

Financial Markets Law Committee (“FMLC”)

Buy-side Scoping Forum

Date: Thursday 14 December

Time: 1.30pm to 2.45pm

Location: Bank of England, Threadneedle Street, London EC2R 8AH



In Attendance:

Iain Cullen (Chair)

Matthew Baker

Philip Bartram

Richard Chapman

Christopher Dearie

Henrietta de Salis

Julian Eustace

David Gasperow

Neil Robson

Selina Sagayam

Andrew Tuson

Simmons & Simmons LLP

Berwin Leighton Paisner LLP

Travers Smith LLP

AB Trading Advisors

MJ Hudson

Willkie Farr & Gallagher (UK) LLP

Schroders Investment Management Ltd

Orbis Investment Advisory Limited

Katten Muchin Rosenman UK LLP

Gibson Dunn & Crutcher LLP

Berwin Leighton Paisner LLP

Jennifer Enwezor

FMLC

Thomas Willett

FMLC

Guest Speaker:

Arun Srivastava

Baker McKenzie LLP

Regrets:

Gregg Beechey

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

Jonathan Gilmour

Travers Smith LLP

Monica Gogna

Dechert LLP

Jiří Król

The Alternative Investment Management Association Limited (“AIMA”)

Jon May

Marshall Wace LLP

Palvi Shah

J P Morgan Asset Management

Sarah Smith

Akin Gump LLP

Registered Charity Number: 1164902.

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Minutes:

1. Introduction.

1.1. Iain Cullen opened the meeting and delivered a brief introduction.

2. Administration:

a. a short presentation: Your Scoping Forum Needs You (Jennifer Enwezor);¹

2.1. Jennifer Enwezor described to the participants what their role as a member of an FMLC Scoping Forum involves, specifically outlining the roles of the Chair, Speakers and Forum Members before, during and after the Forum meetings.

b. confirmation of the draft 2018 Forward Schedule;²

2.2. As no concerns were raised, the dates for the 2018 Forward Schedule are now confirmed.

c. suggestions for the 2018 Forward Agenda;

2.3. No suggestions for the 2018 Forward Agenda were raised during the meeting. The Secretariat very much welcomes any agenda topic or speaker suggestions for the meetings in 2018.³

d. proposal to change the title of the Buy-side Scoping Forum to the Asset Management Scoping Forum.

2.4. As no objections were raised, it was resolved that the Buy-side Scoping Forum will be renamed as the Asset Management Scoping Forum.

3. Collective Investment Schemes (Arun Srivastava)

3.1. Mr Srivastava spoke about the difficulties encountered in practice with applying the definition of collective investment scheme (“CIS”) in Section 235 of the Financial Services and Markets Act 2000 (“FSMA”) to arrangements which in operation are similar to a CIS but do not meet all of the requirements specified in Section 235. He noted in particular, the difficulties with determining whether a property is a “scheme property” or whether the property is “managed as a whole”.

¹ Please see Appendix I below.

² *Ibid*, slide 6.

³ If you have any suggestions for the 2018 Forward Agenda, please contact Thomas Willett at forums@fmlc.org.

- 3.2. Citing *Asset Land Investment Plc and anr v the FCA*, he emphasised the approach taken by Lord Sumption in construing whether an arrangement made to enable members of the public to invest in land was a CIS. Lord Sumption had cautioned against pushing the boundary of a CIS to cover every sort of arrangement, noting that the FSMA cannot be construed on the assumption that it was intended to regulate every kind of investment in which members of the public are liable to have advantage taken of them by unscrupulous intermediary.
- 3.3. Mr Srivastava also cited the investigation undertaken by the FCA in respect of an airport parking property investment scheme run by Park First Limited where the FCA had concluded that the scheme was a CIS to further illustrate the problems associated with applying the definition of a CIS to the different permutations of schemes that are or may be available.
- 3.4. A forum member mentioned that the FMLC had published a paper on the problems associated with the definition of CIS back in 2008 and the members deliberated on whether the paper should be revisited with a view to reiterating the points made in it paper or even refreshing the paper to include the issues that have arisen from the *Asset Land* case. Members did not make any further recommendation on this point.
- 3.5. For the second half of his presentation, Mr Srivastava turned to the topic of Initial Coin Offerings (“**ICOs**”) and considered the question of whether ICOs constitute a CIS. Highlighting the different approaches taken by regulators across the world, he concluded that there is a risk of contravening the regulatory regime if the persons conducting the ICO are not authorised or registered in the correct ways, thus exposing those involved to civil and criminal liabilities.

