

**Minutes of Meeting of the
City of London Law Society Regulatory Law Committee
(the "Committee")**

Held on Tuesday, 9 September 2014 at 12.30pm
at Exchange House, Primrose Street, London, EC2A 2EG

1 ATTENDEES

Present	Firm Represented
Karen Anderson (" KA ") (Co-chair)	Herbert Smith Freehills LLP
Peter Richards-Carpenter (" PRC ") (Co-chair)	Berwin Leighton Paisner LLP
Angela Hayes (" AH ")	King & Spalding LLP
David Berman (" DB ")	Macfarlanes LLP
Peter Bevan (" PB ")	Linklaters LLP
Simon Crown (" SC ")	Clifford Chance LLP
Mark Kalderon (" MK ")	Freshfields Bruckhaus Deringer LLP
Ben Kingsley (" BK ")	Slaughter and May
Rob Moulton (" RM ")	Ashurst LLP
Debbie Wong (Secretary)	Herbert Smith Freehills LLP

2 MINUTES

A.1 ESMA Consultation Paper 2014/809 ("CP") on the technical advice and technical standards required under the Market Abuse Regulation ("MAR")

The Committee discussed whether there were any points of legal uncertainty on the CP on which the Committee may wish to make a submission. The Committee identified the following as potential areas on which it may be appropriate to respond:

- i. Market soundings (Q3-8): The Committee discussed ESMA's proposal that the record keeping requirements stemming from Article 11(8) should apply in relation to every type of market sounding, irrespective of whether inside information is part of the communication. The Committee questioned the rationale provided in the CP that it is appropriate to apply record-keeping requirements for non-inside information market soundings in order to allow the disclosing market participant to avail itself of the protection of the safe harbour under Article 11, given that this safe harbour only applies to inside information.
- ii. Near misses (Q16): The Committee discussed the current uncertainty regarding the requirement to record and retain records relating to near misses. There should be a clear distinction between what amounts to insider information and non-inside information; however, it is presently unclear how "near" a miss needs to be for it to amount to a near miss. The Committee agreed that additional clarification from ESMA on this point would be helpful.
- iii. Investment research (Q28): The Committee discussed the different interpretation of "investment recommendations" in MAR and MiFID. It was questioned whether the CP ran

counter to existing practice by suggesting that, in order to avoid sales notes and trade ideas being regarded as investment recommendations under MAR, firms would now have to regard these as being personal recommendations under MiFID. The Committee agreed that it would be helpful for ESMA to clarify its policy intention in this regard.

- iv. Other potential topics included buy-backs and stabilisations, and orders to trade. It was agreed that KA and AH would consider these topics further to see whether there are points on which the Committee might usefully respond.

A.3 Other significant consultations to which the Committee may wish to respond

PRA and FCA: Joint consultation paper (FCA CP14/13 / PRA CP14/14) – Senior Managers and Certification Regimes, fitness and propriety, conduct rules, the application of the new regime to UK branches of foreign banks and the regulators' current approach to supervising the new regimes (including enforcement)

KA summarised the consultation paper and explained that, although there are some areas of possible legal uncertainty, the paper primarily raises practical implementation issues. The Committee decided not to make a submission on the consultation paper.

Calls for examples of retrospective application of regulatory rules by the FCA/FSA (Deadline: 10 October 2014)

The Committee discussed possible examples of retrospective application of regulatory rules. For example, in its 2012 paper on conflicts of interest in asset management firms the FCA said it was 'clarifying' that the rules required that firms should not pay for corporate access. It was agreed this was actually a more demanding interpretation of the rules than had previously been adopted. Payments for corporate access were a widespread industry practice that the FSA had been aware of.

The Committee considered that retrospectivity could be said to involve not only retrospective application of rules, but also of the regulator's standards and expectations. It was agreed that members would collect suitable examples.

Consultation papers relating to the implementation of the Bank Recovery and Resolution Directive:

The Committee discussed whether a response could be made on the proposal to give enforcement powers to the Bank of England for early intervention. The consultation paper proposed that the powers be modelled on the PRA/FCAs' FSMA powers, including a power to refer cases to the Tribunal. It was questioned whether it would be desirable for early intervention cases to be taken to a public hearing. There were also some points on enforcement powers more generally which could be made. It was decided that a draft response to the HMT Consultation paper (Box 3.A) would be produced on this point.

There being no other business the meeting was declared closed.



Karen Anderson
Co-chair, CLLS Regulatory Law Committee



Peter Richards-Carpenter
Co-chair, CLLS Regulatory Law Committee