

Meeting Minutes

By Teleconference

Thursday, December 3, 2020

4:00 pm – 5:30 pm

Members present: Syed Riaz Ali, Sarah Ashkenazi, James Brown, Martha Burke, Maria Douvas-Orme, Chinedu Ezetah, Terence Filewych, Glade Jacobsen, Amelia Kaufman, Robert Klein, Matthew Lillvis, Nancy Rigby, Jeffrey Saxon, Lisa Shemie, David Trapani, James Wallin, and Frank Weigand

Federal Reserve Bank of New York (“New York Fed”) participants: Michael Ahn, Michael Nelson, and Thomas Noone

Other participants: Mary Breslin (Deutsche Bank), Jon Green (Arnold & Porter Kaye Scholer), Jeffrey Lillien (Wells Fargo), Annette Maluenda (Barclays), Alex van Voorhees (Bank of America), and Erik Walsh (Arnold & Porter Kaye Scholer)

Membership update

FMLG Chair Michael Nelson introduced two new FMLG members: Martha Burke and Amelia Kaufman. Ms. Burke is an Associate General Counsel at Mitsubishi UFJ Financial Group, Inc. She was a member of the FMLG from 2013 to 2019 and served for five years as Treasurer. Ms. Kaufman is an attorney in the Global Trading Group at Blackrock Financial Management. She has been an active participant in FMLG matters for several years. Mr. Nelson thanked Ms. Burke and Ms. Kaufman for their contributions to the FMLG and, together with the members, welcomed them to the group.

Spoofing prosecutions

Jon Green and Erik Walsh from Arnold & Porter Kaye Scholer LLP provided an update on the Department of Justice’s (“DOJ”) various “spoofing” prosecutions. They previously addressed these cases at the [FMLG’s May 2019 meeting](#).

Mr. Green and Mr. Walsh began with *United States v. Vorley*, in which a jury in the Northern District of Illinois found two traders guilty under the federal wire fraud statute for “spoofing” transactions that created a false impression of supply and demand on the COMEX, a precious metals exchange. Among other issues, Mr. Green and Mr. Walsh discussed the government’s theory of implied misrepresentation and its decision to charge the defendants under the general wire fraud statute, as opposed to a more specific anti-spoofing law created in the Dodd-Frank Act. They also summarized defense arguments based on fair notice and intent, and compared these arguments to similar ones raised in *United States v. Litvak*, a securities fraud prosecution in the District of Connecticut. On the issue of intent, Mr. Green and Mr. Walsh reflected on the examples of misconduct in the [Department of Justice’s recent deferred prosecution agreement with JPMorgan Chase & Co. for fraudulent trading in the precious metals and Treasury futures markets](#). Finally, Mr. Green and Mr. Walsh discussed compliance lessons from *United States v. Johnson*—another application of the wire fraud statute to police misconduct in a specialized market.

LIBOR transition

Maria Douvas summarized several significant announcements concerning the transition away from LIBOR. On November 18, 2020, the [Intercontinental Exchange \(“ICE”\) Benchmark Administration \(“IBA”\)—the administrator of LIBOR—announced that it will consult](#) on the cessation of all of the currency LIBORs, other than USD LIBOR, after December 31, 2021. On the same day, the [UK’s Financial Conduct Authority initiated public consultations](#) on two issues: (i) the use of its powers under the UK’s Financial Services Bill to designate LIBOR as unrepresentative, resulting in the prohibition of its use by UK regulated entities; and (ii) requiring changes to the methodology for a critical benchmark, such as a synthetic LIBOR that does not rely on panel submissions. On November 30, 2020, the [IBA launched a market consultation](#) on the cessation of one-week and two-month USD LIBOR on the first business day after December 31, 2021, and the remaining tenors of USD LIBOR after June 30, 2023. Also on November 30, [the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation issued a joint statement](#) advising regulated banks to move away from LIBOR as soon as practicable, and warning that “[f]ailure to prepare for disruptions to USD LIBOR, including operating with insufficiently robust fallback language, could undermine financial stability and banks’ safety and soundness.”

