

## Financial Markets Law Committee (“FMLC”)

### Banking Scoping Forum

Date: Thursday 14 December 2017

Time: 2.00pm to 3.30pm

Location: The offices of White & Case LLP, 5 Old Broad Street, London, EC2N 1DW



#### In Attendance:

Stuart Willey (Chair)	White & Case LLP
Clare Dawson	Loan Market Association
Thomas Donegan	Shearman & Sterling (London) LLP
Paul Gough	The Bank of New York Mellon – London Branch
Etay Katz	Allen & Overy LLP
Dorothy Livingston	Herbert Smith Freehills LLP
Monica Sah	Clifford Chance LLP
Andrew Taylor	Hogan Lovells (International) LLP
Venessa Parekh	FMLC

#### Guest Speakers:

Mark Kalderon	Freshfields Bruckhaus Deringer LLP
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#### Regrets:

Alex Biles	Ashurst
Sarah Coucher	Norton Rose Fulbright LLP
Leland Goss	International Capital Market Association
Charles Gray (dial in)	Sullivan & Cromwell LLP
Jons Lehmann	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Oliver Moullin	Association for Financial Markets in Europe
Mitja Siraj	FIA
Julia Smithers Excell	JP Morgan

Registered Charity Number: 1164902

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## Minutes:

### 1. Introduction.

1.1. Mr Willey opened the meeting. Forum members in attendance introduced themselves.

### 2. Administration:

#### a. a short presentation: Your Scoping Forum Needs You (Venessa Parekh);<sup>1</sup>

2.1. Venessa Parekh provided participants with an overview of their role as members of an FMLC Scoping Forum, specifically outlining the roles of the Chair, Speakers and attendees before, during and after the Forum meetings.

#### b. confirmation of the draft 2018 Forward Schedule;

2.2. As no concerns were raised, the dates for the 2018 Forward Schedule are now confirmed.<sup>2</sup>

#### c. suggestions for the 2018 Forward Agenda.

2.3. Ms Parekh asked that suggestions for the 2018 Forward Agenda be sent *via* email.<sup>3</sup>

### 3. Opinion of the European Banking Authority on issues related to the departure of the United Kingdom from the European Union (Mark Kalderon).

3.1. Mr Kalderon introduced the Opinion, published by the European Banking Authority (“EBA”), on the requirements of credit institutions to gain access to the E.U. market post-Brexit through new or existing subsidiaries or branches.

3.2. With regards to the authorisation of subsidiaries, Mr Kalderon pointed out that the EBA’s aim was to create consistency across the market. Accordingly, existing authorisations could not be relied upon and institutions would compulsorily have to apply for and undergo the authorisation process. Institutions would also be expected to justify their choice of jurisdiction so as to guard against jurisdiction shopping. Mr Kalderon also mentioned that “Class I” investment firms would be supervised by the European Central Bank (“ECB”) which, a Forum member observed, might be legally challenging without a change in legislation.

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<sup>1</sup> Please see Appendix I below.

<sup>2</sup> *Ibid*, slide 6.

<sup>3</sup> If you have any suggestions of agenda items or speaker topics, please email Venessa Parekh at: [research@fmlc.org](mailto:research@fmlc.org).

- 3.3. While the authorisation of branches is subject to national discretion, Mr Kalderon drew attention to E.U. law which requires that Third Country branches are not treated more favourably than branches of E.U. firms. He also observed that existing branches (of U.K. institutions) would need to be reauthorised and that prudential requirements which aren't currently applied to the passported branches of U.K. firms will become relevant. Forum members discussed a lack of certainty regarding the supervision of Third Country branches by the Financial Conduct Authority (“FCA”) and Prudential Regulation Authority (“PRA”).
- 3.4. Mr Kalderon then moved on to discuss the approvals required for firms' internal models. The Opinion helpfully offers for the internal models of existing subsidiaries to be grandfathered.
- 3.5. Mr Kalderon remarked on the importance of the recognition of bail-in under English law instruments. Forum members discussed the incorporation of the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the “BRRD”) into U.K. law by means of the European Union (Withdrawal) Bill, and discussed the continued applicability of important clauses in the BRRD in the U.K. A Forum member raised the question of whether contracts which are due to end after Exit Day (i.e., potentially 29 March 2019) should include a clause regarding the recognition of E.U. law. Other Forum members agreed that this question might be revisited after the negotiations had progressed.
- 3.6. Mr Kalderon also touched upon the EBA's guidelines on outsourcing—in which regard, it hoped to prevent the establishment of empty shells and to require sufficient local governance and risk management capability—and those for back-to-back arrangements, including the suggestion of an additional Pillar 2 capital buffer to cover the failure of the institution with which risks is laid off. He also mentioned the EBA's observations on the equivalence regime and its suggestion that the third country regime should have prudential requirements equivalent to those under the CRR, even though this was not specified in MiFID II/MiFIR.
4. **Legal complexities arising in relation to MiFID II and (i) the role of banks as product manufacturers—the “target market test”; and (ii) the classification of buy-side counterparties in securities distribution (Stuart Willey to lead).**
- 4.1. Mr Willey turned first to topic (ii) on the classification of buy-side counterparties in securities distribution, which he noted was particularly important for debt capital markets

