that sense, it should be ensured that authorities' discretionary power to declassify confidential information is almost nonexistent.
  - Ensure that the professional secrecy obligation is extended beyond the term of the employment for or on behalf of the authority. Disclosure of confidential information in breach of the obligation of professional secrecy by any person bound by the obligation should be unlawful and be subjected to penalties.
  - Restrict the use of confidential information to the purpose on which the information was provided.
  - Establish restrictions on the transfer of confidential information.
- » Regarding the restrictions on the transfer of confidential information:
  - Disclosure to courts should be limited to criminal courts, courts in charge of institution's liquidation or bankruptcy, and administrative courts (only for cases where the authority is an active party).

# 4

## LICENSING AND AUTHORIZATIONS

### KEY PROVISIONS

#### *Objectives and scope*

1. Authorities recognize the importance of ongoing contacts between cross jurisdictional supervisors during the licensing (both issuance and revocation) or an authorization process of a cross-border establishment of a financial institution.
2. Activities may include, but are not limited to the following: i) establishment of a cross-border office(s) through licensing (both issuance and revocation) or acquisition; ii) assesses changes in the ownership structures of cross-border establishments; and iii) assesses the fitness and properness of the candidates for management positions in cross-border establishments (directors or members of the management board, key function holders, etc.) or of qualified shareholders).

Examples of the fitness and properness of an applicant bank's management may include a review of its financial soundness, competency, reputation, and reliability. If legally and practically possible, an additional verification during this process may consist of the execution of background investigations on principal shareholders and top management officials, which may require the obtaining of information about their financial, legal, and employment status.

#### ***SUGGESTED WORDING: Principles for the cooperation on licensing and authorization***

1. Authorities intend to consult each other before granting authorization to a cross-border establishment in the other country or when assessing any acquisition of controlling interest, as defined by their respective national laws, of one supervised entity by another supervised entity within the jurisdiction of the other authority.
2. Authorities intend to timely notify the appropriate home authority of the applications to get approval of cross-border establishments in one jurisdiction by a supervised entity from the other jurisdiction.



3. In the process of establishing a cross-border establishment within the territory of the host authority, and upon request, to the extent permitted by the regulation or policy, the home authority can inform the host authority about the solvency ratio and the historic track-records of the parent supervised entity, as well as the details of the deposit guarantee schemes in the home country.
4. The home authority intends to timely inform the host authority of whether the applicant is in compliance with banking laws and regulations, and whether it may be expected for the foreign parent, given its administrative structure and internal controls, to manage the cross-border establishment in an orderly manner.
5. Upon request, and to the extent allowed by applicable law, the home authority attempts to assist the host authority by verifying or supplementing any information submitted by the applicant financial institution.
6. The home authority will inform the host authority of whether the approval of the cross-border establishment depends on its authorization.
7. To the extent reasonable and consistent with law, authorities intend to share information that may be useful in assessing the fitness and properness of prospective directors, key function holders, relevant shareholders, and/or ultimate beneficiaries of the property of a cross-border establishment, provided such information is available to the Authorities.

# 5

## ONGOING SUPERVISION

### KEY PROVISIONS

#### *Objectives and scope*

The Authorities may conduct regular meetings, as appropriate, to discuss the general supervisory and coordination matters, discuss the issues concerning the supervised entities that maintain cross-border establishments in their respective jurisdictions, and review the effectiveness of the MoU.

#### ***Suggested wording: Principles for the cooperation on licensing and authorization***

1. To facilitate the ongoing supervision of the supervised entities and their cross-border establishments, the Authorities may agree on the establishment of supervisory examination programs (SEP) for specific supervised entities with cross-border establishments. Such supervisory examination programs may, whenever agreed, cover relevant tasks and activities, such as:
  - a. pre-planned meetings between authorities;
  - b. pre-planned on-site examinations to the supervised entities and cross-border establishments;
  - c. pre-planned supervisory visits to the supervised entities and cross-border establishments.
2. Authorities may convene *ad hoc* meetings to address the supervisory problems concerning a cross-border establishment whenever an authority requests such meetings on the basis that it has a material supervisory concern.

