

## Financial Markets Law Committee (“FMLC”)

### Infrastructure Scoping Forum

Date: Monday 11 December 2017

Time: 9.00am to 10.05am

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



#### In Attendance:

Emma Dwyer (Chair)	Allen & Overy LLP
Antony Beaves	Bank of England
Thomas Donegan	Shearman & Sterling LLP
Adam Eades	CBOE Europe
John Ewan	
Nathaniel Lalone	Katten Muchin Rosenman UK LLP
Alex Rutter	Tradeweb Europe Limited
Rachel Toon	FMLC
Thomas Willett	FMLC

#### Guest Speakers:

Rick Sandilands	International Swaps and Derivatives Association (“ISDA”)
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#### Regrets:

Nick Carew-Hunt	
Mark Evans	Travers Smith LLP
Iona Levine	Minerva Chambers
Hannah Meakin	Norton Rose Fulbright LLP
Bob Penn	Cleary Gottlieb Steen & Hamilton LLP
Barnabas Reynolds	Shearman & Sterling LLP
Mitja Siraj	FIA
Arun Srivastava	Baker McKenzie LLP
Christopher Twemlow	Euroclear SA/NV London
Paul Vine	Norton Rose Fulbright LLP

Registered Charity Number: 1164902.

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## Minutes:

### 1. Introduction.

1.1. Emma Dwyer opened the meeting and delivered a brief introduction.

### 2. Administration:

#### a. a short presentation: **Your Scoping Forum Needs You (Rachel Toon)**;<sup>1</sup>

2.1. Rachel Toon 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;<sup>2</sup>

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.<sup>3</sup>

### 3. The future of contacts linked to London Interbank Offered Rate (“LIBOR”) and the future of legacy contacts linked to the ISDA LIBOR definitions (John Ewan and Rick Sandilands).

3.1. Following Will Parry’s (Bank of England) presentation on the transition from LIBOR to Sterling Over Night Index Average (“SONIA”) at the third quarter meeting of 2017,<sup>4</sup> John Ewan and Rick Sandilands elaborated on this topic by discussing the future of contacts linked to LIBOR and the future of legacy contracts linked to the ISDA LIBOR definitions.

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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 for the 2018 Forward Agenda, please contact Thomas Willett at [forums@fmlc.org](mailto:forums@fmlc.org).

<sup>4</sup> Minutes from the Q3 Infrastructures Scoping Forum meeting can be found at: [http://www.fmlc.org/uploads/2/6/5/8/26584807/fmlc\\_up\\_11691098\\_v\\_1\\_18\\_september\\_2017\\_forum\\_minutes.pdf](http://www.fmlc.org/uploads/2/6/5/8/26584807/fmlc_up_11691098_v_1_18_september_2017_forum_minutes.pdf)

- 3.2. In his introduction, Mr Ewan referenced a statement by the Financial Conduct Authority (“**FCA**”) on LIBOR panels<sup>5</sup> which confirms that all of the 20 panel banks agree that LIBOR is needed until the end of 2021, after which a transition can be made to other benchmarks. It was then explained how work to establish alternative benchmarks to LIBOR is at different stages, for example: the Bank of England has stipulated that a reformed version of the Sterling Overnight Index Average (“**SONIA**”) will be introduced on 23 April 2018.<sup>6</sup>
- 3.3. Mr Ewan also observed that there are questions surrounding the sustainability of the Euro Interbank Offered Rate (“**EURIBOR**”); and the European Central Bank (“**ECB**”) is looking to develop a new unsecured overnight interest rate<sup>7</sup>.
- 3.4. He continued by identifying the problems facing markets in instruments historically linked to key interest rate (“**IBOR**”) benchmarks, these were chiefly:
- i. the structure of alternative reference rates developed from overnight and/or risk free rates—with the need for a term structure being a particular challenge; and
  - ii. the transition period from an existing IBOR rate to an alternative reference rate.
- 3.5. With regards to the term structure, Mr Ewan explained how the Bank of England was aware of this problem and was exploring the ways in which a term structure could be built. A consultation on these issues is expected to be released during the first quarter of 2018.
- 3.6. Turning to the transition period from LIBOR, Mr Ewan noted how the Bank of England and the FCA had released a statement in November<sup>8</sup> announcing the next phase of work on LIBOR transition. It was emphasised that while the administrators of current IBOR rates are working hard on evolution of these rates, as a matter of prudence, the Bank and FCA must nevertheless plan for scenarios in which existing benchmarks may not be

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<sup>5</sup> FCA Statement on LIBOR panels, (24 November 2017), available at: <https://www.fca.org.uk/news/statements/fca-statement-libor-panels>.

