Financial Markets Law Committee ("FMLC")

Asset Management Scoping Forum

Date: Thursday 1 October 2020

Time: 2.00pm to 3.30pm

Virtual meeting

Attendees:

Philippa List (Moderator)	Dechert LLP
Matthew Baker	Bryan Cave Leighton Paisner LLP
Phil Bartram	Travers Smith LLP
Iain Cullen	Simmons & Simmons LLP
David Gasperow	Orbis Investments
Jonathan Gilmour	Travers Smith LLP
Kirsten Lapham	Proskauer Rose LLP
Owen Lysak	Clifford Chance LLP
Vlad Maly	Morrison & Foerster LLP
Jon May	Marshall Wace LLP
Michelle Moran	K&L Gates LLP
Leonard Ng	Sidley Austin LLP
Selina Sagayam	Gibson, Dunn & Crutcher UK LLP
Ezra Zahabi	Akin Gump Strauss Hauer & Feld
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Guest Speaker:

David Bloom	Truist

Regrets:

Ida Levine	Impact Investing Institute
Neil Robson	Katten Muchin Rosenman UK LLP

Minutes:

1. Introductions

1.1. Ms List opened the meeting.

2. Did you know the FMLC are moving premises? (Venessa Parekh)

2.1. Ms Parekh informed members the FMLC Secretariat will be moving out from the current offices in the Bank of England to new premises offered by the City of London later this year. In light of the coronavirus pandemic, many FMLC meetings have been held virtually and there is a possibility of continuing to schedule more of the FMLC's meetings online in future. Ms Parekh noted some meetings and events are better face to face and when in-person meetings can resume the FMLC would appreciate offers to host and cater some of its annual events and meetings, or even for logistical support, such as printing.

3. MiFID II; unbundling—recent developments (David Bloom)

3.1. Mr Bloom introduced himself and explained he would provide an overview of developments in relation to research unbundling requirements under Directive 2014/65/EU on markets in financial instruments (the "**Markets in Financial Instruments Directive II**" or "**MiFID II**"). Since June 2019, asset managers are required to explicitly pay for third-party research and brokers must price and provide research separately. Mr Bloom stated that the Financial Conduct Authority ("**FCA**") had conducted a multi-firm review of research unbundling reforms which had shown that most fund managers have chosen to absorb the costs of research but have, in turn, reduced research budgets.[1] The FCA's multi-firm review noted that research pricing is still evolving.

3.2. Mr Bloom turned to the U.S., commenting that the MiFID II unbundling regime raised interesting conflict of laws issues state-side. The U.S. Securities and Exchange Commission ("**SEC**") had granted no-action relief in October 2017 to assist market participants in complying with the research requirements of MiFID II in a manner consistent with the U.S. federal securities laws. The relief was to expire in July 2020 but

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[1] FCA, Implementing MiFID II – multi-firm review of research unbundling reforms (19 September 2019), available at: https://www.fca.org.uk/publications/multi-firm-reviews/implementing-mifid-ii-multi-firm-review-research-unbundling-reforms

has been extended until July 2023.[2] Mr Bloom remarked that the letter granting extension implicitly approves the use of Client Commission Arrangements.

3.3. The European Commission had launched a Consultation on the review of MiFID II and MiFIR in February 2020.[3] The Consultation noted that the availability of research for Small to Medium Enterprises ("**SMEs**") had declined, possibly because of the unbundling requirements. Following on from that initial consultation, the European Commission launched another consultation on unbundling in July 2020.[4] The proposed "quick fix" amendments to MiFID II included changes to the research regime for SMEs.[5] Mr Bloom remarked that the FCA has not voiced any reaction to the European Commission's proposals and that European Securities and Markets Authority ("**ESMA**") had found no material evidence of research drop off from the MiFID II unbundling rules.[6]

3.4. Mr Bloom noted Dalia Blass, the SEC Director of the Division of Investment Management, has suggested industry participants should provide for data and input to shape US policy in this space.[7] Mr Bloom remarked that, in the E.U., research costs anecdotally appear to be being borne by investment managers, whereas, in the U.S., investment managers have continued to pass research costs on to clients; albeit with investors demanding greater transparency on these costs. Members discussed whether the European Commission's "quick fix" amendments to MiFID II aligned with ESMA's research on the matter.

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2 Securities Industry and Financial Markets Association, SEC Staff No-Action Letter (4 November 2019), available at: https://www.sec.gov/investment/sifma-110419.

