

10/17

Financial Services Authority

# Taping of mobile phones

Feedback on CP10/7 and final rules

November 2010



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**Annex 1:** List of non-confidential respondents

**Appendix 1:** Final rules (legal instrument)

This Policy Statement reports on the main issues arising from Consultation Paper 10/7: *Taping: Removing the mobile phone exemption* and publishes final rules. Please address any comments or enquiries to:

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Copies of this Consultation Paper are available to download from our website – [www.fsa.gov.uk](http://www.fsa.gov.uk). Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

# List of acronyms used in this Policy Statement

CBA	Cost-benefits analysis
CESR	Committee of European Securities Regulators
COBS	Conduct of Business sourcebook
CP	Consultation Paper
EU	European Union
IT	Information Technology
MAD	Market Abuse Directive
MiFID	Markets in Financial Instruments Directive
PDA	Personal Digital Assistant
PS	Policy Statement
RIPA	Regulation of Investigatory Powers Act
SYSC	Senior Management Arrangements, Systems & Controls



# 1 Overview

## Purpose

- 1.1 This Policy Statement (PS) reports back on the responses we received to our Consultation Paper, CP10/7: *Taping: Removing the Mobile Phone Exemption*,<sup>1</sup> describes our final policy decision and includes the Handbook text that will give effect to that policy.
- 1.2 The consultation period ended on 14 June 2010. We received fifteen responses to our proposals from a range of stakeholders including trade associations, investment firms and technology providers. We are very grateful to all respondents for taking the time to provide feedback.

## Introduction

- 1.3 CP10/7 set out our draft proposals to remove the current exemption that applies to mobile phones from our Conduct of Business sourcebook (COBS) 11.8 taping rules. In particular, we proposed that firms:
  - record and store – for a period of six months – all ‘relevant conversations’ made with/received from firm-issued mobile phones; and
  - take reasonable steps to prevent ‘relevant conversations’ taking place on private communication equipment including private mobiles, private handheld mobile electronic communication devices, and private non-mobile electronic communication devices.
- 1.4 We asked for feedback to three specific questions:
  - Q1: Do you agree that mandatory recording of mobile phones should be restricted to devices issued by firms for business purposes only? If not, why not?

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1 CP10/7: *Taping: Removing the Mobile Phone Exemption*, (March 2010).

- Q2: What justifications are there for allowing 'relevant conversations' to continue to take place on private mobile phones? (We understand that some firms are highly dependent on private mobile lines for business as well as personal calls.) What circumstances make 'relevant conversations' on private mobile phones essential and diversion/resumption to a fixed line impractical?
- Q3: Do you have any observations on the cost-benefit analysis?

## Who should read this PS?

- 1.5 This paper will be of primary interest to investment firms including banks, stockbrokers, investment managers (including collective investment scheme managers and hedge fund managers), and financial and commodity derivatives firms.

## Outcome of our consultation

- 1.6 After considering the views received in response to the consultation and in previous discussions with stakeholders, we have decided to remove the current exemption (COBS 11.8.6R (1)) applied to mobile phones and other handheld electronic communication devices from our taping rules.
- 1.7 The removal of this exemption will have two parts:
1. it will require the recording and storage – for a period of six months – of all 'relevant communications'<sup>2</sup> made with, sent from or received on mobile phones and other handheld electronic communication devices.<sup>3</sup> We will only apply this rule to mobile phones and other handheld electronic communication devices that are issued by firms for business purposes.
  2. To support this, we will also introduce a new rule requiring firms to take reasonable steps to ensure that such communications do not take place on private communication equipment that firms cannot record mainly for privacy reasons. This includes private mobiles, private handheld mobile electronic communication devices, and private non-mobile electronic communication devices.
- 1.8 The new rule takes into account previous concerns raised by stakeholders over the difficulties they face in recording communications on private mobile devices. In our CP we said we believed this is the most practical and proportionate way to implement recording requirements, and should allay most industry concern about the privacy issues associated with recording private communication equipment.