<sup>6</sup> Bank of England, “SONIA reform to be implemented on 23 April 2018”, (16 October 2017), available at: <https://www.bankofengland.co.uk/news/2017/october/sonia-reform-to-be-implemented-on-23-april-2018>.

<sup>7</sup> Press release by ECB: “ECB to publish new unsecured overnight interest rate”, (21 September 2017), available at: <https://www.ecb.europa.eu/press/pr/date/2017/html/ecb.pr170921.en.html>.

<sup>8</sup> Bank of England and FCA News Release: “Bank and FCA launch next phase of sterling libor transition work”, (29 November 2017), available at: <https://www.bankofengland.co.uk/-/media/boe/files/news/2017/november/bank-and-fca-launch-next-phase-of-sterling-libor-transition-work.pdf?la=en&hash=C703BAB8FC50916478CFE78EBB45DF6814BF4F33>.

available for use. Mr Ewan stressed that these bodies need input and engagement from market participants.

- 3.7. Rick Sandilands then continued the presentation by concentrating on the future of legacy contacts linked to the ISDA LIBOR definitions. Mr Sandilands mentioned that ISDA has participated as an observer over the past two years on the Working group on sterling risk-free reference rates.
- 3.8. Mr Sandilands then isolated three key issues facing the future of legacy contracts; the first of these being the lack of a term structure. He explained that ISDA are keen to not have a term structure involving different tenors; whereas the Alternative Reference Rates Committee (“**ARRC**”) have been speaking about a term structure that can be implemented during the transitional period with the aim of creating a liquid overnight market. The regulators, however, were described as being unhappy, emphasising that alternative term rates at various tenors need to be implemented to prevent market fragmentation in case the IBOR benchmarks are withdrawn. In response, Mr Sandilands explained how ISDA have initiated a series of working groups to come up with solutions to fall-backs, with a compounded overnight rate in arrears as one suggestion.
- 3.9. The second issue Mr Sandilands touched upon was the transfer of economic value—an issue connected to the challenge of transitioning from the IBOR rates reflecting a credit component to risk free, or nearly risk free, rates. It was highlighted how work on a solution from a transition point of view is far less advanced, and that regulators will be turning to ISDA to lead this work.
- 3.10. The last issue Mr Sandilands referred to was the possible basis risk with other products. In particular, it was explained how if loans and securities have different transitional arrangements, people are less likely to sign up to arrangements on ISDA protocols. Currently, there are no standard protocols in existence for formal abilities to change contracts that exist in different products. Mr Sandilands stressed that there needs to be a universal and efficient approach to solve this issue; this would, however, present a huge challenge. Alternatively, a more bespoke method could be taken for the different scenarios to include optionality and standard terms.
- 3.11. E.U. benchmarks were explored next, focusing on the future of the EURIBOR benchmark.
- 3.12. When opened to the Forum members for questions and discussion, one individual articulated how they believed that the use of LIBOR will continue after 2021 and will

move towards a non-submission basis. The member stressed that if you assume LIBOR will continue, the big challenge will be the ISDA protocols.

3.13. The possibility of either party of a contract that uses the LIBOR nominating an alternative benchmark was also discussed.

3.14. The Forum members agreed for this topic to be revisited in 2018.

#### **4. An update on drawing a distinction between bilateral and multilateral trading activities (Nathaniel Lalone).**

4.1. Nathaniel Lalone delivered an update on drawing a distinction between bilateral and multilateral trading activities following his presentation at the first quarter meeting of 2017.<sup>9</sup>

4.2. Mr Lalone began by noting how the European Securities and Markets Authority (“ESMA”) has provided helpful information on multilateral and bilateral systems,<sup>10</sup> and how the FCA have as a consequence withdrawn their earlier proposed definition of “multilateral system”, a definition which may have introduced significant legal uncertainty for U.K. market participants.