### OTHER CONSIDERATIONS

The Authorities can assess the introduction of the following clauses in the manner in which they deem appropriate. For some supervisory agencies, these topics could be incorporated in a more general way within the definition of the scope of the MoU. However, for other authorities, incorporating these clauses in a more granular way can facilitate supervisory cooperation.

### *Supervisory measures and sanctions at a micro-prudential level, including early intervention measures*

- » The Authorities intend to inform each other in a timely manner and to a reasonable extent about any of the events known to them, which have the potential to endanger the stability of the supervised entities or cross-border establishments in the respective other jurisdictions.
- » The Authorities intend to notify each other about the material non-public administrative pecuniary penalties, enforcements or sanctions, decisions, supervisory measures, or early intervention measures, which they have imposed under their supervisory tasks or responsibilities, whenever they may impact the other Authority.
- » The Authorities acknowledge that information regarding the application of early intervention measures should be subjected to the obligations placed upon them by their respective applicable legal framework and could be shared with the resolution authorities in their respective jurisdictions in accordance with the applicable legal framework.

### *Enforcement*

- » The Authorities intend to cooperate in carrying out enforcement actions to the extent possible under their applicable legal frameworks.
- » If a request for assistance relates to the actual or possible enforcement action, the request should include as many details as possible to allow the other authority to consider the request. For example, a description of the conduct or suspected conduct, the applicable legal framework, the link between the specified rule or law and the regulatory functions of the requesting authority, and whether certain people should be present during interviews that form a part of an investigation.
- » In situations where an investigation concerns the suspected breaches of the law of both the jurisdictions, the authority suggesting the establishment of a joint investigation involving members from both the Authorities should provide the other authority with as much detail as possible to allow the other authority to consider the nature, expected duration, funding, management, and objectives of the joint investigation.

### *Application of macroprudential supervisory measures*

- » The Authorities should recognize the unique competence of the host authorities to assess the macro-prudential measures that are necessary for ensuring financial stability in the host's jurisdiction.
- » The Authorities may consider communicating with each other to exchange relevant assessments and facilitate discussions with respect to the planned measures, where it may assist in assessing and mitigating the risks to financial stability in their respective jurisdictions.

### *Cooperation in relation to the internal models or advanced approaches*

- » Subject to the proportionality considerations, the Authorities might consider sharing views and information about their supervised entities' designs and the use of internal models such as the use of internal models in decision making, or information on data and IT frameworks.
- » The Authorities also consider sharing relevant information in their possession to assist each other to arrive at their respective decisions on an internal model application from a supervised entity, such as the supervised entities' plans for implementing the internal models for regulatory purposes, the results of the Authorities' assessment, or the main deficiencies identified.
- » The Authorities should bear in mind that the availability of data will depend on the Authorities need to collect such information, taking into account the principle of proportionality.

# 6

## ON-SITE INSPECTIONS

### KEY PROVISIONS

#### *Objectives and scope*

The Authorities recognize that cooperation is particularly useful in assisting each other in carrying out on-site inspections of cross-border establishments in the host jurisdiction. They are carried out to ensure that the operations of cross-border establishments of the supervised entities under their respective jurisdictions are prudently conducted.

#### ***SUGGESTED WORDING: Principles for the cooperation on licensing and authorization***

1. The Authorities recognize that cooperation is particularly useful in assisting each other in carrying out on-site inspections of cross-border establishments in the host jurisdiction. The inspections are carried out to ensure that the operations of cross-border establishments of the supervised entities under their respective jurisdictions are prudently conducted.
2. The host authority may allow the home authority to conduct on-site inspections. Inspections or examinations of cross-border establishments in the host jurisdiction would be undertaken only after the sending of notice to the host authority at least thirty days in advance. Through such a notice, the home authority would indicate:
  - a. the purpose of the visit and the aspects of the cross-border establishment they wish to explore;
  - b. the expected date for the inspection;
  - c. the identity of examination/inspection officials;
  - d. the manner in which the evaluation will be executed;
  - e. the information needed; and
  - f. request for assistance and use of facilities.