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2 As set out in COBS 11.8.8R

3 Emails sent from handheld devices are already covered by the taping provisions in COBS 11.8.



## **Timing**

- 1.9 We have acknowledged that firms should be given a reasonable timeframe to make the necessary changes to their taping infrastructure. We have previously stated we think one year gives firms sufficient time to comply with our policy amendments. Therefore, these changes to our taping rules will be effective from 14 November 2011.

## **Structure of this paper**

- 1.10 This paper outlines our policy decision to remove the exemption that currently applies to mobile phones from our COBS 11.8 taping rules. Chapter 2 will discuss the feedback we received from our proposals outlined in CP10/7. Annex 1 lists non-confidential respondents and Appendix 1 gives a copy of the made Handbook text.

# 2 Consultation feedback and analysis of responses

- 2.1 This chapter discusses the feedback we received to our proposals. We received fifteen responses to our proposals from investment firms, technology vendors and trade associations.
- 2.2 We are very grateful to those who provided us with comments. We received a mixture of general comments about the merits or otherwise of removing the exemption and specific responses to the questions posed in CP10/7. A list of non-confidential respondents can be found in Annex 1.
- 2.3 It is also worth noting that during the consultation process we also gave presentations at several technology vendor events where industry participants aired their concerns to us. These concerns broadly echoed those submitted to us as part of the formal consultation response. It was stressed during these presentations that we do not endorse individual supplier solutions and we do not hold a preferred supplier list, and this is our continued position.
- 2.4 We are pleased that many of the respondents have found the dialogue with us throughout this process open, constructive and helpful. We are also pleased to note that many respondents recognise the value of telephone recording in the monitoring, investigating and enforcing market abuse cases. Furthermore, respondents widely recognise that recording technology has considerably advanced since we made our fixed line rules in 2008.
- 2.5 However, while in principle respondents supported using recordings of mobile phones to counter market abuse, (a joint submission by industry associations acknowledged that ‘the recording requirement is likely to place an obstacle in the path of the would-be market abuser/insider dealer, particularly those for whom speed is of the essence’), many held reservations about the practical implementation and the associated costs of removing the exemption.
- 2.6 Concern was focused around five key issues:
  1. **Cost-benefits analysis (CBA):** On the whole, firms and trade associations are unconvinced that the cost-benefit case is proven.

2. **EU and international privacy laws:** Given the various national privacy laws some firms would have to engage with, many respondents questioned the legality/feasibility of recording mobile phones inside and outside the EU.
3. **Reasonable steps:** Industry participants have asked us to clarify further what we regard as reasonable steps to ensure ‘relevant conversations’ do not take place on private mobile devices.
4. **Loopholes:** As has been the case throughout this process, the industry believes that removing this exemption will not prevent determined/inventive individuals from circumventing our rules.
5. **Compatibility with EU timetable:** There has been concern that our rules are being implemented ahead of potential amendments at an EU level and this, say firms, will result in duplication of effort/cost.

2.7 We will now address each of these issues in more detail.

### **Cost-benefits analysis feedback**

- 2.8 Our discussion here will also address the specific (i.e., Q3 of CP10/7: ‘Do you have any observation on the cost-benefit analysis?’) and high-level feedback we received about the cost and benefits of removing the exemption.
- 2.9 Respondents’ general view was that the benefits will not outweigh the costs – and indeed the benefits are ‘hard to quantify’. Concern was expressed about the likely costs to industry, especially for larger firms with complex information technology (IT) systems and international reach, which some respondents felt had been underestimated. Some respondents asked that we further clarify the actual costs involved. The joint response from trade associations cited a number of examples where larger firms provided cost estimates exceeding our estimates for their category:
  1. one investment bank’s analysis indicated that for a population of 50 users the estimated cost would be £500,000 (i.e. £10,000 per user) for a one-year recording solution with an associated cost of £100,000 (i.e. £2,000 per user) for ongoing maintenance;
  2. a global investment bank has estimated that the cost, to their firm alone, of recording all BlackBerry phones issued to front office staff would be over £2.6m per annum;
  3. Another example was cited where a firm reported one-off installation costs that are lower than detailed in the report, but more expensive ongoing costs.
- 2.10 We accept that individual cost estimates will vary between firms. Our numbers were generated from a random sample of firms, representative of the industry, and expressed as an **average** cost. Individual firms will inevitably incur costs above and below these levels. Also, our estimates included data provided by several large global investment banks included in our sample. Typically, these firms provided quotes for

a larger number of users than the investment bank example used by the respondents. Their quotes for both one-off and ongoing costs were well below those cited here by respondents.

