Financial Markets Law Committee ("FMLC")

Finance and Technology Scoping Forum

Date: Monday 20 November 2017

Time: 9.00am to 10.30am

Location: Bank of England, 20 Moorgate, London, EC2R 6DA

In Attendance:

Simon Evers (Chair)	Crowell & Moring LLP
Antony Beaves	Bank of England
Kirsty Bell	Bank of England
John Casanova	Sidley Austin LLP
Peter Chapman	Clifford Chance LLP
Pinar Emirdag	State Street Bank and Trust Company
Scott Farrell (Dial in)	King & Wood Mallesons
Monica Gogna	Dechert LLP
Joel Harrison	Milbank Tweed Hadley & McCloy LLP
Siân Jones (Dial-in)	European Digital Currency and Blockchain Technology ("**EDCAB**")
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Ben Kingsley	Slaughter and May
Sarah Lewis	Cleary Gottlieb Steen & Hamilton LLP
Vladimir Maly	Morrison & Foerster LLP
Ciarán McGonagle	International Swaps and Derivatives Association ("**ISDA**")
Angus McLean	Simmons & Simmons LLP
Olufola Oluwole	The Law Society
Simon Puleston Jones	FIA
Deborah Sabalot	Deborah A. Sabalot Regulatory Consulting
John Salmon	Hogan Lovells International LLP
Adam Sanitt	Norton Rose Fulbright LLP
Mark Simpson	Baker & McKenzie LLP
Ian Stevens	CMS Cameron McKenna Nabarro Olswang LLP
Kathleen Tyson	Granularity Ltd
Emily Bradley	FMLC
Thomas Willett	FMLC

Observers:

Lewis Liu	Eigen Technologies

Regrets:

Cat Dankos	Herbert Smith Freehills LLP
Jonathan Gilmour	Travers Smith LLP
Andrew Harvey	Global Financial Markets Association
Lewis Lee	CLS Services Ltd.
Nina Moffatt	Baker McKenzie LLP
Barnabas Reynolds	Shearman & Sterling (London) LLP
Nicole Sandler	Barclays Bank Plc
Michael Sholem	Davis Polk & Wardwell London LLP
Philip Smith	Allen & Overy LLP
John Taylor	Queen Mary University of London
Simon Toms	Allen & Overy LLP
Sanjev Warna-kula-suriya	Latham & Watkins LLP`
Oliver Yaros	Mayer Brown International LLP

Minutes:

1. Introduction.

1.1. Simon Evers opened the meeting and delivered a brief introduction.

2. Administration:

a. a short presentation: Your Scoping Forum Needs You (Emily Bradley);[1]

2.1. Emily Bradley 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.

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[1] Please see Appendix I below.

[2] *Ibid,* slide 6.

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]

3. Durable medium—a bump in the road of the E.U.'s digital revolution (Deborah Sabalot).

3.1. Deborah Sabalot's introduction to her talk explored how there are a number of varying legislative sources at an E.U. level which present inconsistent definitions of the concept of "durable medium", displaying a lack of joined up thinking. Ms Sabalot highlighted how different directives and regulations apply either a consumer protection or commercial perspective to their approaches. She then conveyed how it would be useful to reach a consistent definition across E.U. legislation, while observing the nuance that Brexit may require the U.K. to think through the question of a consistent definition for itself.

3.2. The origins of the concept of durable medium were discussed next. Ms Sabalot described how it was first introduced in the E.U. by the Directive 97/7/EC on the protection of consumers in respect of distance contracts (the "**Distance Selling Directive**" or "**the Directive**") as an alternative to paper as the support or medium for information. It was highlighted how the two components of the Directive's definition of durable medium—storability and unchanged reproduction—are aimed at protecting consumers and not limiting their choice or method of communication. Here, Ms Sabalot emphasised how the initial 10 years following this Directive were focused on negotiating the specific technology; now, the principles behind this technology need to be explored, with a move towards functionality.