3. The purposes and the extent of such inspections, as well as the manner in which they will be carried out, should be commonly defined and agreed upon by both the Authorities, under the prior written acceptance of the host supervisor and without any prejudice toward the home supervisor to conduct the examinations of cross-border establishments.
4. As mutually agreed between the Authorities, examinations or inspections may be carried out independently by the Home Authority, or in coordination with the host authority.
5. The host authority may assist in such examinations and inform the home authority of any subject matter in which it has a particular concern or interest.
6. If a supervised institution has been audited along with its cross-border establishment in the other country, the home supervisor intends to provide the host supervisor with a summary report on the findings, which bear relevance to the cross-border establishment.
7. All the information exchanges are subjected to the information exchange and confidentiality principles addressed in Section 3.

## OTHER CONSIDERATIONS

### *Ground to deny on-site evaluations*

- » As per the local law, a host authority can be allowed to deny or restraint on-site supervision on the grounds of public interest, national security, or when the disclosure would interfere with an ongoing investigation or legal procedure.

### *Remote evaluations*

- » Due to the current pandemic, or in case of there being any other event of a similar impact, authorities can consider the possibility of conducting an evaluation virtually or remotely, which imposes challenges regarding the cross-border access to data processing and banks systems.

# 7

## COOPERATION DURING CRISIS SITUATIONS

### KEY PROVISIONS

#### *Objectives and scope*

Authorities intend to seek coordinated responses to any crisis emerging in a cross-border establishment operating in their respective jurisdictions, in accordance with the applicable legal frameworks.

#### ***SUGGESTED WORDING: Cooperation during crisis situations***

1. To the extent possible, and without prejudice to their involvement in the relevant cross-border cooperation fora, the authorities intend to seek coordinated responses to any crisis emerging in a cross-border establishment operating in their respective jurisdictions, in accordance with the applicable legal frameworks.
2. The Authorities intend to inform each other immediately if they have become aware of an incipient crisis, such as, but not limited to, serious financial difficulties, which might have an adverse impact on the operations relating to any supervised entity in the respective jurisdictions of the Authorities.
3. If an Authority is taking any action, including early intervention measures, that could trigger instability elsewhere in a supervised entity/group or in the financial system, wherever and to the extent possible, the Authorities intend to cooperate in order to seek potential solutions.
4. The Authorities intend to inform each other, as soon as it is reasonably practical, after a supervised entity or its cross-border establishment has activated their respective recovery plans or taken any recovery actions in accordance with the applicable legal framework (see Section 10).
5. Notwithstanding the normal procedure described in Section 6, in the case of a crisis or any other event regarding a cross-border establishment, where it has concerns about its solvency or financial stability, the home authority would be allowed to conduct on-site evaluations with prior notice, even if it is given with less than 30-day notice.

6. The Authorities intend to notify each other of any intended public communication regarding supervised entities' cross-border establishments before their publication, and especially during crisis situations.
7. Each authority reserves the right to act on its own initiative if it is necessary to preserve domestic financial stability, in the absence of an effective early intervention or of other actions taken by another authority.