- 2.11 Overall, we considered the evidence supplied but we do not think it is sufficient for us to revise our cost estimates. We believe our estimates generated from the firm survey and from Europe Economics' supplier data remain valid.
- 2.12 The trade associations also queried whether the additional charges incurred with some technologies as a call passes in and out of the company's server have been factored into our CBA. We can confirm that the Europe Economics' cost estimates for the cheapest technologies for each group of firms (small, medium and high costs estimates)<sup>4</sup> do take into account this additional cost to firms.
- 2.13 Concern was raised about the 'proportionality' effects of removing the exemption with the joint association response and individual responses from trade associations representing smaller firms which argued that costs fall disproportionately on their members despite the fact that although they are not typically the subject of our market abuse inquiries.
- 2.14 It is not our view or experience that market abuse inquiries involve only larger sized firms. In the main, we understand that hosted solutions will be the preferred and cheaper option for smaller firms. Respondents to the consultation did not provide evidence suggesting that smaller firms would be competitively disadvantaged as a result of opting for these hosted solutions. Indeed, we note the observation made in the joint response by trade associations confirming our costs estimates for smaller firms: 'smaller firms are however, reporting hosted solutions broadly in line with the CP10/7 estimates' (pg 13).
- 2.15 Many respondents' argued that the benefits will not materialise as a result of individuals circumventing the rules and persisting in market abuse practices. It is true that determined and inventive individuals will always find ways to evade the rules; however, we believe that removing the exemption will pose an obstacle to these individuals and close off an important avenue to them. It is our contention that by having as comprehensive a taping regime as possible, we limit the scope or temptation for employees to infringe the market abuse rules on fixed or mobile lines which are not taped. And by taping these previously unrecorded lines, we have an additional source of evidence to draw on, which our experience shows can be of significant value to our investigative and enforcement work.
- 2.16 Even where individuals are aware they are being recorded, they have been known to incriminate themselves and/or to betray their knowledge and intent which helps to bolster an otherwise circumstantial case. Equally, recorded conversations may support an individual's subsequent defence of his actions, which may lead us to close down an investigation sooner than we may otherwise have done and, in turn, to divert our resources into investigating other potential cases of market abuse.

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4 Based on discussions Europe Economics carried out last year with four technology suppliers to analyse their cost data.

- 2.17 Additionally, while individuals can conduct relevant conversations on unrecorded lines, our view is that if a firm has audit trails in place covering the receipt of client orders and the conclusions of transactions, this should alert firms to any potential wrong-doing.
- 2.18 In conclusion, having duly assessed the feedback received, we continue to believe that our costs estimates remain valid and we maintain that the proposals will generate the benefits described in CP10/7.