4.3. Mr Lalone stipulated that the fundamental issue was in the definition of “multilateral” versus “bilateral” systems. Now that some guidance has been delivered, firms might have enough information to determine their appropriate regulatory characterisation..

4.4. This is, however, not a finished debate. It was noted that the guidance regarding “bilateral” and “multilateral” systems introduced definitional rigidities that effectively require existing business models to be forcibly adjusted to fit within one of the permissible forms of system. It was stressed how uncertainties still remain over so-called “multiple-bilateral” constructs.

#### **5. Regulation of Commodities Benchmarks (Arun Srivastava).**

5.1. Owing to the absence of the speaker this agenda topic was not discussed.

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<sup>9</sup> Minutes from the Q1 Infrastructure Scoping Forum meeting can be found at: [http://www.fmlc.org/uploads/2/6/5/8/26584807/infrastructure\\_sf\\_minutes\\_final.pdf](http://www.fmlc.org/uploads/2/6/5/8/26584807/infrastructure_sf_minutes_final.pdf).

<sup>10</sup> ESMA, *Questions and Answers on MiFID II and MiFIR market structures topics*, (5 April 2017), available at: [https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-38\\_gas\\_markets\\_structures\\_issues.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-38_gas_markets_structures_issues.pdf) (updated on 18 December 2017).

**6. Any other business.**

6.1. No other business was raised.

# Scoping Forums

## Your Forum needs you!

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Rachel Toon,  
FMLC Executive Assistant



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# Your Role in the Scoping Forum

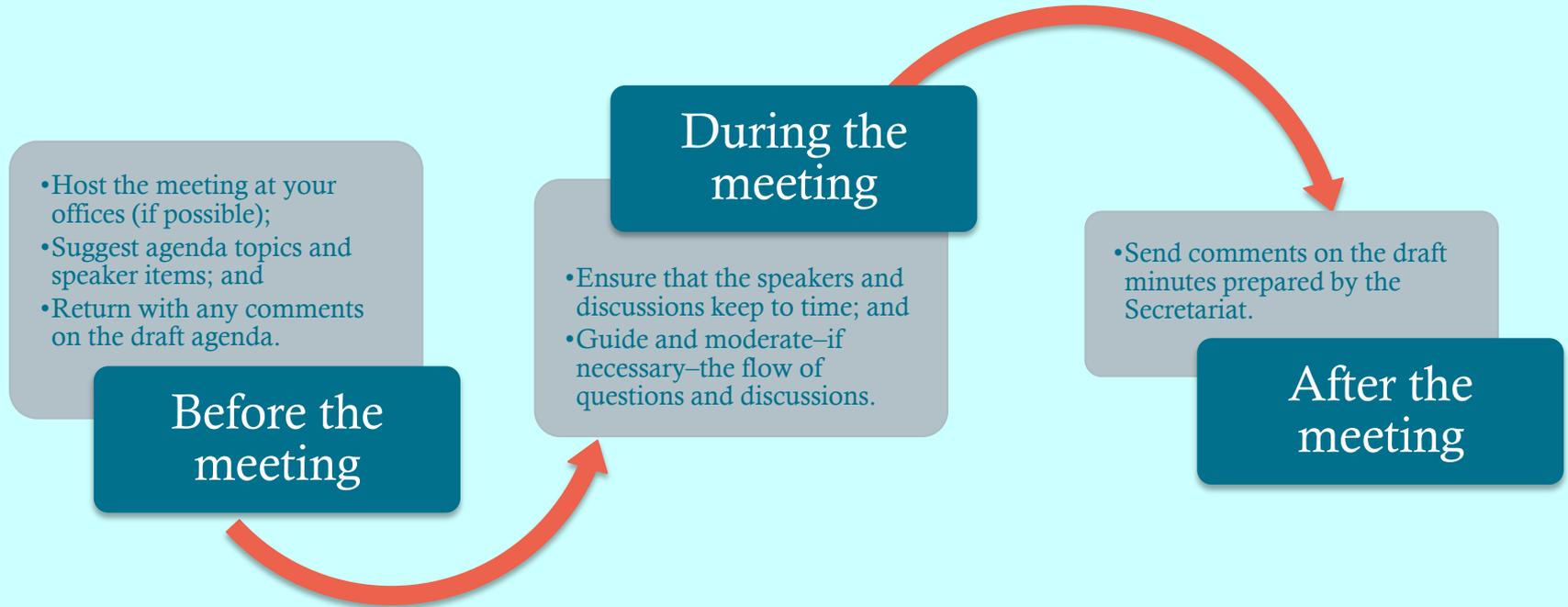
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- The role of the Chair
- The role of the Speakers
- The role of the Forum Members