3.3. Ms Sabalot then turned to the Markets in Financial Instruments Directive (recast)—Directive 2014/65/EU of the European Parliament and of the Council ("**MiFID II**"), citing the Questions and Answers on MiFID II and the Markets in Financial Instruments Regulation ("**MiFIR**") investor protection and intermediaries topics.[4] She explained how, under MiFID II, a website and other media in electronic form can fulfil the definition of "durable medium" provided that they comply with the relevant MiFID II

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

[4] *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics* by ESMA, (10 November 2017), available at: https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf.

requirements. Ms Sabalot also highlighted other related areas of uncertainty, such as when information will be considered to have been "made available".

3.4. The presentation then moved on to consider the approach taken by the Financial Conduct Authority ("**FCA**"), in which it identifies that a durable medium needs to:

i. allow information to be addressed personally to the recipient (i.e. it needs to be personal not a generic or common communication);

ii. enable the recipient to store information in a way that is accessible for future reference and for a period of time adequate for the purposes of the information (storability); and

iii. allow the unchanged reproduction of the information stored (reproduction/permanence).

3.5. Ms Sabalot also flagged as relevant: (i) the ESMA Technical Advice on MiFID II and MiFIR, which includes the requirement that records are to be stored in a durable medium which allows them to be replayed or copied and does not allow the original record to be altered or deleted, as well as; (ii) E.U. caselaw, and in particular, the Opinion of the Advocate General Bobek in the BAWAG case, C-375/15 which stated that an integrated mailbox without any supplementary communication to a client was insufficient within the context of Directive 2007/64/EC on payment services in the internal market (the "**Payment Services Directive**").

3.6. Ms Sabalot concluded by outlining the principles needed for a robust definition of durable medium, these being:

i. technology neutrality;

ii. designed for consumer protection – not administrative convenience;

iii. personal to the consumer/client – notifies them and protects their data;

iv. accessible by the consumer/client – even if on the firm's website (providing v. making available debate);

v. capable of being saved or stored by the consumer/client;

vi. permanence of the record (including meta data/date/time stamp); and

vii. storage for mandated period.

3.7. Ms Sabalot also highlighted to the Forum members other considerations which need to be addressed when discussing the concept of durable medium. The General Data Protection Regulation ("**GDPR**") and its principle requirements for the collection and processing of personal data was summarised and noted to create further inconsistences for the definition of durable medium.

4. ICOs: the international regulatory response (Peter Chapman).

4.1. Peter Chapman presented to the participants an overview of the trends and the cross-jurisdictional regulatory responses to Initial Coin Offerings ("**ICOs**"). In his introductory remarks, Mr Chapman observed that many regulator attitudes to ICOs are beginning to harden with some regulatory powers applying limitations in certain cases.

4.2. Beginning with the U.S., Mr Chapman explained how in a speech given by the Securities and Exchange Commission ("**SEC**") Chairman Jay Clayton on 8 November 2017, Chairman Clayton observed that the SEC had previously warned that tokens offered and sold in ICOs could be securities, and hinted at moves towards enforcement. This, Mr Chapman explained, demonstrated a move by the U.S. towards a material policy shift and the enforcement of ICOs. Mr Chapman then went on to reference a series of case studies in the U.S. that contribute to the debate on the nature and classification of ICOs. Firstly, the Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO[5] was discussed, in which the SEC determined that the DAO tokens sold to investors by the corporation Slock.it were in fact securities. Despite this conclusion, the SEC determined not to pursue enforcement action, which Mr Chapman described as a warning for other corporations. In September 2017, the SEC charged those behind REcoin, which had allegedly been touted as "The First Ever Cryptocurrency Backed by Real Estate" (when in reality it has no real operations), with defrauding investors. Two class actions against the cybersecurity technology project Tezos were also mentioned, which allege the founders misleadingly sold unregistered securities in violation of both U.S. federal and state law when they raised $232 million in an ICO in July 2017. Lastly, the use of Simple Agreements for Future Tokens ("**SAFTs**") was briefly mentioned; these are investment contracts which grant a right for investors to obtain tokens only once a project is up and running. In this sense, the tokens, seemingly, do not need to comply with securities law.

