

FSA Approves Taping Relevant Communications Conducted on Mobile Phones

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The FSA recently set new rules obligating authorised firms to record the 'relevant communications' of their employees conducted on mobile and other handheld devices.

On 11 November 2010, the UK Financial Services Authority (FSA) published the results of its consultation paper 'Taping: Removing the mobile phone exemption' ([view further information](#)). The results set out new rules stating that firms, including banks, brokers, investment houses and financial and commodity derivatives firms, would be obligated to record the 'relevant communications' of their employees conducted on mobile and other handheld electronic devices issued for business purposes. The purpose of the heightened level of scrutiny is to provide the FSA with an additional source of evidence to draw on, to aid their investigation and enforcement work. The FSA hopes the increased monitoring of communications will deter individuals from engaging in illegal activity over the phone, namely market abuse and, more specifically, insider dealing.

'Relevant communications' are defined as those between an employee or contractor of a firm and the firm's client, during which there is an agreement for the firm to carry out activities on the part of the client, by acting either as principal or agent. The wide definition suggests the FSA intends to record as many communications as possible.

The new guidelines on the taping of mobile phones follow the rules published by the FSA in March 2008, which have been in force since March 2009 and require firms to record conversations that take place on landlines, all e-mail and other electronic correspondence, including communications (other than voice conversations) on mobile devices. (View more information on [the March 2009 rules](#).) The new legislation indicates that traders will no longer be able to simply put down their desk phone and pick up their mobile phone, in the hope of avoiding having their conversation recorded. The delay in applying the taping rules to mobile devices was caused by the requisite technology not being in place in 2008, when the rules relating to the taping of landlines and e-mails were set out.

Exemption

For various reasons, including stringent domestic and European privacy laws, the FSA's new rules will only apply to mobile devices that have been issued by firms for business purposes, and hence do not cover communications that take place on employees' private mobile devices. Respondents to the FSA's consultation, which included leading financial institutions, argued that the stated benefits of the new rules would not materialise, given the ease with which individuals and firms could circumvent the new rules.

Firms will be under an obligation to take reasonable steps, however, to ensure relevant communications do not take place on private communication equipment. The FSA has stated that it will not prescribe exactly what constitute 'reasonable steps', as its strong view is that each firm must determine what are appropriate measures vis-à-vis their own business. However, the FSA has stated that, at a minimum, firms should be addressing this through their compliance training programmes. To the extent that it has not been done already, firms should be advised to update their compliance programmes to reflect these changes to the FSA rules. As was the case when the original rules came into force, the FSA has agreed to assist firms through the review of compliance aids prepared by trade associations. One obvious measure for complying with the rule would appear to be through prohibiting the use of private mobile phones for making / receiving relevant conversations. However, such a rule will only be effective if it is rigorously monitored and enforced.

There is some uncertainty regarding the position of employees using their business mobile device outside the European Union, and whether a firm would be required to record such conversations. Firms will have to self-assess to decide whether the rules would apply in such circumstances. Firms also would have to be wary of local privacy laws, if they prevent the recording of a conversation. In such circumstances, firms would not be obliged to breach local privacy laws to record a conversation.

Some of the respondents to the consultation questioned whether the cost of implementing the recording equipment would outweigh the benefits presented by the new systems, the benefits being hard to quantify. One respondent estimated the cost of implementation of recording equipment for the Blackberries of front office staff alone would be £2.6m per annum.

Relationship with other European legislation

The FSA guidelines will be subject to any new rules that arise following the European Commission's (the Commission) review of the Markets in Financial Instruments Directive (MiFID) and the Market Abuse Directive (MAD). Part of the Commission's ongoing review of MiFID will examine the rules each Member State has in place regarding taping of fixed lines and mobile phones. The rules in each Member State currently differ, thereby affording individual Member States discretion regarding issues such as how long recordings of telephone conversations can be held. The FSA's rules state that the recorded information can only be kept for six months, yet there is a suggestion that under the revised MiFID, there will be a retention period of five years. The Commission will report its findings on the revisions of MiFID to the European Parliament in the first quarter of 2011.

The FSA also envisages that the E-Privacy Directive will be modified to ensure regulators are able to obtain the relevant date when investigating suspected cases of market abuse. The revised MAD will afford competent

authorities, such as the FSA, all the requisite supervisory and investigatory powers needed to exercise their functions. It also requires strengthened and effective enforcement against market abuse.

Timeframe and Penalties

Firms will have until 14 November 2011 to put in place the requisite systems and regulations to ensure compliance with the FSA's new rules. It has been suggested that those firms failing to comply with the new rules would face a monetary fine of up to 10 per cent of their annual revenue.

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