



Financial Markets Law Committee (the “FMLC” or “Committee”)

Buy-side Scoping Forum

Date: Friday 7 April 2017

Time: 1.30pm—2.30pm

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

In Attendance:

Christopher Dearie (Chair)	MJ Hudson Limited
Philip Bartram	Travers Smith LLP
Iain Cullen	Simmons & Simmons LLP
David Gasperow	Orbis Investment Advisory Limited
Emily Bradley	FMLC
Emma McClean	FMLC
Thomas Willett	FMLC

Regrets:

Matthew Baker	Berwin Leighton Paisner LLP
Antony Bryceson	AB Trading Advisors
Monica Gogna	Ropes & Gray International LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Jíří Król	The Alternative Investment Management Association Limited
Kirsten Lapham	Ropes & Gray International LLP
Jon May	Marshall Wace LLP
Shenell Page	CQS (UK) LLP
Palvi Shah	JP Morgan Asset Management
Michael Sholem	Davis Polk & Wardwell LLP
Howard Trust	Schroders Investment Management Ltd
Helen Watkins	Eton Park International LLP
Atholl Wilton	CQS (UK) LLP

Registered Charity Number: 1164902.

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Minutes:

1. Introduction

- 1.1. Christopher Dearie (Chair) opened the meeting and gave a brief introduction.
2. **Short update by Emily Bradley (FMLC) on issues of uncertainty concerning the MiFID II framework, identified by the FMLC Working Group on MiFID II**
 - 2.1. Ms Bradley updated the Forum on the developments of the MiFID II Working Group, informing the participants that the Secretariat is in the process of collating contributions which address areas of legal uncertainty within the MiFID II framework. Ms Bradley stated that the ultimate goal of the Working Group is to produce a paper to be sent to the European Securities and Markets Authority (“ESMA”) with a view to their clarifying these issues of uncertainty.
 - 2.2. Ms Bradley referred to the updated question and answer document (“Q&A”) published by ESMA on 5 April 2017 concerning MiFID II and MiFIR market structures topics, noting that the content of the Working Group paper may change slightly in response to this Q&A.

3. Short update by Emily Bradley (FMLC) on issues arising in the context of the FMLC Working Group on MAR

- 3.1. Ms Bradley informed Members that the paper on MAR has been sent to Dr Joanna Perkins (FMLC) for final review, after which it will be sent to the MAR Working Group and, ultimately, to the FMLC Committee for approval before being published.
- 3.2. Participants considered the Financial Conduct Authority (“FCA”) Quarterly Consultation paper No.16 in which the implementation of MAR on a European level was raised as a potential area of uncertainty in light of Brexit, with one Member questioning if the paper on MAR will seek to address European and/ or U.K. implementation. A Member of the Forum suggested that an additional working group focusing on U.K. implementation of MAR may be beneficial.

4. Report that the Committee has published a letter regarding the FCA’s interim findings of its asset management market study

- 4.1. Emma McClean (FMLC) informed Members that there has been no response to the letter sent to the FCA regarding the interim findings of the FCA’s asset management market study. The Secretariat will circulate a response to Forum Members should one be received.

- 4.2. The Committee thanked Leonard Ng and Philip Bartram for their assistance in producing the document.
5. **Report that the FMLC has resolved to establish a Working Group examining the ESA Q&A's process**
- 5.1. Following the Committee's resolution to establish a Working Group examining the ESA Q&A's process, the Secretariat invited Members of the Buy-side Scoping Forum to join the Working Group or to suggest an appropriate colleague to join and contribute to this work stream.¹ Regrettably, however, interest from Buy-side Scoping Forum Members has been low.
- 5.2. Concerns surrounding the possible political element of this Working Group were raised, with one Member suggesting that the work produced may run the risk of moving beyond the sphere of legal uncertainty. The Member continued by stressing the importance of isolating potential issues of legal uncertainty relating to the ESA Q&A's process, while remaining within the [FMLC remit](#).
6. **Discussion of recent developments:**
- a. [**FCA Quarterly Consultation, including changes to Market Conduct Sourcebook on commodity derivatives;**](#)
 - b. [**The proposed new unsecured creditor hierarchy for bank insolvencies in the E.U. Banking Reform Package; and**](#)
 - c. [**"Brexit Bill" receives Royal Assent and Article 50 triggered.**](#)
- 6.1. The definition of insider trading contained in the FCA Quarterly Consultation was discussed by the Forum and, in particular, how the MAR guidelines on commodity derivatives might alter this definition.
- 6.2. The Forum highlighted that the proposed new unsecured creditor hierarchy for bank insolvencies contained in the BRRD may create certain arbitrage opportunities.
- 6.3. The Secretariat's work toward a paper on [**third country equivalence**](#) was discussed. Listing where issues might arise in the event of the U.K. becoming a third country, rather than suggesting solutions, was highlighted by one participant as a valuable exercise on the assumption of a hard Brexit. The Secretariat aims to have a draft of the paper

¹ For further information, or to suggest an individual for membership, please contact Emily Bradley at legalassistant@fmcl.org.

prepared in advance of the next meeting of the Committee on 25 May and welcomes further contributions.² Members expressed an interest in receiving further information regarding this work stream.

7. Suggested priorities for Forward Agenda 2017

- 7.1. Potential issues arising under Directive 2011/61/EU on Alternative Investment Fund Managers (the “AIFMD”) and reported plans for an “AIFMD II” were suggested as priorities for the Forward Agenda 2017 by Forum Members. In particular, this includes potential market misunderstandings regarding what constitutes leverage and difficulties in envisaging what AIFMD II might look like.
- 7.2. The European Commission has issued a contract tender for a Review on the Operation of the AIFMD and Thomas Willett (FMLC) undertook to circulate background information relating to this to Members alongside the minutes from the meeting.