4. Anti-money laundering (Andrew Tuson)⁴

- 4.1. Mr Tuson said that the FCA’s increased activities which include increased supervisory visits, criminal investigations (along with parallel civil investigations) and enforcements under the Money Laundering Regulations 2007 (“MLR”) requires firms to be more vigilant in their operations so as to ensure compliance with the MLR. Highlighting the Bank of Beirut and Sonali Bank (U.K.) Ltd cases, he noted that some of the problems picked up by the FCA include the improper on-boarding of clients, poor understanding of money laundering risks and transaction reporting and emphasised the usefulness of having a second line of defence to ensure that any lapses are identified and remediated.

⁴ Please see Appendix IV.

- 4.2. The uncertainty, he said, arose from the manner in which firms were being treated by the FCA, in particular, the handling of the investigations and the attribution of corporate and individual responsibility.
- 4.3. Members highlighted that buy-side firms tend to be smaller and may not have a second line function that is fully independent, and as such, the application of the regulations to buy-side firms would need to be proportional.
- 5. Update on the FMLC's work on Brexit and contractual continuity (Jennifer Enwezor)**
 - 5.1. Ms Enwezor said that the FMLC had established a Working Group for the purpose of exploring the effect which a disorderly cliff-edge withdrawal from the European Union by the exit date of 29 March 2019 might have on certain financial contracts. At issue is whether such a withdrawal would make the performance of existing contracts illegal, impracticable or impossible in some way. She also mentioned that the FMLC would host a Colloquium on this topic on 18 January 2018 and invited members to attend.
- 6. Any other business.**
 - 6.1. No other business was raised.

Scoping Forums

Your Forum needs you!



Jennifer Enwezor,
FMLC Project Manager



Registered Charity Number: 1164902.

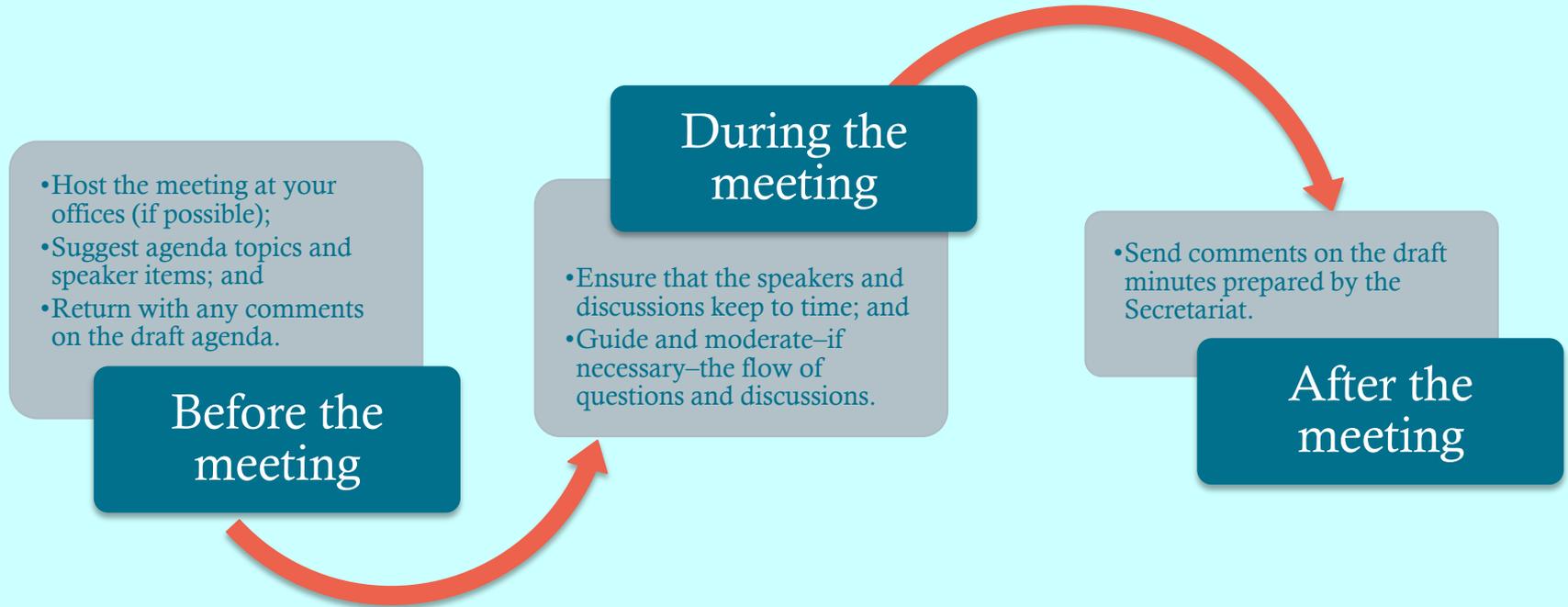
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Your Role in the Scoping Forum

