Financial Markets Law Committee ("FMLC")

Infrastructure Scoping Forum

Date: Thursday 1 July 2021

Time: 2.00pm to 3.00pm

Virtual meeting

Attendees:

Tom Callaby (Moderator)	CMS Cameron McKenna Nabarro Olswang LLP
Antony Beaves	Bank of England
Jonathan Gilmour	Travers Smith LPP
Lewis Lee	CLS Bank International
Iona Levine	Minerva Chambers
Barney Reynolds	Shearman & Sterling LLP
Julia Smithers Excell	White & Case LLP
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Paul Watkins	ICE Futures
Venessa Parekh	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Guest Speaker:

Amber Phillips	Cleary Gottlieb Steen & Hamilton LLP

Regrets:

Thomas Donegan	Shearman & Sterling LLP
Emma Dwyer	Allen & Overy LLP
John Ewan	
Matthias Lehmann	University of Vienna
Natalie Lewis	Travers Smith LLP
Mitja Siraj	FIA
Arun Srivastava	Paul Hastings LLP

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Minutes

1. Introductions

1.1. Mr Callaby opened the meeting.

2. SOFR Transition—Credit Sensitive Alternatives Cause Commitment Phobia in US Markets (Amber Phillips)

2.1. Ms Phillips introduced herself, explaining she would bring a U.S. perspective as she is based in Washington DC and works across finance, private equity and capital markets transactions for New York and London-based financial institutions. She noted the State of New York adopted legislation addressing the cessation of U.S. Dollar LIBOR, which the Forum had previously discussed, but there is no Federal legislation addressing the cessation of U.S. Dollar LIBOR yet.

2.2. Ms Phillips observed that the uptake the Secured Overnight Financing Rate ("**SOFR**") in contracts is low in the US. In the absence of a published and ARRC recommended term SOFR rate, other alternatives have been needed, which the market has responded to provide. There is also a growing push in the market to produce "credit sensitive" reference rates to replace U.S. Dollar LIBOR, as an alternative to SOFR. Ms Phillips gave three examples of different credit sensitive approaches. Firstly, the Bloomberg Short-Term Bank Yield Index ("**BSBY**"), which is based mainly on trading of commercial paper, certificates of deposit and short-term bank bonds, is a forward-looking rate launched in early 2021 as a U.S. Dollar LIBOR replacement. The U.S. Securities and Exchange Commission ("**SEC**") has raised concerns about this benchmark,[1] asserting, among other things, that the low transaction volume underlying the rate results in a higher risk of manipulation, to which Bloomberg has responded by altering the methodology. Secondly, Ameribor, which was created in 2015 with the aim of representing the cost of funds for financial institutions not based in New York, uses a 2.5 billion trading volume of unsecured overnight loan transactions on the American Financial Exchange, and appears to be accepted by U.S. regulators.[2] Thirdly, the Across-

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[1] SEC, Gary Gensler, Chair of the U.S. Securities and Exchange Commission, Prepared Remarks Before the Financial Stability Oversight Council (11 June 2021), available at: https://www.sec.gov/news/public-statement/gensler-fsoc-libor-2021-06-11

[2] Federal Reserve Board Chairman Jerome H. Powell described Ameribor as "a fully appropriate rate for the banks that fund themselves through the American Financial Exchange (AFX) or for other similar institutions for whom AMERIBOR may reflect their cost of funding", please see Forbes, Federal Reserve Endorses Ethereum-Backed Alternative To Libor (3 June

the-Curve Funding Index ("**AXI**"), developed by the SOFR Academy, is a weighted average of the credit spreads of unsecured bank funding transactions, with weights that reflect both transaction volumes and issuance volumes. AXI was developed to be added to SOFR to form a credit-sensitive interest rate benchmark. Ms Phillips commented that AXI is an artificial rate. She observed that, while U.S. Regulators have strongly recommended that the market adopt SOFR as the successor to U.S. Dollar LIBOR, and bank regulators have signalled that U.S. Dollar LIBOR exposure will be a feature of their examinations of regulated financial institutions, apart from criticism of BSBY, they have adopted a neutral position on the use of other benchmarks, acknowledging it as a commercial decision.

2.3. Members discussed how different segments of the market were responding to LIBOR cessation and the difference between the U.S and U.K. approach. A member commented they were seeing clients adopt SOFR for certain instruments. A member suggested the Forum should monitor developments around the transition away from LIBOR of so-called "tough legacy" contracts.

