

Financial Markets Law Committee (“FMLC”)

Quarterly Discussion Forum

Date: Friday 8 December 2017

Time: 3.00pm to 4.15pm (London)

10.00am to 11.15am (New York)



In Attendance:

FMLC:

Joanna Perkins (Chair)	FMLC
Carolyn Jackson (dial in)	Katten Muchin Rosenman UK LLP
Mark Kalderon (dial in)	Freshfields Bruckhaus Deringer LLP
Lord Thomas of Cwmgiedd	FMLC Chairman
Rachel Toon	FMLC
Thomas Willett	FMLC

FMLG:

Sarah Ashkenazi	Bank of America
Maria Douvas	Morgan Stanley
Luke Farber	Standard Chartered
Jill Hurwitz	Deutsche Bank
Amelia Kaufman	Deutsche Bank
Thomas Noone	FMLG
Jeff Saxon	BNP Paribas
David Trapani	CLS
Bryan Woodard	State Street

Regrets:

Andrew Bagley	Goldman Sachs International
Paul Double	City of London Corporation
Jon May	Marshall Wace LLP
Sinead Meany	Bank of England
Barney Reynolds	Shearman & Sterling LLP

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Minutes:

1. Introduction

1.1. Joanna Perkins (Chair) opened the meeting and gave a brief introduction.

2. MiFID II (Mark Kalderon)

2.1. Mark Kalderon explained that firms are readying themselves for compliance ahead of the implementation date for MiFID II on 3 January 2018.

2.2. Mr Kalderon explained how there is a lack of guidance around the extraterritorial scope of MiFID II meaning questions such as whether firms who deal through branches outside the E.U. will be subject to all or none of the MiFID II requirements, have not yet been addressed.

2.3. Mr Kalderon highlighted that although the implementation date is 3 January 2018, there is still guidance being published and it would not be practical to respond to this guidance by then so it will continue to be ongoing. Current unresolved issues will also need to be revisited after this date.

2.4. Mr Kalderon also noted the issue of supervisory enforcement and the question surrounding how the authorities are going to react to those who are non-compliant and whether they will be understanding towards those who have tried to be compliant. There is currently a drive among the supervisory authorities for greater consistency. Mr Kalderon explained there are likely to be problems arising for the next 6–12 months.

3. Update on Brexit (Joanna Perkins)

3.1. Joanna Perkins provided a summary of the developments in relation to the Brexit negotiations since the previous Quarterly Discussion Forum meeting, which took place on Friday 8 September 2017. These developments included: (i) the U.K. government's winning a vote to take the E.U. Withdrawal Bill forward; (ii) a policy statement about how the U.K. would aim to develop a distinct regulatory framework from the E.U. after Brexit; and (iii) an "agreement-in-principle" reached by the E.U. and the U.K. in relation to the Brexit financial settlement ("**divorce bill**").

4. "Brexit subsidiaries – trading with U.S. pension plans" (Luke Farber)

4.1 Luke Farber introduced a discussion concerning so-called "Brexit subsidiaries"—i.e., new group companies which U.K. operating firms may putatively establish so as to retain a presence within the E.U. regulatory perimeter for financial services after Brexit. Mr

Farber explained that any new entities established after Brexit, whether in the U.K. or in the E.U., will prima facie need to apply for registration with the Commodity Futures Trading Commission (“**CFTC**”) if they are to continue doing business on behalf of the group with U.S. clients. He observed that there was a lack of forward-looking clarity as to the approach which might be adopted by the CFTC in these circumstances. Mr Farber asked Dr Perkins if these are legal issues which she has come across.

- 4.2 Dr Perkins mentioned that this was an issue she had seen being raised before in relation to Brexit restructurings in general and was related to the broader question of whether U.K. firms would continue to benefit after Brexit from mutual recognition agreements negotiated between the European Commission and U.S. regulators. She observed that it would not be safe to assume regulatory continuity for U.K. firms in this respect. Dr Perkins offered to raise the issue with the FMLC so there can be further discussion on the next Quarterly Discussion call.

5. **E.U. Benchmark Regulation (Joanna Perkins)**

- 5.1 Dr Perkins highlighted that there are currently three major developments in the field of financial benchmarks: (i) the coming into application of the E.U. Benchmarks Regulation (“**BMR**”) in January 2018; (ii) Brexit, in view of the fact that many key European Benchmarks are based and administered in London; and (iii) the growing recognition by regulators that the objective of transitioning to a fully transactions-based methodology, which set out for key interest rate benchmarks in a report dated July 2014 by the Financial Stability Board was unlikely to be fulfilled as it was originally envisaged.
- 5.2 On the subject of the BMR, Dr Perkins noted the current focus on Article 51 of the which sets out transitional provisions, including a grace period for the registration of E.U. benchmarks. She briefly outlined the three routes open to so-called Third Country benchmark administrators who wish to make their benchmarks available in the E.U. (recognition, endorsement and/or equivalence) and explained the operation of transitional provisions for benchmarks incorporated into legacy contracts. The European Securities Markets Authority had recently noted that a grace period which is available for new E.U. benchmarks (“**ESMA**”) which have not yet registered with ESMA is not *prima facie* available for third country benchmarks.
- 5.3 Dr Perkins highlighted that on 27 July 2017 the Financial Conduct Authority (“**FCA**”) announced it would no longer support the London Interbank Offered Rate (“**LIBOR**”) after 2021. In part, this announcement reflected the recognition,

referred to earlier by Dr Perkins, that a fully transactions-based methodology for LIBOR is not feasible in a world of diminishing unsecured, interbank lending.

- 5.4 Dr Perkins also noted that Brexit could possibly leave the U.K. Benchmark administrators faced with the problem of registering as “Third Country” benchmark administrators. If this were to happen, timing would be crucial because several of the transitional provisions expire in 2020.

6. Confirm Forward Schedule for 2018 (Joanna Perkins)

- 6.1 Dr Perkins confirmed that the Forward Schedule for 2018 has been confirmed by the FMLC Secretariat and the FMLG Secretariat. As the 2018 Quadrilateral has been fixed for 7- 8 June, this will stand as a substitute for the Quarter 2 teleconference. Thomas Noone suggested the following topics for the next teleconference: (i) an update on the FMLG’s Best Practice Reviews; (ii) FX Global Code Implementation; (iii) Virtual Currencies; (iv) Brexit Subsidiary; and (v) an update on Brexit.

7. Any other business

- 7.1 No other business was raised.