Financial Markets Law Committee ("FMLC")

Asset Management Scoping Forum

Date: Thursday 18 June 2020

Time: 2.00pm to 3.00pm

Virtual meeting

Attendees:

Leonard Ng (Moderator)	Sidley Austin LLP
Phil Bartram	Travers Smith LLP
Iain Cullen	Simmons & Simmons LLP
Henrietta de Salis	Willkie Farr & Gallagher (UK) LLP
David Gasperow	Orbis Investments
Jonathan Gilmour	Travers Smith LLP
Kirsten Lapham	Proskauer Rose LLP
Ida Levine	Impact Investing Institute
Philippa List	Dechert LLP
Owen Lysak	Clifford Chance LLP
Jon May	Marshall Wace LLP
Michelle Moran	K&L Gates LLP
Neil Robson	Katten Muchin Rosenman UK LLP
Palvi Shah	J.P. Morgan Asset Management
Ezra Zahabi	Akin Gump Strauss Hauer & Feld LLP
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Regrets:

Matthew Baker	Bryan Cave Leighton Paisner LLP

Minutes:

1. Introductions

1.1. Mr Ng opened the meeting.

2. Linking with the FMLC (Venessa Parekh)[1]

2.1 Ms Parekh provided an overview of some of the ways in which Forum members, or their institutions, could contribute to the work of the FMLC, aside from, or in addition to, a financial donation. These include contributing to its research, hosting meetings and events and seconding lawyers to the Secretariat.

3. Regulation 43 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017: obligations to update changes to KYC information. What is being done in practice? Is practice indicative of legal uncertainty? (Phil Bartram)

3.1 Mr Bartram provided an overview of Article 43(4) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the "**MLRs**"). He explained that Article 43(4) of MLRs requires all U.K. bodies corporate (excluding those listed on a regulated market) to notify "relevant persons", during the course of a business relationship, of changes to prescribed information and the date on which those changes occurred within 14 days of the date on which the corporate becomes aware of the change. These changes include, amongst other things, changes to the U.K. body corporate's registered office, board of directors, senior persons responsible for its operations, legal owners and beneficial owners. U.K. bodies corporate typically have a number of business relationships with, for example, credit institutions, financial institutions, lawyers, accountants, tax advisors, auditors and estate agents (all of whom would fall within the definition of "relevant persons"). Failure to notify under the MLRs is a criminal offence—breach of this requirement may have implications under Part 7 of the Proceeds of Crime Act 2002.

3.2 Mr Bartram queried if this is general market practice and whether U.K. bodies corporate are aware of or have systems in place designed to secure compliance with the obligation under Article 43(4) of MLRs, which became effective on 26 June 2017. He noted that, although the MLRs principally implemented the Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the **"Fourth**

[1] Please see Appendix I below

Money Laundering Directive" or "**4MLD**"), this requirement (of notifying 'relevant persons' of changes to prescribed information) does not appear in the E.U. legislation and appears to reflect a U.K. policy priority. It is not specifically discussed in HM Treasury's consultation paper on the transposition of the Fourth Money Laundering Directive and the Fund Transfer Regulation,[2] although the time limit for notifying "relevant persons" did appear in the final text of the MLRs to be 14 days. Mr Bartram explained the notification obligation is currently relevant as it has been mentioned in the latest consultation draft of the Joint Money Laundering Steering Group Guidance for the UK Financial Sector on Prevention of money laundering/combating terrorist financing ("**the JMLSG Guidance**").[3]

3.3 Members discussed whether the requirements under Article 43(4) of the MLRs have been overlooked and therefore are not complied with. A member questioned if this generates any issues of legal uncertainty or is simply a lack of awareness about the obligation. Members discussed that this issue might be raised with the Alternative Investment Management Association ("**AIMA**") which might be able to raise market awareness. Ms Parekh stated that the FMLC's remit includes addressing areas where law and practice are out of step. Members agreed that law firms should consider circulating information regarding this obligation and explaining to their clients about the regulatory requirements. The issue applies to a wide category of market participants, not only asset managers. Members agreed that the obligation under Article 43(4) of MLRs has a broad application which is wider than the remit of this Scoping Forum. They suggested the issue could be better dealt with by the City of London Law Society ("**CLSS**") and agreed to raise it there.