# SUPPLEMENTARY CONSIDERATIONS

## 8

### CYBERSECURITY/OPERATIONAL INCIDENTS

#### KEY PROVISIONS

##### *Objectives and scope*

1. Although in theory, the topic is already covered in the concept of supervision in a broad sense, in recent years, the subject has gained increasing importance. Therefore, MoUs can include a specific chapter for the subject, as well as the sharing of information about cyber threats and operational resilience practices.
2. Timely sharing of cyber threat information is useful for prevention purposes, in particular when it is possible to map the attacks and behaviors seen in other jurisdictions and establish preventive measures within the local financial system. This information may not necessarily be associated with a specific institution.
3. Data processing abroad (third-party providers of data processing services, data storage services, and cloud computing services) is also a current issue that may pose risks to the financial institutions in home jurisdictions and may be included within the MOU's scope. Where available, thinking about the mechanisms that may enable the sharing of information on issues involving these providers and their potential risks will help strengthen the supervisory process.
4. From a supervisory point of view, mapping the dependence of the financial system on the main providers is very useful to know the exposure to concentration risk, especially when considering IT service providers.
5. Cybersecurity information exchange is still in the early stages of discussions. Until there is a consensus on the best approach, more generic clauses on the subject may be preferable, especially in regards of the “scope” provisions. For instance, these clauses should avoid establishing the Taxonomy and/or Traffic Light Protocol (TLP) as it would delve deeply into the subject.

6. Discussing TLP and other aspects is especially useful when the information sharing process is already in place and you need to classify the information, as well as speed up the processing of the received information.

### ***SUGGESTED WORDING***

1. To the extent permitted by law, the host authority might allow consultations to the supervised entities that provide data processing services to cross-border establishments.
2. The Authorities agree to co-operate in the field of exchanging information with regard to cyber security and operational resilience. To that end, the Authorities will exchange, at their own initiative or upon request, information that may be relevant for their supervisory activities.

## ANTI-MONEY LAUNDERING AND COUNTERING THE FINANCING OF TERRORISM

### KEY PROVISIONS

#### *Objectives and scope*

1. Supervisors should, to the extent permissible under national laws or relevant supervisory responsibility, consider how to exchange information regarding money laundering, terrorist financing, unauthorized banking business, and other criminal financial activities.
2. In theory this subject is already included in the concept of supervision in a broad sense. However, as a result of the broad dimension that the subject has assumed in recent years, it is recommended that there be a specific chapter in the MoU.
3. The idea behind the inclusion of the AML/CFT subject in the MoUs should focus mainly on the exchange of information regarding the structures that supervised institutions must have in place to curb anti-money laundering and terrorist financing. Only in serious cases where a practice poses an important risk to financial stability, the Authorities can consider the exchanging of information regarding concrete situations of money laundering, if applicable.
4. The MoU should, as far as possible, be in line with the FATF recommendations and their terminology, keeping the definitions and the scope of application up to date with the best international practices. Indeed, FATF recommendations include international cooperation on AML in its jurisdictional assessments (Risk & International Cooperation Feedback). Some jurisdictions are also incorporating the concept of unauthorized banking business, and are thus, broadening the scope of application.
5. The nature of the information to be exchanged differs from the nature of the information exchanged for the financial intelligence units (FIU), and thus, these issues should be avoided in the agreements.
6. Wherever necessary and in the absence of other relevant cooperation arrangements and subjected to any restrictions with regard to the confidentiality in their applicable legal frameworks, the Authorities may act as intermediaries to facilitate the contact between a financial intelligence unit in one jurisdiction and an authority in another jurisdiction.

***SUGGESTED WORDING: Co-operation in the field of anti-money  
Laundering and countering the financing of terrorism***

1. The Authorities agree to co-operate in the field of anti-money laundering and countering the financing of terrorism as well as in countering the proliferation financing of weapons of mass destruction. To that end, the Authorities will exchange, in their own initiative or upon request, information that may be relevant to their supervisory activities.
2. The Authorities intend to co-operate closely, within the confines of their legal framework, when they identify suspected financial crime activities among supervised entities.
3. In the event when an Authority, during an examination or inspection conducted on the territory of the counterparty's jurisdiction, detects a serious criminal violation of the applicable legal framework of its jurisdiction, the Authority may be under a strict legal obligation to pass the information immediately to the appropriate law enforcement authorities in its home country. In these circumstances, to the extent permitted by law, the authority should inform the other authority of its intended action.