# The Role of the Chair

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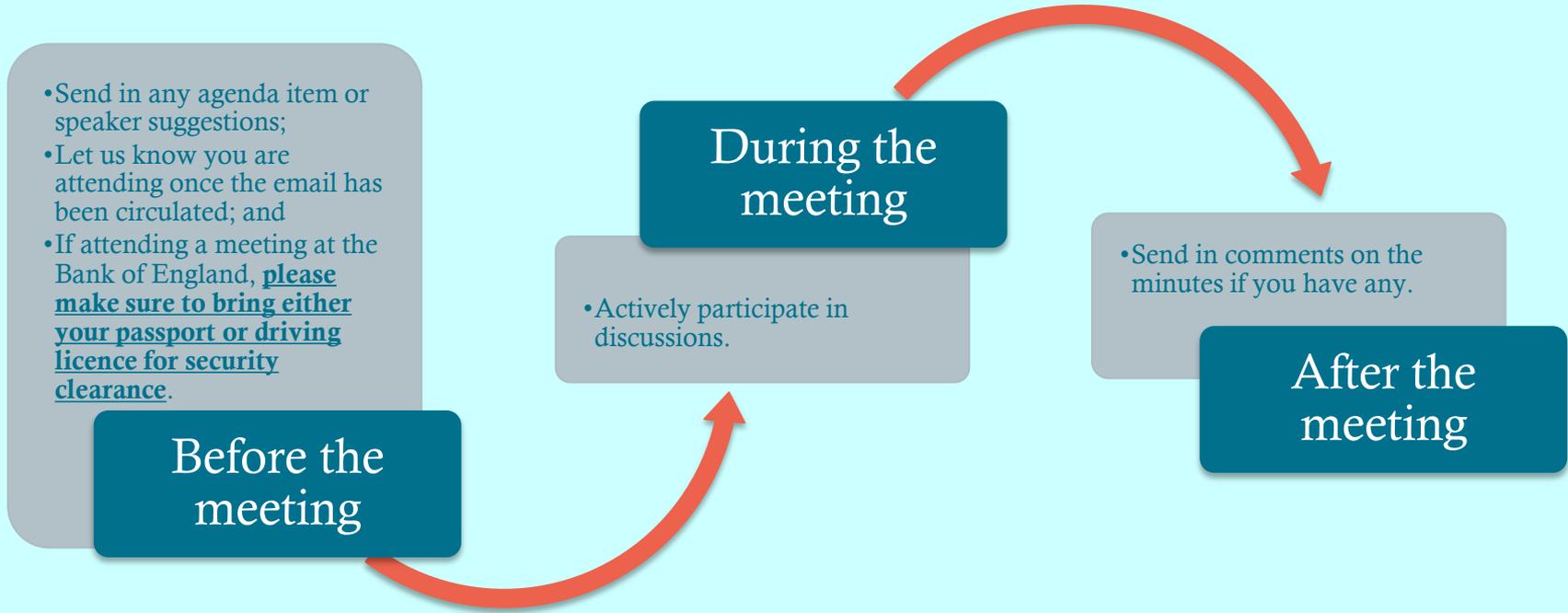
# The Role of the Speakers

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# The Role of the Forum Members

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# 2018 Forward Schedule

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**Thursday 8 March**

2.00pm to 3.30pm (U.K.)

**Thursday 7 June**

2.00pm to 3.30pm (U.K.)

**Thursday 13 September**

2.00pm to 3.30pm (U.K.)

**Thursday 6 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**

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