3. ESMA Final Report: Guidelines on the MiFID II/MiFIR obligations on market data (Tom Callaby)

3.1. Mr Callaby stated the European Securities and Markets Authority ("**ESMA**") had published its Final Report in June on obligations on market data under the Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ("**MiFID II**") and Regulation (EU) No 600/2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ("**MiFIR**").[3] Mr Callaby explained that the Final Report attempts to clarify some of the Level 1 text, providing guidelines on the requirement to publish market data on a reasonable commercial basis and the requirement to make market data available free of charge 15 minutes after publication. Mr Callaby provided an overview of key points from the Final Report, including the transparency obligations, and the requirement to provide market data on the basis of cost including cost methodologies and audit data. In the U.K., Mr Callaby highlighted that the Financial Conduct Authority ("**FCA**") had published a Call

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2020), available at: https://www.forbes.com/sites/jasonbrett/2020/06/03/federal-endorses-ethereum-backed-alternative-to-libor/?sh=21eadf4769f3

33 ESMA, Final Report on the MiFID II/MiFIR obligations on market data (June 2020), available at: https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-report-mifidiimifir-obligations-market-data

for Input on accessing and using wholesale data in March 2020.[4] It is anticipated that the FCA will publish a statement following the Call for Input in due course.

3.2. Members discussed the Final Report, including differences between the U.K and E.U.'s approach to obligations around market data and whether the question of how to define a reasonable margin of profit might become the subject of a debate. They agreed to monitor developments including the impending publication of the FCA's statement.

4. FCA and ESMA announcements on MiFID II RTS 27 best execution reporting (Tom Callaby)

4.1. Mr Callaby explained that ESMA had issued a Public Statement to promote coordinated action by National Competent Authorities ("**NCAs**") under MiFID II in relation to the suspension of the obligation on execution venues to make available to the public data related to the quality of execution of transactions on their venues (known as "**RTS 27 Reports**").[5] The Statement provides clarity on the application date of the suspension. It sets out ESMA's expectation that NCAs should not prioritise supervisory actions towards execution venues relating to the obligation to publish RTS 27 Reports, until the date on which the national transposition measures for Directive (EU) 2021/338 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis, which made targeted amendments to MiFID II as part of the Capital Markets Recovery Package, apply.

4.2. Mr Callaby went on to explain that the FCA published a statement on 19 March stating that it would not take action against firms which do not produce RTS 27 Reports for the rest of 2021.[6] In April the FCA published a consultation with a view to abolishing the

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[4] FCA, Accessing and using wholesale data—Call for Input (March 2020), available at: https://www.fca.org.uk/publications/calls-input/accessing-and-using-wholesale-data-call-input

[5] ESMA, Public Statement: Application of the temporary suspension of the obligation to publish RTS 27 reports (31 March 2021) available at: https://www.esma.europa.eu/sites/default/files/library/esma35-43-2632_statement_suspension_rts_27.pdf

[6] FCA, Supervisory flexibility on RTS 27 reports and 10% depreciation notifications (19 March 2021), available at: https://www.fca.org.uk/news/statements/supervisory-flexibility-rts-27-reports-ten-per-cent-depreciation-notifications

RTS 27 reporting obligation.[7] Mr Callaby noted that a related consultation is also expected from HM Treasury.

4.3. Members discussed whether there is—or there needs to be—a legal mechanism under which regulators are permitted to state that rules included in the rulebook would not be enforced. A member commented that "no action" letters issued by regulators are commonplace in the U.S., where market participants have confidence in statements in such letters, even when they are addressed to a single or specific party and legally do not apply to them. Members queried the legal basis for "no action" letters in the U.K. Another member commented that "no action" letters could give rise to concerns under the Bill of Rights 1689 and that waivers and/or rapid rule making might be a better option for communicating changes to regulatory policy with market participants. Members recommended that the FMLC consider a project examining the legal basis for "no action" letters in the U.K. and the potential legal uncertainties which could arise from their use.

5. Any other business

5.1. No further business was raised.

[7] FCA, CP21/9: Changes to UK MIFID's conduct and organisational requirements (April 2021), available at: https://www.fca.org.uk/publication/consultation/cp21-9.pdf