**KEY PROVISIONS***Objectives and scope*

1. Authorities acknowledge the importance of identifying and implementing resolution processes and joint communication strategies that meet the basic goals of resolution. These typically include the aim of maintaining financial stability, maximizing recoveries, minimizing the losses for the benefit of different stakeholders, and minimizing the moral hazard.
2. The main objectives of the Authorities assisting each other in this assessment are to ensure a high standard of crisis prevention and to preserve the financial stability of the local market focusing on:
  - a. effective cooperation between the supervisory authorities involved in crisis management; and
  - b. recovery options for the local operations and continuity of any critical local economic functions.
3. The Authorities may include this supplement to discuss the kinds of considerations that may be useful for the authorities seeking to enhance cooperation when analyzing cross-border resolution issues, planning for potential resolution scenarios, crisis management, and contingency planning, or other works intended to improve the preparations of authorities for planning, managing, and resolving the crises involving supervised financial institutions with cross-border operations in both home and host jurisdictions.
4. Jurisdictions should consider consulting the FSB Key Attributes for Effective Resolution Regimes for Financial Institutions, the IADI Core Principles of Effective Deposit Insurance Schemes, and the Basel Core Principles for additional guidance related to the objectives and scope of cross-border resolution agreements.
5. Before including a supplement, the roles and responsibilities of the authorities throughout the resolution timeline should be understood by all the parties. This includes activities before, during, and after the failure of a financial institution. A preliminary questionnaire directed to all the authorities considering the setting of an arrangement describing the respective responsibilities

and legal powers could often be useful for this purpose. Further, all the authorities should have the ability to share resolution-related information and keep the shared resolution-related information confidential.

6. Authorities should also confirm that there are significant cross-border operations in both jurisdictions. Significance is defined by individual jurisdictions and it should be discussed by the parties.
7. A supplement to the supervisory cooperation agreement may not be necessary or appropriate if the legal powers and responsibilities of the authorities are not aligned. Authorities must assess whether the provisions in the main agreement reasonably address cooperation and coordination are sufficient for the purposes of the cooperation.
8. Descriptions of communication, information sharing, and cooperation activities during both business-as-usual and times of stress should be considered for inclusion. Activities described should include both periodic and *ad hoc* arrangements.

If both Authorities conduct resolvability assessments and/or prepare resolution plans, the sharing of that information is appropriate to consider, where possible and practicable. The Authorities should discuss and identify the types of information each could be asked to provide, and the frequency with which that information could be provided.

10. The outcome of those discussions as well as the process for requesting information may also be included in the provisions.

### ***SUGGESTED WORDING: Principles on bank resolution and resolvability assessment***

1. The Authorities intend to share, in accordance with the applicable legal framework, parts of the recovery plans prepared by the supervised entities or their cross-border establishments that are relevant for the other Authorities.
2. The Authorities commit to discussing the approaches for resolution planning. This includes the sharing of ideas and strategies, and the mutual understanding of resolution rules, practices, and implementation in each jurisdiction. These provisions could address one or more financial institutions.

3. The Authorities exchange information that is necessary for the development of the resolvability assessments of supervised institutions. In addition, the Authorities may share these assessments and inform each other about the significant measures they may be required to adopt from supervised Institutions in order to improve their resolvability.
4. The Authorities undertake the responsibility to, whenever possible and in accordance with the applicable legislation, inform each other, before implementing any resolution measures in a supervised institution active in both jurisdictions. In case it is not possible to inform the other authority before the implementation of the resolution measures, the authority intends to inform the other authority as soon as possible after the implementation.
5. The Authorities may choose to include provisions related to the exchanging of information about the regulatory changes relevant to the resolution that may have a significant material impact on the operations or activities of a financial institution in the other jurisdiction.
6. Provisions regarding the exchange of information, ongoing communication, and coordination during crisis situations are applicable in this supplement, as treated in the respective sections.