[5] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Release No. 81207 (20 July 2017), available at: https://www.sec.gov/litigation/investreport/34-81207.pdf.

4.3. Mr Chapman then turned to the developments in Asia. He outlined how China implemented a ban on ICO funding in September 2017, and how there have been discussions in Hong Kong and Singapore in which they determined that ICOs are likely to fall under securities laws. With regards to Australia, Mr Chapman relayed to the Forum members how the Australian Securities & Investment Commission have published an information sheet, giving guidance about the potential application of the Corporations Act 2001 (Corporations Act) to businesses that are considering raising funds through an ICO.[6]

4.4. Developments in the Middle East were addressed next. It was highlighted how the United Arab Emirates ("**UAE**") have not applied any regulation to ICOs, and that some licences have been granted where ICOs relate to commodities such as gold.

4.5. Lastly, Mr Chapman turned to Europe. He outlined how ESMA has released two statements on ICOs: one on risks of ICOs for investors[7] and one on the rules applicable to firms involved in ICOs.[8] In addition, the French regulator L'Autorité des marchés financiers ("**AMF**") discussion paper on ICOs was also considered.[9] Mr Chapman described how the paper presents three possible options for the regulation of ICOs, these being: (i) to maintain the regulatory status quo and establish best practice; (ii) to regulate ICOs using the existing legal framework for prospectuses; or (iii) to adopt an *ad hoc* regulation tailored to ICOs. To this, one Forum member stated that a pan-European approach would be more helpful compared to a member state approach.

4.6. When opened for discussion, one Forum member mentioned Gibraltar's recent production of a regulatory framework for distributed ledger technology ("DLT") which is expected to take effect in January 2018.

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6 "Initial coin offerings Information sheet" by the Australian Securities & Investments Commission, (September 2017), available at: http://asic.gov.au/regulatory-resources/digital-transformation/initial-coin-offerings/.

7 ESMA statement: "ESMA alters investors on the high risks of ICOs", (13 November 2017), available at: https://www.esma.europa.eu/sites/default/files/library/esma50-157-829_ico_statement_investors.pdf.

8 ESMA statement: "EMSA alerts firms involved in ICOs to the need to meet relevant regulatory requirements", (13 November 2017), available at: https://www.esma.europa.eu/sites/default/files/library/esma50-157-828_ico_statement_firms.pdf.

9 AMF: "public consultation on ICOs", (26 October 2017), available at: http://www.amf-france.org/en_US/Publications/Consultations-publiques/Archives?docId=workspace%3A%2F%2FSpacesStore%2Fa2b267b3-2d94-4c24-acad-7fe3351dfc8a.

4.7. Dubai's progress with ICO regulation was also noted by a participant and a question concerning how quickly they are advancing their work on a global wholesale level was raised.

4.8. One Forum member presented the idea of using crowd funding regulation as a template to test the waters with ICO regulation. The consumer protection element of the regulation of ICOs was also flagged (particularly as tokens are likely to be a relatively illiquid investment). Participants concluded the discussion by agreeing that, without work commencing on ICO regulation soon, inconsistences will appear in what approaches jurisdictions and corporations take to the regulations of ICOs.

5. New Technologies, Innovation in Regulated Markets & in the Real World (Pinar Emirdag).

5.1. Pinar Emirdag began her talk by exploring the convergence of trends that have emerged in the regulated markets over the past decade. For example, Ms Emirdag described how financial services have begun to move from a standardised to more customised experience; while governance is gradually moving from a member owned to an increasingly demutualised structure. It is within the context of these overarching trends that the impact of new technology and innovation has been brought to bear on the financial markets.