Members asked questions about the work of the New York Fed’s Alternative Reference Rate Committee on legislative solutions for legacy contracts governed by state law—especially New York law—and similar efforts at the federal level.

Pre-hedging

Terence Filewych and Jeffrey Lillien of Wells Fargo summarized the Global Foreign Exchange Committee’s (“GFXC’s”) draft paper on pre-hedging, which was prepared as part of the three-year review of the FX Global Code. In the discussion that followed, members raised, among other issues, the nexus between Principles 11 (pre-hedging) and 18 (information handling) of the FX Global Code; differences between how the term “pre-hedging” is used in the paper and in the Code, and how that term may be used or understood by market participants; possible ways to distinguish pre-hedging from hedging existing positions; and the need for additional examples that illustrate risks associated with principle-based trading. Some members suggested that further clarification would be helpful about whether a customer may always give instruction not to pre-hedge, and about disclosure and consent regarding the use of confidential information. Some members suggested relevant precedents from equities markets. Finally, members discussed the need to better explain the purpose of pre-hedging—specifically, that it is designed to minimize market impact in the context of a large order, which should be in the customer’s interest. Some members observed that although clarifications will be helpful, they will not resolve the broader market debate over the propriety of pre-hedging.

ESMA MAR report

FMLG Secretary Thomas Noone provided an overview of the [European Securities and Markets Authority’s \(“ESMA’s”\) final report to the European Commission on the European Union’s Market Abuse Regulation \(“MAR”\)](#). ESMA published its report in September 2020, based on a 2019 market consultation about several issues, including whether spot FX contracts should be covered by MAR. This question about spot FX contracts was raised by the European Commission. (The FMLG previously discussed this issue at [several meetings in late 2019](#).) ESMA’s report concluded that it was premature to recommend treating spot FX as a financial instrument covered by MAR. ESMA recommended further analysis of the suitability of an EU regulatory regime on market abuse in the spot FX market, taking into account the growing adherence by market participants to the FX Global Code of Conduct. ESMA also recommended coordination with other central banks in major FX trading jurisdictions on any regulatory framework for spot FX.

In addition, Mr. Noone briefly summarized the report’s conclusions and recommendations about pre-hedging. ESMA noted that responses to its public consultation contained fundamentally diverging opinions on whether pre-hedging should be permitted. Several responses also requested that ESMA identify criteria to help market participants identify when pre-hedging is allowed, which level of transparency the clients may expect, and which procedural arrangements should be put in place by the broker. Mr. Noone said that ESMA intends to issue further guidance on pre-hedging, and suggested adding this topic to the agenda

for the 2021 Quadrilateral Meeting of the FMLG, the European Financial Markets Lawyers Group, the Financial Market Law Committee, and the Financial Law Board.

ISDA deliverable disruption event update

Mr. Lillien provided a brief update on ISDA’s recent member survey as to priorities for 2021. He reported that the survey, which included deliverable disruption events, is now closed and that survey results have not yet been published.

2021 Quadrilateral planning

Mr. Noone asked for member feedback on the revised draft of the agenda for the 2021 Quadrilateral. He shared his thoughts on technological capacities and topics for discussion, and underscored the need for volunteers. The 2021 Quadrilateral Meeting will comprise three sessions in March, June, and September. Each session will run for two hours. Mr. Nelson requested that every member participate either as a presenter or moderator.

BIS paper on stablecoins

Jeffrey Saxon and Chinedu Ezetah provided a brief summary of a recent [BIS paper on the regulation of stablecoins](#). The paper assessed “global stablecoin” proposals and presented Facebook’s revised Libra 2.0 project as a case study. Members discussed potential regulatory responses to stablecoins, including the role of supervision. Mr. Nelson suggested continuing discussion of this topic at the next FMLG meeting.

Fallback alternatives and calculation agent practices

Due to time constraints, this topic was tabled for a future meeting.

Administrative matters

Mr. Nelson gave a brief update on the group’s finances.

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