1. In order to enhance the quality of cooperation, representatives of the Authorities may agree to convene *ad hoc* meetings to discuss the issues concerning supervised institutions. In these meetings, they may also agree to review the effectiveness of these arrangements.
2. The representatives of the Authorities may promote their cooperation through visits for informational purposes and exchange of personnel for practical training or internships.
3. The Authorities should deploy their best efforts in the performance of the MoU. Any disagreement arising from an interpretation of the MoU intends to be amicably settled via the means of consultations between the Authorities. Both the Authorities should endeavor to create proper opportunities for such consultations.
4. The costs and expenses in connection with the execution of an on-site evaluation should be bore by the authority that incurred them. The costs associated with the provision of assistance should be considered by both the requesting authority as well as the provider when the cost-sharing arrangements are applicable.
5. It should be taken to account that the Authorities may publish or disclose the MoU in its entirety, in accordance with their respective national laws.
6. The Authorities may expressly recognize qualified electronic signatures as sufficient proof of their consent to the MoU, with the same legal force and effect of wet signatures. For the purposes of the MoU, qualified electronic signatures are signatures created with the use of digital keys and certificates that enable the safe identification of the signatories. These digital keys and certificates must be issued by accredited certificate entities that are a part of each jurisdiction's Public Key Infrastructure.



# DEFINITIONS

**APPLICABLE LAW:** All applicable provisions of constitutions, laws, statutes, ordinances, rules, treaties, regulations, permits, licenses, approvals, interpretations and orders of courts or Governmental Authorities and all orders and decrees of all courts and arbitrators.

**APPLICABLE LEGAL FRAMEWORK:** Any law, regulation or requirement that applies to a Home Authority or Host Authority regarding its relevant functions.

**AUTHORITY:** Signatory authorities. Collectively referred as the “Authorities”.

**BANK RESOLUTION:** Occurs when authorities determine that a failing bank cannot go through normal insolvency proceedings without harming public interest and causing financial instability. Meanwhile, any part of the bank that cannot be made viable again goes through normal insolvency proceedings.

**CONFIDENTIAL INFORMATION:** The information received from the other Authority or obtained in the course of work for an Authority, which is not in the public domain and not in a summary or aggregate form, such that individual credit information, or any other information that is defined as confidential by law or regulation of the Authorities.

**EMERGENCIES:** Refers to, but not limited to, serious financial difficulties which might have an adverse impact on operations relating to any supervised entity in the respective jurisdictions of the Authorities.

**CROSS-BORDER ESTABLISHMENT:** A branch, subsidiary, representative office, or other supervised entity operating or located within a jurisdiction other than the Home Authority’s.

## **CYBER SECURITY INFORMATION:**

- a. Cyber incidents and cyber threats occurred in the financial sector in respective jurisdictions.
- b. Information related to cyber risk, and operational resilience, relevant to the financial sector that comes to the attention of either of the two Authorities.
- c. Selected topics about cyber security (including regulatory responses, actions and measures) of the respective jurisdictions.
- d. The results of supervisory actions taken to evaluate the information security controls of Authorised Institutions, including the opinion of the Authorities on the adequacy of such controls.

# DEFINITIONS

**DISCLOSING AUTHORITY:** An Authority that discloses, or receives a request for disclosure of, confidential information within the meaning of and pursuant to this Memorandum of Understanding.

**EARLY INTERVENTION:** Early supervisory intervention is defined as supervisors taking actions before quantitative thresholds or other regulatory requirements are breached in order to address unsafe and unsound practices or activities that could pose risks to banks or to the banking system. These early supervisory actions can range from supervisory measures that encompass moral suasion to more corrective sanctions, which are triggered when banks are deemed to be in danger of failing.

**HOME AUTHORITY:** In most of the jurisdictions this is the authority of the country where the parent financial institution is established. However, in other cases, this is the authority responsible for the supervision of a financial institution on a consolidated basis regardless the parent's location.

