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) Simmons & Simmons LLP
Matthew Baker Berwin Leighton Paisner LLP
Philip Bartram Travers Smith LLP
Richard Chapman AB Trading Advisors
Christopher Dearie MJ Hudson
Henrietta de Salis Willkie Farr & Gallagher (UK) LLP
Julian Eustace Schroders Investment Management Ltd
David Gasperow Orbis Investment Advisory Limited
Neil Robson Katten Muchin Rosenman UK LLP
Selina Sagayam Gibson Dunn & Crutchler LLP
Andrew Tuson 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
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).**

   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. 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.  

   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”.

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1 Please see Appendix I below.  
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)**

4.1. 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.

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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
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

Before the meeting
- Host the meeting at your offices (if possible);
- Suggest agenda topics and speaker items; and
- Return with any comments on the draft agenda.

During the meeting
- Ensure that the speakers and discussions keep to time; and
- Guide and moderate—if necessary—the flow of questions and discussions.

After the meeting
- Send comments on the draft minutes prepared by the Secretariat.
The Role of the Speakers

Before the meeting
- Confirm topic and title of presentation;
- Send in any materials or PowerPoint presentations; and
- Inform the Secretariat of any materials that cannot be published on the website.

During the meeting
- Let the Secretariat know if you have any concerns or have any additional requirements.

After the meeting
- Send in comments on the draft minutes.
The Role of the Forum Members

Before the meeting
• Send in any agenda item or speaker suggestions;
• Let us know you are attending once the email has been circulated; and
• If attending a meeting at the Bank of England, please make sure to bring either your passport or driving licence for security clearance.

During the meeting
• Actively participate in discussions.

After the meeting
• Send in comments on the minutes if you have any.
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!
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.
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.
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.