

Subject: New FSA rules mandating data retention

FSA publishes new rules on telephone recording. The FSA has published its policy statement (PS) PS08/1 "Telephone Recording: recording of voice conversations and electronic communications". In Chapter 19 of CP07/9 "Conduct of Business regime: non-MiFID deferred matters (including proposals on Telephone Recording)" (see Daily News 4 May 2007 [<http://tinyurl.com/2jdptf>]), the FSA set out proposals to require firms to record certain telephone lines and maintain certain electronic communications and keep recordings and records for three years in a form that would be easily accessible by the FSA. In the light of responses received to the consultation the proposals have changed significantly from those presented in CP07/9, in particular with regard to (i) the retention period for records, (ii) the coverage of discretionary investment managers and (iii) the treatment of mobile-phone conversations.

Scope. In response to concerns expressed in the consultation responses, the final Handbook text provides greater clarity on the scope of the regime. The FSA's guidance in COBS 11.8.9G(2) notes that the FSA would not ordinarily expect the conversations of research analysts, retail financial advisers and persons carrying on back-office functions to be captured. Corporate finance business and corporate treasury functions are excluded explicitly by COBS 11.8.2R. In addition, the FSA has decided not to require discretionary investment managers to record their conversations and electronic communications with other firms that are subject to the taping rules, as these relevant conversations and communications should be captured through the taping obligation on "sell-side" firms. Furthermore, discretionary investment managers will not be required to record conversations and communications with firms who are not subject to the taping rules (e.g. overseas brokers not subject to FSA regulation) when such conversations and communications are infrequent and a small proportion of the total relevant conversations/communications made by the discretionary investment manager.

Outsourcing. The FSA has amended SYSC 8.1.5R to make it clear the outsourcing of taping to third-party service providers will not be considered a critical or important function for the purposes of SYSC.

Record keeping and retrieval. COBS 11.8.10R requires firms to record all relevant telephone conversations and electronic communications so that the FSA has easy access to them and any changes to the originals can be identified. The FSA has not set any technical standards for search facilities (e.g. the specification of voice recognition) but would expect firms' search facilities to support a reasonable interpretation of "readily accessible". The MiFID general record-keeping standard requires tapes not to be manipulated or altered. Although the FSA does not expect firms to put in place expensive security arrangements, firms should implement appropriate systems and controls to monitor this area.

Mobile telephones. Although the FSA has applied an exemption with regard to recording conversations and communications (with the exception of e-mails) on mobile telephones or other handheld electronic communication devices, this decision will be reviewed in 18 months' time to decide whether it is still appropriate to continue with the exemption (this review is intended to coincide with the EU review of taping).

Retention period. The original requirement to keep taping records for three years has been changed to six months because of industry concerns about the costs associated with this requirement.

Electronic communications. The FSA has noted that the term 'electronic communication' has a wide application but has said that it will not produce an exhaustive list of such communications because of the continuing innovation and advancement in technology which would mean that the list frequently becomes out of date. However, the FSA expects senior management to exercise their judgement in this area.

The new rules will come into force in March 2009 (please note that in yesterday's Daily News we mistakenly referred to the rules as coming into force in March 2008 - we apologise for this error). In this one year transitional period, the FSA expects firms to have enough time to prepare and implement the necessary system changes.