3 European Commission, Public consultation on the review of the MiFID II/MiFIR regulatory framework (17 February 2020) https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2020-mifid-2-mifir-review-consultation-document_en.pdf

4 European Commission, Consultation on amendments to Delegated Directive (EU) 2017/593 on the research regime to help the recovery from the COVID-19 pandemic (24 July 2020), available at: Capital markets – research on companies seeking alternative financing (updated rules in light of COVID-19) (europa.eu)

5 European Commission, MiFID review proposal (24 July 2020) available at: https://ec.europa.eu/finance/docs/law/200724-mifid-review-proposal_en.pdf

6 ESMA, Report on Trends, Risks and Vulnerabilities (2 September 2020) available at: https://www.esma.europa.eu/file/56986/download?token=l4HaYrg4

7 SEC, Dalia Blass Statement at the SEC Regulation Think-In 2020 Conference (16 September 2020), available at: https://www.sec.gov/news/public-statement/blass-sec-regulation-think-2020-09-16

4. ESMA letter to the European Commission on AIFMD review (Philippa List)

4.1. Ms List stated that ESMA's letter to the European Commission makes 19 recommendations as to areas which the European Commission should focus on in its review of Directive 2011/61/EU on Alternative Investment Fund Managers (the "**Alternative Investment Fund Managers Directive**" or "**AIFMD**").[8] Ms List went on to summarise the contents of ESMA's letter. She noted the letter suggests amendments to Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (the "**UCITS Directive**") in addition to amendments to AIFMD.

4.2. ESMA has suggested providing clarifications in the AIFMD with respect to delegation and substance requirements. ESMA's letter notes Alternative Investment Fund Managers ("**AIFMs**") often rely heavily on delegated arrangements while only performing some control functions internally. Ms List commented that ESMA perceives risk from extensive delegation arrangements. ESMA recommends supplementing Article 82(1)(d) of the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision with clear quantitative criteria or by providing a list of core or critical functions that must always be performed internally and may not be delegated to third parties.

4.3. Members discussed some of ESMA's letter's recommendations in light of Brexit. A member commented that while some recommendations may seem political, it could just be poor timing. A member commented that the proposals to harmonise the wording of the AFIMD and the UCITS Directive echoes a speech from France's Autorité des Marchés Financiers last year.[9] A member commented that it would be interesting to see the outcome of the European Commission's consultation on this topic, publication of which is expected in November.

8 ESMA, Letter on AIFMD review (19 August 2020), available at: https://www.esma.europa.eu/press-news/esma-news/esma-recommends-priority-topics-in-aifmd-review

9 AMF, Speech by Robert Ophèle, Chairman of the AMF at the European Fund and Asset Management Association's Annual General Meeting (21 June 2019), available at: https://www.amf-france.org/en/news-publications/public-statements/speech-robert-ophele-chairman-amf-european-fund-and-asset-management-associations-annual-general

5. Recent developments—Brexit (Philippa List)

5.1. Ms List stated that the European Commission published its new Capital Markets Union Action Plan on 24 September.[10] The Capital Markets Union Action Plan proposes 16 actions with 3 key objectives: (1) to support a green, digital, inclusive and resilient economic recovery by making financing more accessible to European companies; (2) to make the E.U. an even safer place for individuals to save and invest long-term; and (3) to integrate national capital markets into a genuine single market.

5.2. In the U.K., Ms List noted that the FCA has re-opened its Temporary Permissions Regime ("**TPR**") notification window. She also pointed out that the U.K. has made announcements about considering a new U.K. financial services regime. For example HM Treasury published a Policy Statement providing an update on its proposed approach to bringing forward certain amendments to the onshored version of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (the "**PRIIPs Regulation**").[11] HM Treasury proposes three areas for change: an amendment enabling the FCA to clarify the scope of the PRIIPs Regulation through its rules, an amendment to replace the terminology around "performance scenario" with "appropriate information on performance" in the PRIIPs Regulation; and an amendment which delegates a power to HM Treasury to further extend the exemption under the PRIIPS Regulation for UCITS for up to a maximum of five years. The FCA has published a Consultation Paper entitled "Our Approach to International Firms"; Ms List highlighted that paragraph 1.6 of the Consultation specifies that it does not include international alternative investment fund ("**AIF**") managers.[12]

6. Any other business

6.1. No further business was raised at the meeting.

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10 European Commission, Capital markets union 2020 action plan: A capital markets union for people and businesses (24 September 2020), available at: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-2020-action-plan_en

11 HM Treasury, Amendments to the PRIIPs Regulation (30 July 2020), available at: https://www.gov.uk/government/publications/amendments-to-the-priips-regulation

12 FCA, CP20/20: Our Approach to International Firms (September 2020), available at: https://www.fca.org.uk/publication/consultation/cp-20-20.pdf