8. A presentation by Emma McClean (FMLC) on the operation of FMLC working groups³

- 8.1. Ms McClean described the different characteristics of scoping fora and working groups: how working groups can be initiated and established; the objectives of working groups; the conduct of business of working groups; and how the Secretariat operates to support working group chairs through organising, facilitating and administering meetings.
- 8.2. The operation of the FMLC post-Brexit, specifically in relation to current working group undertakings such as the issue of equivalence, was discussed.
- 8.3. Members requested sight of a list of active FMLC work streams.

9. Forum administration

- 9.1. The procedure for publishing Forum documentation on the FMLC website was outlined.⁴ One Member suggested that detailed meeting notes exclusive to the Forum, alongside public facing minutes, might provide a more detailed record of meetings.
- 9.2. It was resolved that Ms McClean and Mr Willett will contact Forum Members regarding potential hosts and chairs for the remaining meetings of the Forum in 2017.⁵

² For further information, please contact Venessa Parekh at Communications@FMLC.org.

³ Please see Appendix I below.

⁴ For further information please contact Venessa Parekh at Communications@FMLC.org.

⁵ If you would like to express an interest in hosting and chairing a future meeting of the Buy-side Scoping Forum, please contact Thomas Willett at forums@fmlc.org.

Operation of FMLC Working Groups



Emma McClean, FMLC Managing Assistant

Registered Charity Number: 1164902

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Standing forums are convened quarterly to provide a space for exploration and discussion

FMLC

Scoping Forums

Working Groups

Working Groups

Working Groups are convened ad hoc to address a specific issue of legal uncertainty

N.B. Working Groups may be established on the basis of: 1) a recommendation from a Scoping Forum; 2) a stakeholder proposal; 3) a consultation request; or 4) Secretariat research.

Working groups: objectives

- The ultimate function of a Working Group established by the FMLC is to assist the Committee to address a specific issue of legal uncertainty by expressing an authoritative consensus.
- Pursuant to this aim and to the FMLC's remit, a Working Group will have the following objectives:
 1. to encourage discussion and the expression of a range of views;
 2. to build consensus that can be expressed in an FMLC publication; and
 3. to produce a draft publication to which, ideally, as many Working Group members have contributed as possible.

How are working groups initiated?

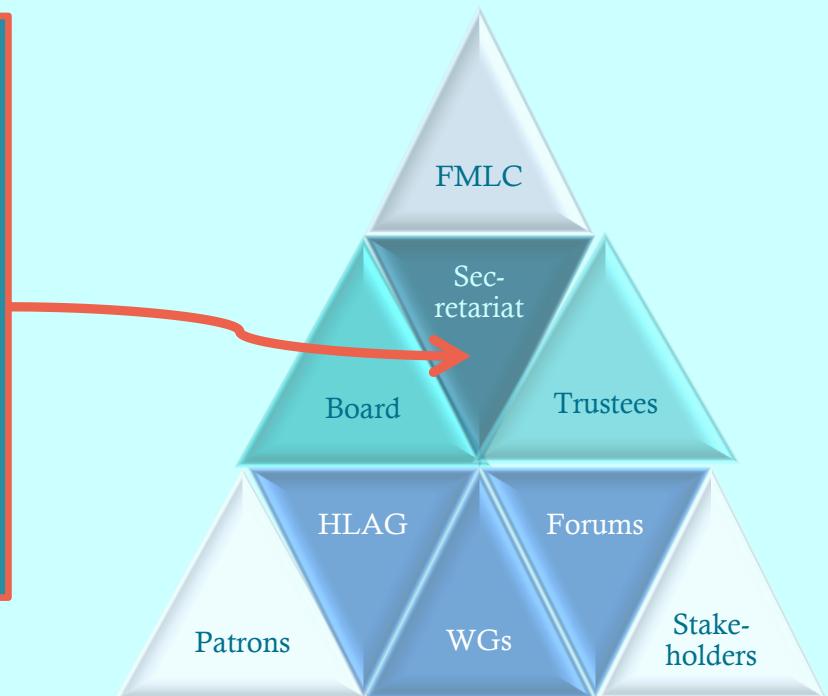
- Working Groups are established by the FMLC on the basis of a note specifying the relevant legal uncertainty (the “brief”).
- This brief defines the scope of work to be undertaken. It serves a threefold function:
 - to establish controls over the group’s output on behalf of FMLC Members;
 - to inform prospective contributors as to the scope of the project; and
 - to assist the Chair and Secretariat to allocate appropriate resources to the project, according to its expected size and complexity.
- In the case of work recommended by the members of a Scoping Forum or any other stakeholder(s), the brief should be prepared by the person or persons making the recommendation and put before the FMLC Committee for approval. (The FMLC Secretariat will normally offer formatting and other assistance in preparing the brief.)

Working groups: conduct of business

- Working groups are convened under Terms of Reference, including conduct of business guidelines. These include the following:
 1. to encourage a diversity of perspectives, Working Group participation is limited to one member per organisation;
 2. to ensure accountability and transparency, alternates are, as a general rule, not permitted to attend meetings; and
 3. to foster individual engagement, Working Group meetings are to be attended in person, where possible. (Accordingly, the FMLC Secretariat does not provide dial-in details for working group meetings unless a member is based abroad.)
- Work within the Group follows a schedule (“Milestones”) established at the inaugural meeting and implemented by the FMLC Secretariat.

Working groups: FMLC Secretariat

- The Secretariat supports the Chair and the Working Group during meetings, and manages Group-related communications outside meetings.
- The Secretariat helps draft and circulate meeting agenda and related documents in advance of Working Group meetings and takes minutes.
- Contributors are asked to send draft submissions to the Secretariat, whether directly or in copy.



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Conclusion / The End

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