## **EU and international privacy laws**

- 2.19 We have been asked to comment on the points raised by trade associations and individual firms on the legality of recording inside and outside the EU given the various national privacy laws at play. The legality of recording mobile phones has been questioned in two main respects:
1. the interaction with EU privacy laws; and
  2. the interaction with non-EU privacy laws, which may vary markedly between countries, and in some cases would require mutual consent/notification before a recording can be lawfully made. This, respondents argue, means firms will have to negotiate permission to record on a country-by-country basis, which they say, renders our proposals infeasible.
- 2.20 Addressing the first point: we consider removing the exemption for mobile phones from the existing taping rules will enhance our ability to carry out our functions under EU financial services legislation. The Market Abuse Directive<sup>5</sup> (MAD) requires a competent authority of an EU member state, such as us, to be given all supervisory and investigatory powers that are necessary to exercise our functions.<sup>6</sup> The Markets in Financial Instruments Directive (MiFID) includes a similar requirement and permits a competent authority to impose taping requirements at its discretion.<sup>7</sup>
- 2.21 We are aware of the European Commission's ongoing review of both MAD and MiFID. In the Commission's consultation on MAD, released on 25 June 2010, it states that one of the Commission's key objectives in the review is to strengthen effective enforcement against market abuse. It also says it envisages a modification to clarify that the E-Privacy Directive<sup>8</sup> does not preclude regulators from obtaining telephone and data traffic records under certain conditions when investigating suspected cases of market abuse. In relation to the MiFID review, the technical advice to the Commission,<sup>9</sup> published on 29 July 2010 by the Committee of European Securities Regulators (CESR), notes that the E-Privacy Directive and the Data Protection Directive<sup>10</sup> do not prevent the recording of telephone conversations and electronic communications, but do limit the circumstances in which recordings

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5 Directive 2003/6/EC.

6 Article 12 of MAD, which provides that these powers shall at least include the right to require existing telephone and data traffic records.

7 Article 50 of Directive 2004/39/EC and Article 51(4) of the MiFID Implementing Directive 2006/73/EC.

8 Directive 2002/58/EC

9 CESR/10-859

10 Directive 95/46/EC

can be made and places safeguards around their handling. CESR believes that recording requirements should be technology neutral and apply to all ways of making/receiving telephone calls and electronic communications.

- 2.22 Likewise, we do not believe that existing national or EU privacy legislation prevent us from imposing these taping rules, although we recognise, as noted in CP10/7, that applying the taping rules to conversations and communications made with, sent from or received on private mobile devices (i.e. mobiles not issued by firms) increases the scope for capturing non-relevant, non-business related conversations. This potentially raises privacy law issues in the UK under the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000. The privacy law issues in other EU member states are likely to be similar to the extent that these enactments implement EU privacy law requirements.
- 2.23 Ultimately, firms must determine that they are complying with relevant privacy laws when recording communications from their employees' mobile devices. However, we would expect firms in most circumstances to arrange for calls on firm-issued equipment to be routed through and recorded on a firm's internal system (recording calls routed through the firm's internal systems should not, for example, contravene RIPA 2000 restrictions), and for policies to be put in place that prohibit a person from having a relevant conversation on private mobiles which cannot be taped for privacy law or other reasons.
- 2.24 On the second point set out in paragraph 2.19, only where the employee of the firm carries out business from a mobile device to phone frequently in other jurisdictions would we expect firms to arrange for their employees' mobile phones to be recorded outside the UK. Additionally, if there are local privacy laws that apply to these communications and prohibit their recording, the 'reasonable steps' standard would not compel a firm to act in breach of those laws. We think, therefore, that the point respondents make in relation to arranging permission to record in multiple jurisdictions will, in many circumstances, be partially mitigated by our 'reasonable steps' standard.

## **Reasonable steps**

- 2.25 Much of the feedback received during the consultation period asked for further clarity on what we explicitly expect from firms when taking 'reasonable steps' to prevent relevant conversations from taking place on private mobile lines.
- 2.26 We have been asked by trade associations and firms to draw 'bright lines' around our reasonable steps standard. The joint submission by trade associations asked us to restate our position more generally on the options available to firms to comply with the removal of the exemption and specifically asked us to confirm whether:
1. the implementation of policies and procedures to **prohibit** the use of mobiles provided by the firm to make/receive relevant conversations could, in principle, comply with the proposed reasonable steps requirement;