where there are no fees for underwriting risks. Forum members discussed the interaction of this with requirements in Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (“**MiFID II**”) and acknowledged research being undertaken by bodies in financial services.

4.2. Forum members also discussed the role of the agent in this context. It was agreed that developments should be expected in the New Year.

4.3. In relation to topic (i) on the target market test of classified securities, Mr Willey drew attention to Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (“**PRIIPs**”). He said that banks were also raising concerns with regards to the test in application to a number of types of instruments.

**5. The U.K.’s post-Brexit requirements for incoming firms (Stuart Willey to lead discussions).**

5.1. Forum members agreed that this topic had been referred to under item (3) above. They raised concerns with regards to a potential gap in the supervision of E.U. banks which were currently supervised by the PRA but which may only under investment activity in the U.K. in the future and would fall under the purview of the FCA.

5.2. Forum members also acknowledged the great degree of uncertainty in relation to incoming firms and stated a preference for guidance to be issued soon.

**6. E.U. Proposals to Strengthen the Powers of the European Supervisory Authorities.**

6.1. Forum members observed that the reform largely expanded the powers of the European Securities Market Association (“**ESMA**”). They also noted that if the European Supervisory Authorities (“**ESAs**”) were given powers for the direct supervision of firms, a suitable form of redressal and due process would have to be provided.

**7. Any other business.**

7.1. One member stated that significant uncertainty arose from the proposals for moratorium requirements in BRRD 2. Ms Parekh asked if he might send a short paragraph describing these issues so that they might be discussed by Forum members and/or the Committee.

# Scoping Forums

## Your Forum needs you!

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Venessa Parekh,  
FMLC Research Manager



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# Your Role in the Scoping Forum

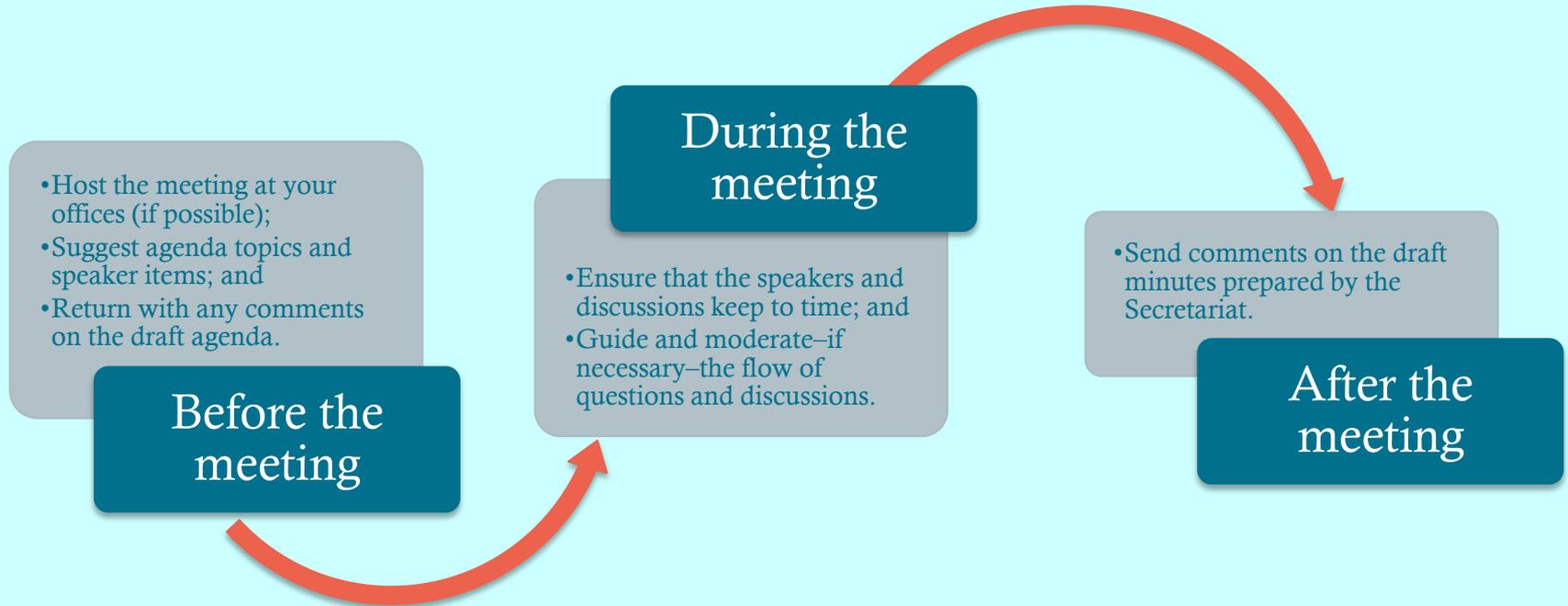
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- The role of the Chair
- The role of the Speakers
- The role of the Forum Members