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



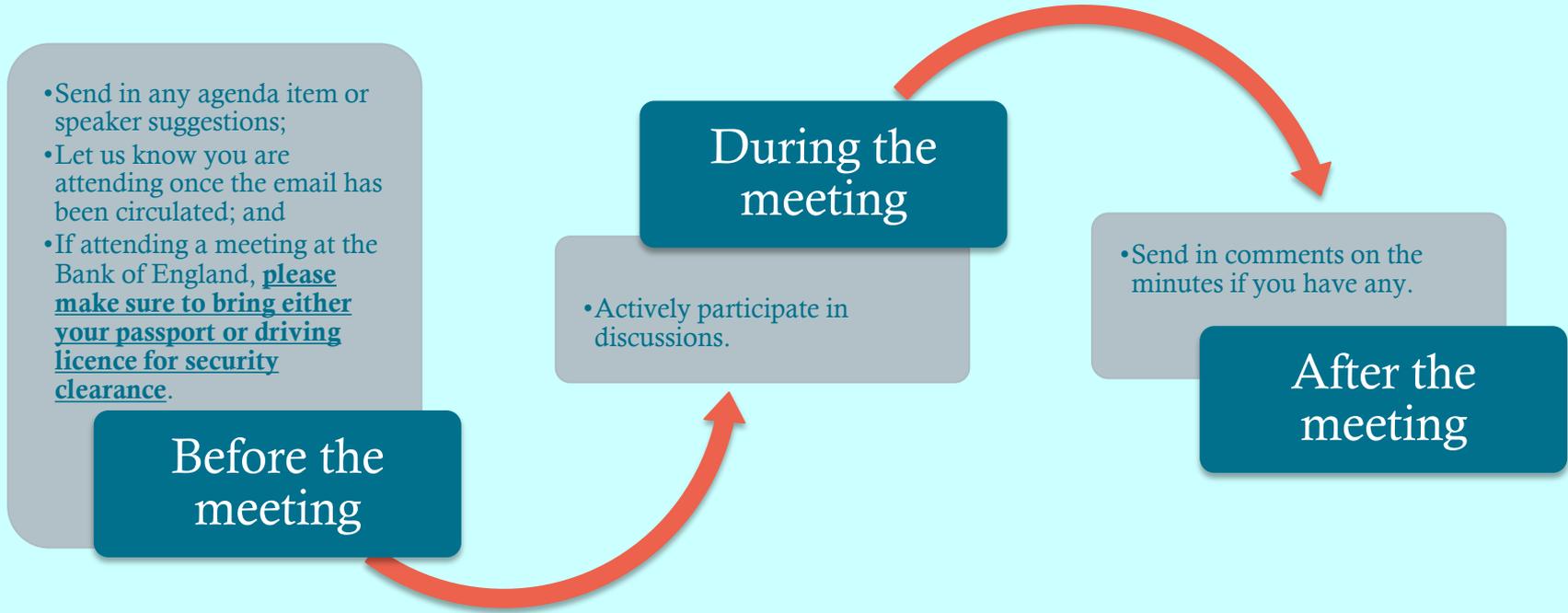
The Role of the Chair



The Role of the Speakers



The Role of the Forum Members



2018 Forward Schedule



Thursday 22 February

1.30pm to 3.00pm (U.K.)