2. the implementation of policies and procedures to **restrict**<sup>11</sup> the use of mobiles provided by the firm to make/receive relevant conversations – together with a recording solution for mobile phones that may be used for these purposes – could, in principle, comply with the proposed reasonable steps requirement; and
  3. in exceptional circumstances (e.g. for expediency where there has been a failure of the firm’s other communication methods) it may be acceptable to make/receive relevant conversations on a mobile that is not recorded while still complying with the reasonable steps standard.
- 2.27 We cannot be expected to comment definitively on these interpretations but we can say that the first two appear sensible given that they stress ‘in principle’. The third also appears sensible because it is tempered by ‘it may be acceptable’; however, firms must be clear in their communications and policies that this does indeed **only** apply in ‘exceptional circumstances.’
- 2.28 What constitutes ‘reasonable steps’ is fundamentally principles-based, meaning that we are not prescriptive about what we expect from firms to be compliant. Each firm must decide what it deems necessary and reasonable to comply with the taping provisions.
- 2.29 Additionally, while firms must choose whether and how to restrict the type of devices, employees and mobile functionalities etc, their internal policies and procedures must adequately reflect the firm’s business model. For example, if a firm opts to conduct ‘relevant communications’ primarily via voice functionality and ‘limit’ the use of non-voice functionality, its internal policies/procedures/training should not exclusively be geared to voice communications; it should also be clear on how in practice they will effect and monitor using non-voice functionalities to ensure ‘relevant communications’ are not being diverted on to non-voice functionalities.
- 2.30 More specifically in relation to requests to clarify the ‘reasonable steps’ to prevent relevant conversations on private mobiles, we would say that, at a minimum, we would expect firms to ensure their employees are made aware of their responsibilities under the requirements (as per their Senior Management Arrangements, Systems & Controls (SYSC) obligations, specifically SYSC 5.1.12R), for example through adequate compliance training. We would also expect proper paper or order trails to be in place so firms are alerted to any ‘relevant conversations’ that have occurred off taped lines, but then result in a client order or conclusion of a transaction.
- 2.31 We accept firms will periodically face compliance challenges that are beyond their control such as technology failings, and recalcitrant employees flouting well-embedded and publicised internal rules/policies/training.
- 2.32 The joint submission by trade associations asked whether we will provide formal or informal guidance regarding the ‘use, supervision and monitoring of internal policies to prohibit or restrict the use of mobiles either provided by firms or privately-owned by employees to make/receive relevant conversations’.

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11 By ‘restrict’ the trade associations mean that some firms will restrict the use of certain types of devices outside the office, and/or to restrict the use of mobiles to those individuals who have been identified using business cases, and/or restrict the use of non-voice functionality on mobile phones e.g. MMS, Video, to simplify the recording requirements.

- 2.33 A similar request was made when our fixed lines rules were introduced. At the time we believed the industry must determine what would constitute reasonable steps. However we agreed to review compliance aids prepared by the trade associations to assist firms with compliance. We will be pleased to do the same again for the mobile taping rules, but our fundamental position is that each firm must determine what is right for their individual business.
- 2.34 Trade associations also asked us to reiterate our approach to data requests, e.g. that such requests will, as far as possible, be precise and take account of how firms typically store and access recordings.
- 2.35 The way in which we interact with firms when requests for telephone recordings are made was set out in detail in our Market Watch publication (Issue 28, June 2008). What we said then – that we will use our best efforts to identify relevant material as quickly as possible, and to focus the scope of our requests so that they are as targeted as possible and are proportionate – will equally apply to requests for recordings of conversations on mobile phones.

## **Loopholes**

- 2.36 We frequently heard from firms and trade associations about the questionable merits of persisting with removing the exemption when determined individuals will still find ways to circumvent the rules. We believe the arguments made in our section discussing ‘benefits’ covers most points repeatedly raised by respondents. We refer readers to paragraphs 2.15-2.17 for our views on the specific points concerning loopholes.

## **EU timetable**

- 2.37 Several respondents requested we await the outcome of the European Commission’s MiFID Review before deciding whether to remove the mobile phone exemption to avoid possible duplication of costs/effort. They are particularly concerned about the five-year retention period proposed by CESR, which they believe will increase costs significantly.
- 2.38 We understand the concerns expressed. However, we would remind firms that, firstly, the advice given by CESR to the Commission that relevant conversations on mobile phones should be recorded and, secondly, the five-year retention period currently has no greater force than as a proposal in advice given to the Commission.