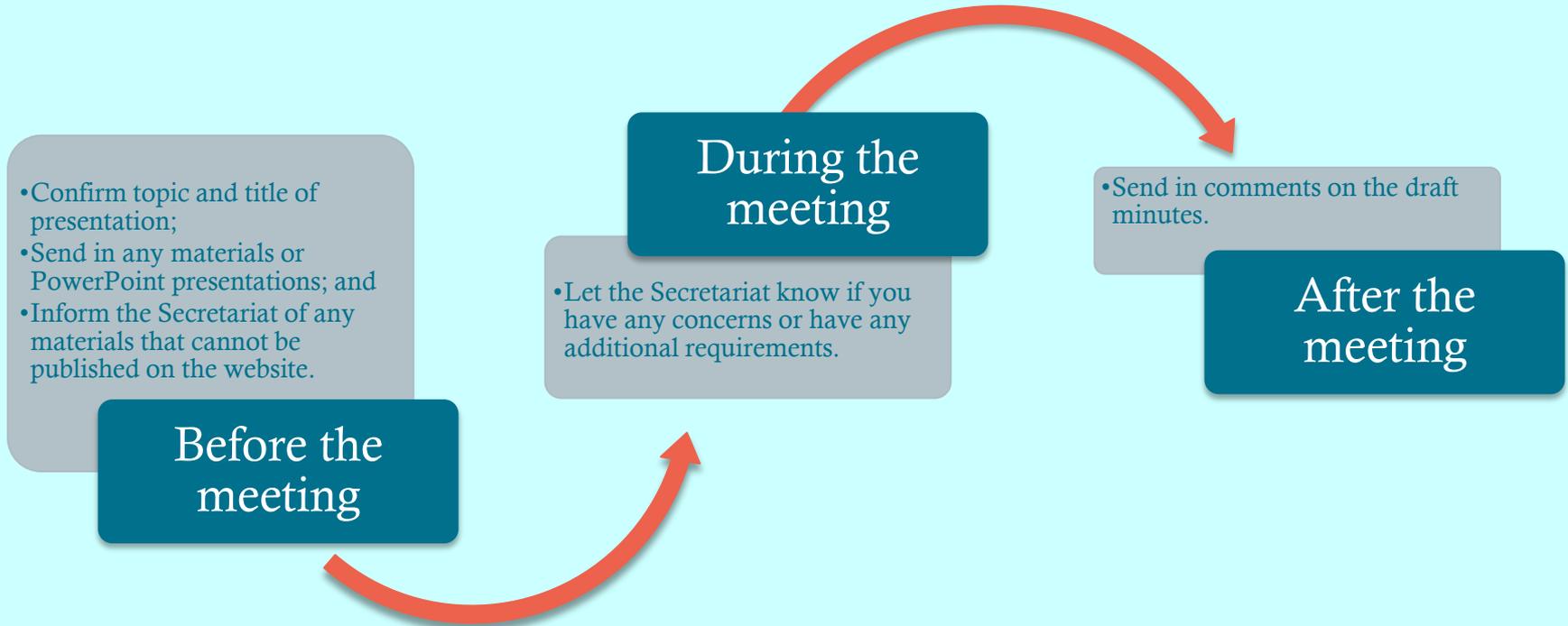
# The Role of the Chair

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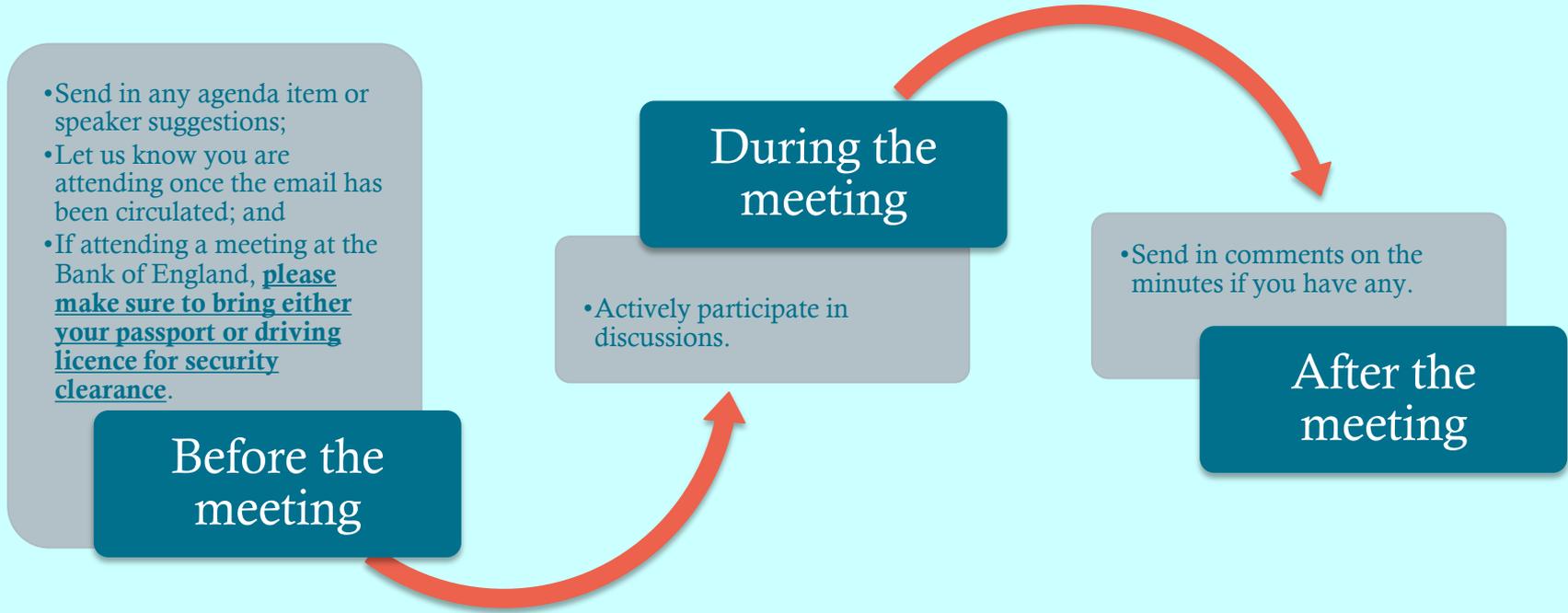
# The Role of the Speakers

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# The Role of the Forum Members

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# 2018 Forward Schedule

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**Tuesday 20 March**

2.00pm to 3.30pm (U.K.)

**Tuesday 19 June**

2.00pm to 3.30pm (U.K.)

**Tuesday 18 September**

2.00pm to 3.30pm (U.K.)

**Tuesday 11 December**

2.00pm to 3.30pm (U.K.)

# 2018 Forward Agenda

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# Conclusion / The End

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- Get involved!



**Financial Markets Law Committee**

[research@FMLC.org](mailto:research@FMLC.org)

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