

Chapter 10A

Recording telephone conversations and electronic communications

10A.1 Application

Application

10A.1.1

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Subject to the exemptions in ■ SYSC 10A.1.4R, this chapter applies to a *firm*:

- (1) that is a:
 - (a) *UK MiFID investment firm*; or
 - (b) *full-scope UK AIFM*; or
 - (c) *small authorised UK AIFM or residual CIS operator*; or
 - (d) *incoming EEA AIFM*; or
 - (e) *UCITS management company*; or
 - (f) *MiFID optional exemption firm*, performing activities covered by the exemption; or
 - (g) *EEA MiFID investment firm*; or
 - (h) *third country investment firm*; or
 - (i) that carries on activities referred to in the *general application rule* related to:
 - (i) *commodity futures*; or
 - (ii) *commodity options*; or
 - (iii) *contracts for differences* related to an underlying commodity; or
 - (iv) other *futures* or *contracts for differences* which are not related to *commodities*, *financial instruments* or *cash*, which are not *MiFID* or *equivalent third country business and energy market activity* or *oil market activity*, but excluding the following *firms*:
 - (v) a *depository* when acting as such; and
 - (vi) an *authorised professional firm* with respect to its *non-mainstream regulated activities*; or
 - (j) that carries on *energy market activity* or *oil market activity*; or
 - (k) is an *OPS firm*; and
 - (2) that carries out any of the following activities, in *investments* that are *financial instruments*:
 - (a) *arranging (bringing about) deals in investments*;
 - (b) *dealing in investments as agent*;

- (c) *dealing in investments as principal;*
- (d) *managing investments;*
- (e) *managing a UCITS to the extent that this comprises the function of investment management referred to in Annex II of the UCITS Directive;*
- (f) *managing an AIF to the extent that this comprises the function of portfolio management referred to in Annex I of the AIFMD;*
- (g) *establishing, operating or winding up a collective investment scheme to the extent that this comprises scheme management activity,*

only with respect to a *firm's* activities carried on from an establishment (including a *branch*) maintained by the *firm* in the *United Kingdom*.

[Note: article 16(7) and 16(11) of *MiFID*]

10A.1.2 **G** Where this chapter applies to a *third country investment firm*, it applies in conjunction with **GEN 2.2.22AR**, to ensure that such *firms* are not treated in a more favourable way than an *EEA firm*.

10A.1.3 **R** For a *firm* in **SYSC 10A.1.1R(1)** (other than a *MiFID investment firm* or a *third country investment firm*) *MiFIR*, and any *EU Regulation* adopted under *MiFIR* or *MiFID*, apply to the extent relevant to the subject matter of this chapter as if it were a *MiFID investment firm* providing *investment services* or performing *investment activities* in accordance with article 16(7) of *MiFID*.

10A.1.4 **R** This chapter does not apply to the carrying on of:

- (1) activities between *operators* and *depositories*, of the same fund (when acting in that capacity); or
- (2) *energy market activity* and *oil market activity* which is not *MiFID* or equivalent *third country business* but which, if the *firm* carrying it on were not *authorised*, would not be a *regulated activity* because of article 16 of the *Regulated Activities Order* (Dealing in contractually based investments) or article 22 of the *Regulated Activities Order* (Deals with or through authorised persons etc.); or
- (3) any activity referred to in **SYSC 10A.1.1R(2)**, to the extent that it is carried out by a *firm* that is not a *MiFID investment firm*, *MiFID optional exemption firm* or *third country investment firm*, in *financial instruments* that are not:
 - (a) admitted to trading on a *trading venue*; or
 - (b) traded on a *trading venue*; or
 - (c) instruments for which a request has been made for admission to trading on a *trading venue*; or
 - (d) instruments covered by paragraph (a), (b) or (c), but the price or value of which depends on, or has an effect on, the price or value of a *financial instrument* referred to in those paragraphs; or

(3A) the activities referred to in ■ SYSC 10A.1.1R(2)(d) to (g), to the extent that they are carried out by a *MiFID investment firm* or *third country investment firm* in *financial instruments* that are not:

- (a) admitted to trading on a *trading venue*; or
- (b) traded on a *trading venue*; or
- (c) instruments for which a request has been made for admission to trading on a *trading venue*; or
- (d) instruments covered by paragraph (a), (b) or (c), but the price or value of which depends on, or has an effect on, the price or value of a *financial instrument* referred to in those paragraphs; or

activities which comprise:

- (a) underwriting of *financial instruments* on a firm commitment basis; or
- (b) placing of *financial instruments* with or without a firm commitment basis,

within the meaning of section A(6) or A(7) of Annex 1 of *MiFID*.

ancillary services.