## **Other concerns**

- 2.39 Individual firms raised particular technology issues that they perceive as potential obstacles to a viable compliance solution. Some of these concerns we can address here; however, our general view on the recording technology is that it is robust and capable of meeting the challenge. Inevitably there will be ‘teething’ problems, but none should be complete barriers to instituting feasible compliance solutions.



- 2.40 Other concerns centred around the implementation period, which was generally not thought long enough and would likely create a spike in prices as firms sought to meet our proposed Q4 2011 deadline.
- 2.41 We do not accept the arguments that a spike in prices will result because one year is an unsuitable/unrealistic timeframe. Given the number of suppliers in the market with viable solutions who have been engaged with this process for some time now, and given the previous conversations Europe Economics held with suppliers, we are content that the technology is sufficiently scalable and able to absorb the expected demand levels. Furthermore, it is acknowledged in the joint response submitted by trade associations that hosted solutions will more easily be available to meet a one-year transition deadline. Since smaller firms are most likely to opt for a hosted solution, if a price spike did occur it is less likely to affect these firms.
- 2.42 We were also asked to clarify more generally how our rules would apply to firms that currently allow private mobiles to be used for business purposes. In particular, one trade association asked for confirmation that our draft COBS 11.8.5AR would not prevent firms from using private mobile phones where the firm has procedures in place deterring their use for relevant conversations, or where the firm takes measures to record relevant conversations on these devices. Further clarity was also requested under circumstances where individuals have multi-function devices (such as a BlackBerry or Personal Digital Assistant – PDA) but where using the voice functionality is at the employee’s discretion.
- 2.43 Our response to this is that we are seeking to ensure ‘relevant conversations’ do not take place on private mobile phones which cannot be taped. If an employee is using a private mobile phone for business communications that do not involve taking client orders or dealing in financial instruments, this would be outside the remit of our taping rules. However, a firm would have to ensure that this policy was consistent with the overall letter and spirit of our rules and that they are actively taking reasonable steps to prevent ‘relevant conversations’ taking place on their mobile phones. Also, if a firm decides to act beyond the requirements of our rules to record their employees’ private mobile phones, they would have to ensure they are doing so within the limits of various privacy legislations.
- 2.44 Aside from these main issues, we also received requests by firms to further clarify:
1. **Territorial scope.** In particular, many respondents asked us to set out whether our rules apply to employees who, for example, are not working from their normal place of work (e.g. working from another office within the EU or working from home); or are not within the EU (e.g. if they are travelling on business to a country outside the EU).
- 2.45 Firms must assess for themselves on an individual basis whether the COBS 11.8 taping rules apply to their business activities and employees. If an employee is operating out of an office in the EU and regularly conducting relevant conversations/communications on behalf of a UK-based firm, (including EU or third country firms with branches in the UK) on a firm-issued mobile phone, the firm should arrange for business communications to that phone to be routed through its internal system so the individual’s relevant communications are taped and a record kept. If an employee

is working from home but regularly conducting relevant activities/conversations on a firm-issued mobile phone, the firm should arrange for business communications to that phone to be routed through its internal system so relevant conversations on the employee's mobile line may be taped and a record kept. Once again, we would remind firms that the 'reasonable steps' requirement should prevent the need to, for example, develop complex technological solutions to record relevant conversations that only take place occasionally in circumstances where recording them would be highly impractical or costly. Clearly, if an employee only infrequently faces these circumstances and the firm does not have a readily available technological solution to tape relevant conversations carried out on the employee's mobile line, it may not be necessary for the firm to tape the firm-issued mobile.

2. **Technical scope.** One major investment bank asked us to explain how our rules will apply to multi-function devices. They asked for clarity on whether:

- i) the rules will apply in instances where employees are issued with a data device (e.g. a BlackBerry or other PDA) to access the firm's email system, but activating and using the device's voice functionality is at the employee's discretion, (i.e. the firm is not requiring the employee to use the device for business calls); and
- ii) applying the rules will vary between devices where the voice services contract is directly between the employer and the service provider, rather than between the employee and the service provider, even if, in both instances, using the voice functionality is solely at the employee's discretion?