5.2. Ms Emirdag then went on to articulate how clients are steadily wanting more on-demand products with access to research, and how it is becoming increasingly important for the financial services to access more clients and create products with a global reach and use. She also expressed how the advancements in finance and technology have formed a peer to peer world, altering the pillars of the financial services. Through the confluence of these trends, Ms Emirdag expressed her opinion that financial services are reaching more people and getting closer to "real economy", highlighting developments in the areas of money (e.g. crypto-currencies), markets (e.g. crowd funding platforms), and products (e.g. the "Internet of Things").

5.3. Next, Ms Emirdag outlined how regulation of technological innovations in the financial services needs to seek new solutions, rather than trying to conform to established regulations. As part of this discussion, she drew attention to the common themes—such as reporting and data—thrown up by diverse regulatory regimes. She then focussed on the regulators themselves, and queried whether they were developing real time involvement in the markets.

5.4. Finally, Ms Emirdag stressed how a divergence of questions has formed in the financial markets owning to these technological innovations. These questions arise from new market structures, digital identity, common language and the issue of semantics (for instance, how do you define "data"?), cybersecurity, energy, the future of work and privacy.

5.5. One participant drew attention to the need for regulators to develop real-time involvement in the markets to combat these fast, global changes. The participant continued to stress how there has been a divergence in the way banks are approaching regulation, and a universal solution is needed for this new technological age.

6. Any other business.

6.1. No other business was raised.

Scoping Forums

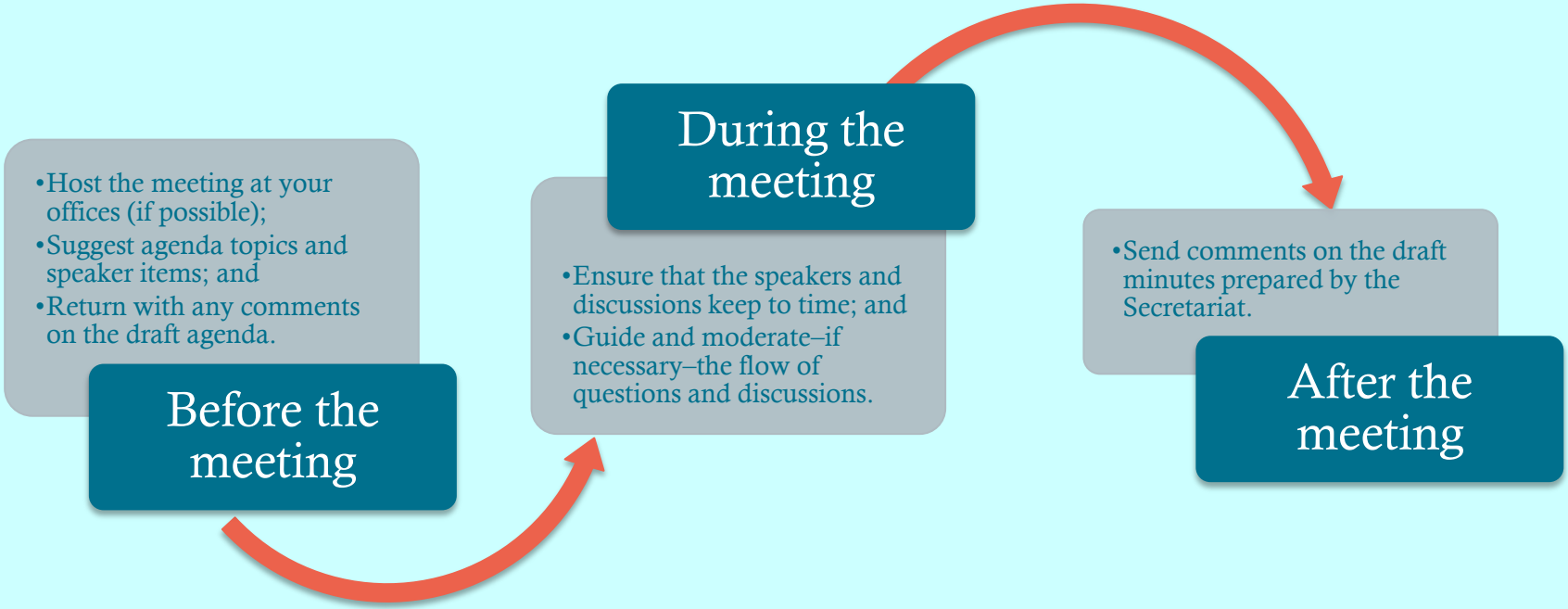
Your Forum needs you!