10A.1.5 G *Firms* should refer to article 76 of the *MiFID Org Regulation*, which contains additional requirements on recording of telephone conversations or electronic communications, in addition to this chapter.

Obligations for telephone and electronic communications.....

10A.1.6 R A *firm* must take all reasonable steps to record telephone conversations, and keep a copy of electronic communications, that relate to the activities in *financial instruments* referred to in ■ SYSC 10A.1.1R(2) (and that are not excluded by ■ SYSC 10A.1.4R), and that are 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 accepted or permitted by the *firm*.

[Note: article 16(7) of *MiFID*, third subparagraph]

10A.1.7 R A *firm* must take all 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.

[Note: article 16(7) of *MiFID*, eighth subparagraph]

10A.1.8 R The telephone conversations and electronic communications referred to in ■ SYSC 10A.1.6R include those that are intended to result in the performance of the activities in *financial instruments* referred to in

■ SYSC 10A.1.1R(2), even if those conversations or communications do not in fact result in the performance of such activities.

[Note: article 16(7) of MiFID, second subparagraph]

10A.1.9 **R** A MiFID optional exemption firm that provides services solely or mainly to retail clients is not required to comply with the requirements of ■ SYSC 10A.1.6R, ■ SYSC 10A.1.7R and ■ SYSC 10A.1.11R in relation to telephone conversations, subject to compliance with the following requirements:

- (1) a telephone conversation that would be subject to ■ SYSC 10A.1.6R must be recorded instead using a written minute or note; and
- (2) the minute or note must include all relevant, and at least the following, information:
 - (a) date and time of the conversation;
 - (b) identity of the individual participants in the conversation;
 - (c) initiator of the conversation; and
 - (d) relevant information about the client order, including the price, volume, type of order and when it will be transmitted or executed.

10A.1.10 **G** A MiFID optional exemption firm that chooses to take advantage of the provisions in ■ SYSC 10A.1.9R should set out its decision in its recording policy. Further, any minute or note made in accordance with ■ SYSC 10A.1.9R should contain all relevant substantive details of the conversation, as well as the information set out in ■ SYSC 10A.1.9R(4)(a)-(d). MiFID optional exemption firms should note that the effect of ■ SYSC 10A.1.3R is to require their compliance, as relevant, with article 76 of the MiFID Org Regulation, including that records must be:

- (1) stored in a durable medium which allows them to be replayed or copied; and
- (2) retained in a format that does not allow the original record to be altered or deleted.

Notification.....

10A.1.11 **R** A firm must notify new and existing clients that telephone communications or conversations between the firm and its clients that result or may result in activities in financial instruments referred to in ■ SYSC 10A.1.1R(2) (and that are not excluded by ■ SYSC 10A.1.4R) will be recorded. The notification must be made before the provision of any investment services to new and existing clients.

[Note: article 16(7) of MiFID, fourth subparagraph]

10A.1.12 **G** A notification referred to in ■ SYSC 10A.1.11R is only required to be made by the firm once, at the following times:

- (1) to a new client prior to the provision of any investment services; and

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- (2) to an existing *client* prior to the provision of any *investment services* following:
 - (a) the commencement of these *rules*; or
 - (b) the *firm* otherwise becoming subject to these *rules*, after the date of commencement.

[Note: article 16(7) of *MiFID*, fifth subparagraph]

Obligation for other communications

10A.1.13 **R**

Client instructions given otherwise than by telephone must be made in a *durable medium* such as by mail, faxes, emails or documentation of *client* instructions issued at meetings. In particular, the content of relevant face-to-face conversations with a *client* may be recorded by using written minutes or notes.

[Note: article 16(7) of *MiFID*, seventh subparagraph]

Record-keeping

10A.1.14 **R**

The records kept in accordance with this chapter must be:

- (1) provided by the *firm* to the *client* involved upon request; and
- (2) kept for a period of five years and, where requested by the *FCA*, for a period of up to seven years.

[Note: article 16(7) of *MiFID*, ninth subparagraph]