

MEMO# 24978

February 18, 2011

FSA Requires Certain Mobile Phone Communications To Be Recorded And Maintained As Of November 14, 2011

[24978]

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TO: COMPLIANCE MEMBERS No. 18-11

INTERNATIONAL MEMBERS No. 7-11

TECHNOLOGY COMMITTEE No. 3-11 RE: FSA REQUIRES CERTAIN MOBILE PHONE COMMUNICATIONS TO BE RECORDED AND MAINTAINED AS OF NOVEMBER 14, 2011

In March 2008, the U.K.'s Financial Services Authority (FSA) required persons subject to its jurisdiction to record certain "relevant communications" and maintain them for six months. At the time this requirement was adopted, an exception was made for all mobile communications, except emails, "because the technology used to capture these communications was insufficiently developed." Effective November 14, 2011, the FSA has removed this exception. As a result, as of that date, persons subject to the FSA's jurisdiction will have an obligation to record and maintain a record of certain mobile communications, as described in more detail below. [\[1\]](#)

Duty to Record Mobile Communications

Rule 11.8 in the FSA's Conduct of Business Sourcebook (COBS) has been revised to delete the previous exemption for mobile communications such that the rule now makes no distinction in the regulatory requirements applicable to communications over mobile devices and those over "fixed telephone lines." With respect to both, COBS Rule 11.8.5 provides that a firm:

must take reasonable steps to record relevant telephone conversations, and keep a copy of relevant electronic communications, made with or sent from 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 [covered by the rule].

Scope of New Requirements

According to the Consultation Paper, the relevant conversations and activities that fall within this new requirement are as follows:

- Relevant Conversations – includes all voice conversations and other electronic communications that involve the receipt of client orders and the negotiating, agreeing and arranging of transactions across the equity, bond and financial commodity and derivatives markets.
- Relevant Activities – are any proprietary trading and other principal dealing and agency broking [\[2\]](#) and the associated sales functions.
- Relevant firms – are all banks, stockbrokers, investment managers, and financial and commodity derivatives firms.

Prohibition on Use of Personal Mobile Devices

The above provisions apply to employer-issued devices. There has also been language added to the rule that is intended to discourage communications made through private mobile devices (e.g., the employee's or contractor's personal mobile phone) that the firm is unable to capture. In particular, new COBS Rule 11.8.5A requires firms to "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." The Consultation Paper notes that requiring firms to capture communications made through personal devices "increases the scope for capturing non-relevant, non-business related conversations," which potentially raises privacy law issues. It goes on to state that the new requirement, "does not mean that firms should breach applicable privacy laws. . . . we do not intend or expect firms to apply the taping obligation to private communication devices owned by their employers or contractors." Instead, "[s]hould any relevant conversation (from voice, SMS to IM) be received or commenced on private communication equipment, [the FSA] would expect the call to be terminated immediately and the conversation diverted to a recorded business line." [\[3\]](#)

The Consultation Paper notes that the FSA is now imposing these requirements because "the technology to record, store and retrieve mobile communications has advanced" and firms "have a choice of 'hosted' or 'in-house integrated' solutions and a wide range of suppliers to capture relevant mobile communications." [\[4\]](#) Indeed, according to the Consultation Paper, the FSA is "satisfied that there is adequate choice of technology and suppliers for all firms." [\[5\]](#) It is expected that this new requirement "will provide an additional source of contemporaneous voice conversations and electronic communication evidence" to enforce the FSA's regulations and counter market abuse. [\[6\]](#) The Consultation Paper estimates that the new requirements will impact approximately 16,000 "mobiles" at a "total one-off cost" of approximately £11m, with total on-going costs around £18m per annum.

endnotes

[1] A copy of the FSA's rule is available in Appendix 1 to FSA Policy Statement 10/17, Taping of mobile phones; Feedback on SP 10/7 and final rules (November 2010). This Policy Statement discusses the rule amendments as proposed in March 2010, the feedback the FSA received on them, and the FSA's response to such feedback. The Policy Statement is available at: http://www.fsa.gov.uk/pubs/policy/ps10_17.pdf. While the Policy Statement is 26 pages in length, a three-page summary of it is available at: http://www.fsa.gov.uk/pubs/policy/ps10_17_newsletter.pdf. The FSA's Consultation Paper 10/7, Taping: Removing the mobile phone exemption (March 2010) (the "Consultation Paper") contains details regarding the genesis of the revisions, the intent behind them, how they are intended to operate, and the costs associated with implementing them. The Consultation Paper is available at: http://www.fsa.gov.uk/pubs/cp/cp10_07.pdf.

[2] "Broking" is the term used in the Consultation Paper. Consultation paper at 1.20.

[3] Consultation Paper at 1.13-1.15.

[4] Consultation Paper at 1.10. Footnotes 4 and 5 accompanying the Consultation Paper's text explain the difference between "hosted solutions" and "integrated solutions."

[5] Consultation Paper at 1.21.

[6] Consultation Paper at 1.11.