

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

Held on Tuesday 9 January 2018 at 12.30pm  
at Herbert Smith Freehills LLP, Exchange House, 12 Primrose Street, London, EC2A 2EG

**ATTENDEES**

<b>Present</b>	<b>Firm Represented</b>
Karen Anderson	Herbert Smith Freehills LLP (chair)
Matthew Baker	Berwin Leighton Paisner LLP
Peter Bevan	Linklaters LLP
Richard Everett	Travers Smith LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Tamasin Little	Reed Smith LLP
Brian McDonnell	Addleshaw Goddard LLP
Rob Moulton	Latham & Watkins LLP
Richard Small	Stephenson Harwood LLP

**1. MINUTES OF PREVIOUS MEETING**

The minutes of the meeting of the Committee held on 12 December 2017 were approved.

**2. EBA OPINION ON NEW PRUDENTIAL REGIME FOR INVESTMENT FIRMS AND**

The member who was due to lead the discussion was not able to be present at the meeting. As the new draft directive and regulation setting out the new prudential regime have now been published for comment, the Committee will not submit a response to the opinion.

**3. EBA DISCUSSION PAPER ON SIGNIFICANT RISK TRANSFER IN SECURITISATION**

The member who was due to provide feedback from the EBA roundtable on this paper was not able to be present at the meeting. As no significant issues arising from the roundtable ahead of the Committee meeting had been flagged, the Committee concluded it would not submit a response.

**4. BOE CONSULTATION PAPER ON PROCEDURE FOR THE ENFORCEMENT DECISION MAKING COMMITTEE**

The Chair had contacted Miles Bake (Head of PRA Regulatory Action Division) to request a meeting to discuss the paper before the consultation closed. It was noted that the paper did not address the co-ordination of joint investigations, or the joint decision making in such cases. Any members who had further comments on the paper were invited to contribute them ahead of any discussion with Miles Bake.

**5. FCA CONSULTATION PAPER ON INDUSTRY CODES OF CONDUCT AND DISCUSSION PAPER ON FCA PRINCIPLE 5**

The Committee discussed various concerns arising from the consultation paper, notably the extension of the obligations under Principle 5 (A firm must observe proper standards of market conduct) to unregulated activities and the status "recognised" codes of conduct would have, as the FCA had been unclear in their articulation of their expectations.

It was not clear whether the intention would be to make such "recognised" codes quasi-mandatory, nor what the position would be where there were conflicting standards, for example in loan markets.

Some members were of the view that for the sake of certainty, it would be preferable for the FCA to carry out a full public consultation process and grant the codes a status more akin to rules or regulatory guidance.

The Committee noted that if a code had been "recognised" and a market participant did not comply for legitimate reasons, the burden of proof would still be on the FCA to prove that the market participant was not observing the proper standards of market conduct by not complying with the code. Industry codes could be helpful evidentially in establishing whether or not proper standards of market conduct had been met, but this would be no different to the current position where the codes are currently not "recognised".

It was also noted that it was difficult to see that industry guidance "recognised" by the FCA differed substantially from "confirmed" industry guidance.

The proposals viewed as a whole appeared primarily aimed at extending the FCA's enforcement powers to activities in unregulated markets, but without providing the infrastructure of regulatory rules, guidance or supervision.

It was decided that a member would draft a response setting out the concerns discussed at the meeting.

## **6. LESSONS LEARNED FROM MIFID II**

The Committee discussed some of the key issues which had been identified in the process of implementing MiFID II. This included issues relating to the implementation process itself (such as the continuing publication of key guidance right up until "go-live" date and the wide-ranging scale of change) as well as the areas of uncertainty relating to the operative provisions. The Committee also considered that applying the same rules across all markets, products and clients was not always necessarily appropriate and had resulted in some unhelpful results.

The use of indexes and improved cross-referencing between directives and regulations were mentioned as practical changes which could make the legislation more accessible.

The Committee considered which would be the most appropriate body to submit its considerations to, noting that it would be unlikely for the European Parliament or Commission to read any submission made.

It was decided that the Committee would consider the issues identified in the context of future legislation, for example, the current European Union (Withdrawal) Bill.

## **7. FCA AND PRA PAPERS ON SMCR EXTENSION**

It was decided that the papers would be considered at the next meeting.

## **8. FCA CONSULTATION PAPERS ON FCA MISSION**

It was decided that the papers would be considered at the next meeting.

## **9. AOB**

### **9.1 FCA response to Committee's letter on outsourcing of portfolio management**

The response from Stephen Hanks to the Committee's letter submitted in December was discussed. There was some uncertainty among those present at the meeting as to whether the Committee's views expressed in the letter had been understood in the way that they were intended. There was some discussion relating to the best way to clarify the point without prompting a potentially unhelpful response.

It was decided that the Chair would send an email response informing the FCA of the Committee's intention to publish its letter with an accompanying note of the FCA's confirmation that the comment on the inducements provisions not falling away was intended to be a comment about the obligations on the investment firm who is delegating rather than the person to whom an investment firm delegates.

9.2 **MIFID II Change in Control Forms**

A member noted that the FCA had introduced new template change in control forms as part of their implementation of MiFID II. In particular, there was a new requirement that where a proposed acquirer would become a parent undertaking, the due diligence report or board pack setting out the risks of the acquisition and how they would be mitigated must now be included as supporting documentation.

It was noted that this was a sudden introduction of a potentially onerous requirement. It was decided that a call would be arranged after the meeting for members to discuss appropriate next steps as an urgent matter.

9.3 **CLLS Vice-Chair**

Mark Kalderon kindly agreed to take the position of Vice-Chair of the Committee. It was noted that the purpose of the role was to assist the Chair in running the meetings, particularly where the Chair was not able to be present.

9.4 **Committee membership**

Further to the discussion on the topic at the previous meeting, the Committee considered opening applications for membership to the Committee. It was decided that an advertisement would be placed on the CLLS website. Members were also invited to suggest nominations for the Committee.

9.5 **Prospectus Disclaimers**

The Committee discussed an issue relating to the content of prospectus disclaimers following a recent case involving promissory notes in connection with a Sukuk, where a bank had been found to have breached its duty of care by not exercising reasonable care and skill to ensure the promissory notes had been properly executed, and had also failed to properly disclaim its liability. The member noted that clients were attempting to broaden the disclaimers on prospectuses as a result of the decision in the case, and the Committee discussed whether it was possible or desirable to do so in equity capital markets.



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**Karen Anderson**  
Chair, CLLS Regulatory Law Committee