4. The status of asset managers' activities in the E.U. in a no-deal Brexit scenario (Leonard Ng)

4.1. Mr Ng stated that for the last eighteen months the asset management industry in the U.K. have been focussed on what asset management firms can do in respect of marketing, distribution, etc. in preparation and mitigation of a possible "no-deal" scenario at the end of the Brexit transition period. In the absence of an equivalence decision, Third Country firms' access may

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[2] HM Treasury, *Consultation on the transposition the Fourth Money Laundering Directive and the Fund Transfer Regulation* (September 2016), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553409/4mld_final_15_sept_2016.pdf

[3] The Joint Money Laundering Steering Group, *Guidance for the UK Financial Sector on Prevention of money laundering/combating terrorist financing* (June 2020), available at: https://secureservercdn.net/160.153.138.163/a3a.8f7.myftpupload.com/wp-content/uploads/2020/07/JMLSG-Guidance_Part-I_-July-2020.pdf

be a matter of individual Member State's national discretion. These aspects of the European regulatory perimeter are not a new development; however, increased focus and regulatory attention has come as a result of Brexit.

4.2. Mr Ng gave some examples of scenarios where Third Country asset management firms may provide services to E.U. clients. Members discussed the need for Third Country firms to have a presence and/or licence in member states to provide services, whether introductory activity may fall outside the need for a MiFID "passport", reception and transmission of orders and the use of the tied agent concept. A member posited that the E.U. is unlikely to adopt the view that marketing is not an investment service, which means it is likely to fall within the scope of the regulation, although "genuine" reverse solicitation would be permitted. Mr Ng noted that Article 42 of Directive 2014/65/EU on markets in financial instruments ("**MiFID II**") allows reverse solicitation—where an E.U. client solicits a service from a Third Country firm, the Third Country firm can provide that investment service without requiring authorisation under Article 39 of MIFID II. A member commented that E.U. counsels have faced a lot of questions around which activities would amount to MiFID services or activities. Mr Ng explained that industry trade bodies have raised issues of equivalence in MiFID II. Members agreed to monitor developments in this context.

5. Any other business

5.1. No further business was raised at the meeting.

Linking into the work of the FMLC

Venessa Parekh
Research Manager

Non-pecuniary involvement with the FMLC

The FMLC's work in furthering legal certainty in the wholesale financial markets, addressing legal risk, and providing impartial analysis is vitally important at this time when so much is happening.

The FMLC appreciates your support through participation in this Scoping Forum. Do you know other ways you can engage with and contribute to the FMLC, aside from a monetary donation?

Engaging with the FMLC

- Alerting the FMLC Secretariat to issues of legal uncertainty
- Participation in FMLC scoping forums, either as a member or a guest speaker
- Joining FMLC working groups, contributing legal expertise and drafting chapters of papers
- Participation in FMLC events, either as a attendee or guest speaker

Supporting FMLC Events

Your organisation can host FMLC events and/or provide logistical support for events, such as printing.

For example:

- Judicial Seminar
- Quadrilateral Conference
- Spring and Autumn Seminars
- Patrons' Dinner, and
- Festive drinks reception

FMLC Secondment Programme

Law firms can supply lawyers on secondment to the FMLC Secretariat, in the role of Legal Analyst.

The secondment provides an opportunity to conduct detailed research on specific issues and will hone key skills such as drafting, legal research and stakeholder relationships.

Each secondment typically lasts for a period of 6 months. Recent secondees have included trainee solicitors and associates at NQ level, as well as associates who are one year or more PQE.

Supporting the FMLC

If you wish to find out more about the FMLC secondment programme and how your organisation can participate, please contact Emma McClean (operations@fmlc.org)

If you wish to find out more about upcoming FMLC events and the ways you can offer support, please contact Rachel Toon (executivesupport@fmlc.org)

If you have an issue of legal uncertainty you would like to raise with the FMLC, or if you or your organisation would like to contribute to the FMLC's work via a Scoping Forum or Working Group, please contact Venessa Parekh (research@fmlc.org) or Katja Trela-Larsen (forums@fmlc.org)