2.46 Whether or not the device is multi-functional, a firm should have appropriate policies in place to prohibit relevant communications from taking place without them being taped or recorded. We believe that although certain functionalities are at the employee's discretion, the firm is responsible for ensuring that, for example, relevant conversations on the firm-issued equipment are either recorded and stored for six months or that conversations that take place on alternative devices are subject to taping.

2.47 The rules will still apply under circumstances when the firm **has issued** the equipment, but the contract for other functionalities is between the employee and service provider, as it is the firm's responsibility to ensure the device is used in accordance with its internal policies.

3. **Technical issues.** The same respondent expressed concern over various technology 'glitches'.

2.48 We have spoken to technology suppliers and are reassured that whatever technology issues there may be, they would arise only infrequently and are not likely to pose any major difficulties for firms. Inevitably, there will be technology issues and we accept that the technology is fallible. However, we are confident that many of these issues are teething problems and will pose no major compliance challenges for firms.

# List of non-confidential respondents

Joint Response: AFME, APCIMS, BBA, FOA

IMA

AIMA

APCIMS

BVCA

Goldman Sachs

Rathbones

BNP Paribas

Travers Smith LLP

AVIVA

BLACKBERRY

MMS RSL

CYBERTECH

IMS SYNAPTEL

EVIDENT EUROPE LTD



# Final rules (legal instrument)

**CONDUCT OF BUSINESS SOURCEBOOK (RECORDING OF TELEPHONE  
CONVERSATIONS AND ELECTRONIC COMMUNICATIONS) (NO 2)  
INSTRUMENT 2010**

**Powers exercised**

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 138 (General rule-making power);
  - (2) section 156 (General supplementary powers); and
  - (3) section 157(1) (Guidance).
- B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

**Commencement**

- C. This instrument comes into force on 14 November 2011.

**Amendments to the Handbook**

- D. The Conduct of Business sourcebook (COBS) is amended in accordance with the Annex to this instrument.

**Citation**

- E. This instrument may be cited as the Conduct of Business Sourcebook (Recording of Telephone Conversations and Electronic Communications) (No 2) Instrument 2010.

By order of the Board  
10 November 2010

## Annex

### Amendments to the Conduct of Business sourcebook (COBS)

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 11.8 Recording telephone conversations and electronic communications

...

Recording telephone conversations, etc

11.8.5 R A *firm* must take reasonable steps to record relevant telephone conversations, and keep a copy of relevant electronic communications, made with, sent from or received on equipment:

- (1) provided by the *firm* to an employee or contractor; or
- (2) the use of which by an employee or contractor has been sanctioned or permitted by the *firm*;

to enable that employee or contractor to carry out any of the activities referred to in *COBS* 11.8.1R.

11.8.5A R A *firm* must take reasonable steps to prevent an employee or contractor from making, sending or receiving relevant telephone conversations and electronic communications on privately-owned equipment which the *firm* is unable to record or copy.

11.8.6 R The obligation in *COBS* 11.8.5R and *COBS* 11.8.5AR does not apply to:

- (1) ~~telephone conversations and electronic communications (except emails) made with, sent from or received on a mobile telephone or other mobile handheld electronic communication device; or [deleted]~~

...

...

11.8.8 R For the purposes of *COBS* 11.8.5R and *COBS* 11.8.5AR, a relevant conversation or communication is any one of the following:

- (1) a conversation or communication between an employee or contractor of the *firm* with a *client*, or when acting on behalf of a *client*, with another *person*, which concludes an agreement by the *firm* to carry out the activities referred to in *COBS* 11.8.1R as principal or as agent;
- (2) a conversation or communication between an employee or contractor of the *firm* with a *professional client* or an *eligible counterparty*, or

when acting on behalf of a *professional client* or an *eligible counterparty*, with another *person*, which is carried on with a view to the conclusion of an agreement referred to in (1) above, and whether or not it is part of the same conversation or communication as in (1).





**PUB REF: 002364**

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