**HOST AUTHORITY:** This is the authority of the country of the cross-border establishment (a branch, subsidiary or representative office of a supervised entity or other entity operating or located within a jurisdiction).

**JURISDICTION:** The territory of the countries where the Authorities that are parties to this Memorandum of Understanding are located.

**ON-SITE SUPERVISION:** Inspection visits carried out in the offices of a supervised institution or a cross-border establishment by Home Authority Supervisor, or the Host Supervisor, as appropriate, through duly authorized officials.

**PROFESSIONAL SECRECY:** The obligation of all persons working for or who have worked for an authority, or those acting on behalf of an authority, not to disclose confidential information received in the course of their duties unless the confidential information is disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law.

**RECEIVING AUTHORITY:** An Authority that has received, or makes a request for disclosure of, confidential information from a disclosing Authority pursuant to this Memorandum of Understanding.

**RESOLVABILITY ASSESSMENT:** Ability of a supervised entity to undergo a resolution process in a timely and orderly manner, safeguarding public interests, the stability of financial systems, with minimal costs to taxpayers.

# DEFINITIONS

**SUPERVISED ENTITY:** An entity that is licensed and supervised by an Authority as specified in their applicable legal framework.

**SUPERVISORY MEASURES, MEASURES, SANCTIONS AND PENALTIES:** Supervisory actions taken by the Authorities in accordance with an applicable legal framework, in relation to a supervised entity or cross-border establishment.

# WORKING GROUP

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José Ignacio Marin	Banco de España
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Richard Gaffin	Office of the Comptroller of the Currency, United States of America
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<b>ASBA SECRETARIAT</b>	
Pascual O'Dogherty	Secretary General
Marcos Fabián	Research and Implementation Director

# ASBA MEMBERS

## ASSOCIATE MEMBERS

### Andean Region

Superintendencia Financiera de Colombia  
Autoridad de Supervisión del Sistema Financiero, Bolivia  
Superintendencia de Bancos del Ecuador  
Superintendencia de Banca, Seguros y AFP, Perú

### Caribbean Region

Central Bank of Belize  
Banco Central de Cuba  
Bank of Guyana  
Bank of Jamaica  
Banque de la République d'Haïti  
Cayman Islands, Monetary Authority  
Centrale Bank van Aruba  
Centrale Bank van Curaçao en Sint Maarten  
Eastern Caribbean Central Bank  
Financial Services Regulatory Commission, Antigua y Barbuda  
Turks & Caicos Islands Financial Services Commission  
Central Bank of Barbados  
Central Bank of the Bahamas  
Central Bank of Trinidad and Tobago  
Centrale Bank van Suriname  
Financial Services Commission, British Virgin Islands

### Central American Region

Superintendencia de Bancos, Guatemala  
Comisión Nacional de Bancos y Seguros, Honduras  
Superintendencia de Bancos y de Otras Instituciones Financieras de Nicaragua  
Superintendencia del Sistema Financiero, El Salvador  
Superintendencia General de Entidades Financieras, Costa Rica  
Superintendencia de Bancos de Panamá  
Superintendencia de Bancos de República Dominicana

# ASBA MEMBERS

## North American Region

Board of Governors of the Federal Reserve System, United States of America  
Office of the Comptroller of the Currency, United States of America  
Federal Deposit Insurance Corporation, United States of America  
Comisión Nacional Bancaria y de Valores, México

## Southern Cone Region

Comisión para el Mercado Financiero, Chile  
Banco Central do Brasil  
Banco Central de la República Argentina  
Banco Central del Paraguay  
Banco Central del Uruguay

## Non Regional

Banco de España

## COLLABORATOR MEMBERS

Banco Central de Reserva de El Salvador  
Comisión Nacional de Microfinanzas, Nicaragua  
Comisión Nacional para la Protección y Defensa de los Usuarios  
de Servicios Financieros, México



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ASSOCIATION OF SUPERVISORS  
OF BANKS OF THE AMERICAS