Emily Bradley, FMLC Legal Analyst

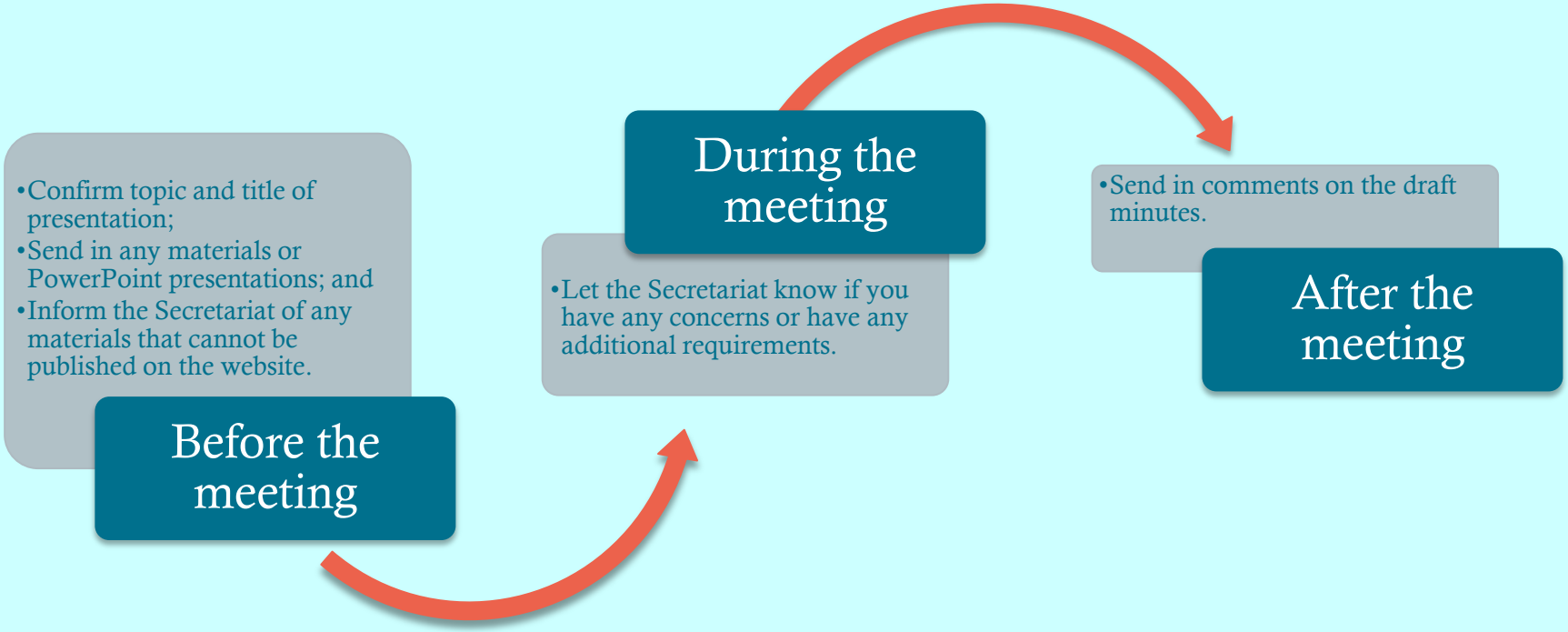
Your Role in the Scoping Forum

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

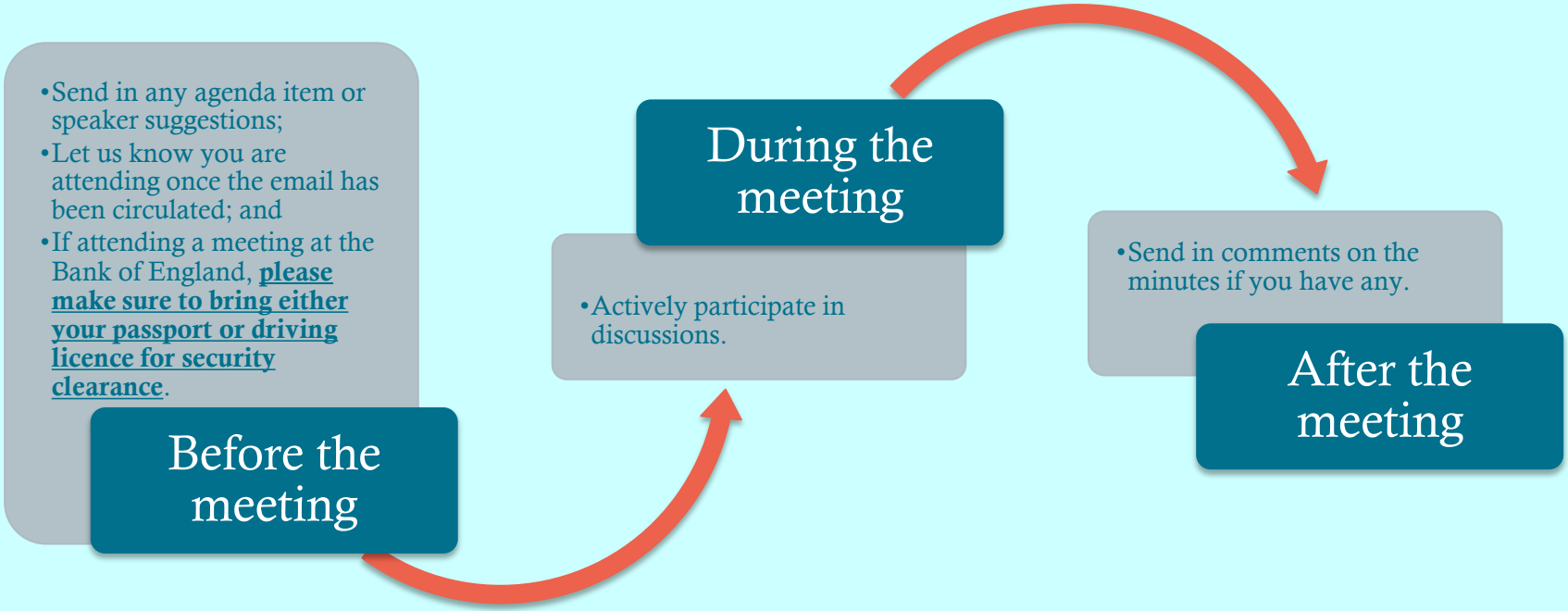
The Role of the Chair



The Role of the Speakers



The Role of the Forum Members



2018 Forward Schedule

Thursday 8 February	2.00am to 3.30pm (U.K.) 9.00am to 10.30am (U.S.)
Thursday 10 May	9.00am to 10.30am (U.K.) 6.00pm to 7.30pm (Australia)
Thursday 9 August	2.00pm to 3.30pm (U.K.) 9.00am to 10.30pm (U.S.)
Thursday 8 November	9.00am to 10.30am (U.K.) 8.00pm to 9.30pm (Australia)

2018 Forward Agenda

- ICOs
- Smart Contracts
- Cross-Jurisdictional legal uncertainties

Conclusion / The End

- Get involved!

Financial Markets Law Committee
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