A plain English guide to recording and storing conversations under MiFID II for UK financial services firms

Firms operating in the EU face the biggest shake-up of regulation in over a decade. The Markets in Financial Instruments Directive (MiFID) was adopted in 2004 as the constitution for European financial markets, aimed at strengthening investor protection, increasing the transparency of trades and preventing market abuse.

Replacing the original Directive in January 2018, MiFID II brings sweeping changes to many areas relating to conduct of business, including far more robust rules around the recording and storing of conversations.

These rules comprise just a few passages in a document that runs to well over 150 pages, so we have isolated and explained the key parts about recording and storing conversations in this cheat sheet.

Who has to record?

Under current regulations, the requirements for recording conversations only apply to those of individuals directly involved in trading.

However, some firms like financial advisers and brokers are currently exempt from MiFID as long as they don't operate across borders or hold client money.

MiFID II will broaden to include anyone involved in the advice chain that may lead to a trade.

This is because the new requirements will apply to all firms who provide financial services to clients linked to 'financial instruments' (shares, bonds, units in collective investment schemes, commodity trades and derivatives) as well as to the venues where those instruments are traded.

Unlike the current FCA regulations, which are specific to those directly involved in financial trading, **MiFID II** will most likely apply to those organisations or individuals who merely give advice that may lead to a trade or investment.

What has to be recorded?

The FCA has mandated the recording of fixed-line calls since 2009 and mobile calls since 2011, with mobile, landline calls and electronic communications now treated in the same manner.

This does not change under MiFID II, except now the requirement to record will broaden to include all conversations 'that are intended to lead to a transaction' rather than the previous, narrower mandate of 'client orders and transactions.'

Under MiFID II, other communications such as face-to-face meetings that are intended to result in a trade need to be documented in a durable medium that allows them to be proactively monitored for compliance

Proper safeguards must be in place to ensure the client doesn't lose out as a result of inaccurately recording these in-person meetings, so treating them 'in the same way as those conducted over telephone' is recommended by the FCA.

How should firms record and store their conversations?

MiFID II stipulates that all records are kept in a durable medium, which allows them to be replayed or copied, and cannot allow the original record to be altered or deleted.

Orders placed by clients, in particular, must be made in a durable medium such as mail, fax, email or audio recording of client orders made at meetings.

Firms are required to ensure the quality, accuracy and completeness of these records. They must also be stored in a medium so they are accessible and readily available to the FCA on request.

How long must recordings be kept for?

Under today's regulation, recordings must be kept for at least six months.

MiFID II, however, extends that period to a minimum of five years, and where requested by the competent authority, for a period of up to seven years.

Although most regulated UK firms already go beyond this and retain five to seven years of records for best practice or to comply with Tax Authority rules, it will now be mandatory.

The period of time for the retention of a record begins to run from the date that the record is created.

How must firms monitor their recordings?

Under current rules, the mere recording of conversations is sufficient. **But MiFID II states** that firms will need to periodically review their recordings to ensure compliance. The monitoring is specified as 'risk based and proportionate.'

Firms will need to show that the policies, procedures and management of recording rules are in place and that management have clear oversight of these.

Firms must periodically re-evaluate the effectiveness of their recording procedures and adopt alternative or additional measures if necessary.

Where they aren't able to comply with recording policies, they need to investigate why the records were not able to be retained. Records of these investigations must also be kept for the same amount of time as the original record's retention period.

Will there be further consultation?

The FCA is still consulting with the industry on the exact implementation of MiFiD II in the UK. This latest consultation period ends on the 4th January 2017.

If the recommendations are accepted, the FCA is likely to go beyond the scope of MiFID to make the recording of business conversations applicable to a wider variety of firms, roles and business areas.

The regulator proposes that the requirement to record should be extended to discretionary investment managers (DIMs) and to non-Directive (or 'Article 3') firms undertaking relevant activities, including portfolio managers and firms carrying out energy market activity or oil market activity.

Among these, it proposes removing exemption from the rules for financial advisory firms, venture capital firms and corporate finance boutiques.

For more information on the upcoming changes to regulation around recording and storing conversations, visit resilientplc.com

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