Thursday 24 May

1.30pm to 3.00pm (U.K.)

Thursday 6 September

1.30pm to 3.00pm (U.K.)

Thursday 29 November

1.30pm to 3.00pm (U.K.)

2018 Forward Agenda



Conclusion / The End

- Get involved!



Financial Markets Law Committee

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FMLC - BUY-SIDE SCOPING FORUM

Andrew Tuson

14 December 2017



Trends in FCA's approach to AML reviews and investigations

Andrew Tuson

AML and criminal focus

- AML priority
- Increasing number of FCA supervisory visits, with supervisory actions or enforcement action following
- Increasing number of criminal investigations (into both firms and individuals) under the Money Laundering Regulations 2007, along with parallel civil investigations

Current priorities on AML

- Independence
- Resourcing
- Up-to-date policies and procedures – addressing UK standard
- Training and communication
- Due diligence
 - Identification of PEPs
 - Source of wealth / funds
- Transaction monitoring
- Engagement with regulators and SARs
- Management information and risk escalation
- Be mindful of 'red flags' and ensure you can evidence you took reasonable steps - recent enforcement action against Steve Smith (Sonali Bank)

Independence of MLRO

- PRA enforcement action in respect of the Co-op Bank (August 2015):
 - Blurring between the lines of defence (in that case the first and second lines) resulted in a lack of independent challenge; and
 - *Second line functions should support and challenge the management of risks firm-wide, by expressing views within a firm on the appropriateness of the level of risk being run. In order to achieve this, these functions should be independent of a firm's revenue-generating functions and should possess sufficient authority and resource to offer robust challenge to the business.*

Bank of Beirut

- Carry out / document an adequate risk assessment of potential money laundering risks posed by higher customers;
- Obtain / document senior management approval to establish business relationship with PEPs;
- Investigate allegations of corruption;
- Establish and verify source of funds and source of wealth of higher risk customers;
- Obtain sufficient identity and verification documentation;
- Conduct on-going reviews of higher risk customer files to ensure that the activity on accounts was consistent with expected activity.

Sonali Bank (UK) Limited

- FCA enforcement action in respect of Sonali Bank (October 2016):

In order to manage such risks, the Authority expects firms to demonstrate a culture that supports effective regulation and expects senior management to lead from the top in this regard. Firms should ensure that robust AML controls are embedded at all levels of the business and that the importance of complying with AML requirements is impressed on all members of staff.

Sonali Bank (UK) Limited

The weaknesses in these controls were serious and systemic, and affected almost all levels of its business and governance structure, including its senior management team, MLRO function, oversight of its branches, and policies and procedures in relation to AML.

Financial crime risks

- Take into account business strategy and form an independent view of whether key risks have been identified?
- How are emerging and systemic risks assessed and managed?
 - Assessment of risk faced by business
 - Internal and external risk factors
 - Keeping risk assessments up to date
 - Are AML requirements appropriate? Is the risk based approach appropriately set?
 - Are recommendations being addressed?
 - Is resource sufficient?
 - Note in Sonali Bank - number of days allocated to consideration of governance and regulation by internal audit were reduced, despite concerns identified
 - Sufficient independence and challenge?
 - Internal audit

FCA Enforcement

- FCA's focus on findings from internal audit
- Risk based approach – where is the line set?
- Review of AML process and assessment of risk
- Current reviews could be considered:
 - Review of Criminal Finances Act risk assessment
 - Market abuse surveillance

Top tips for managing personal regulatory risk



Ensure everyone understands that:

Conduct Rules



personal regulatory duties that are enforceable against them directly by regulators



Senior Managers - is your Statement of Responsibilities document accurate and current?
Are reporting lines clear?



Initial assessment and periodic reassessments by Senior Managers of risk management framework for their business areas.

- **Management information** - is it adequate for you to identify potential risks?
- **Careful record-keeping** of all steps taken to complete your assessments



Be alive to red flags
If a serious issue arises, always consider the regulatory notification obligations of the firm and your own personal regulatory duties.