

**CONDUCT OF BUSINESS SOURCEBOOK (RECORDING OF TELEPHONE
CONVERSATIONS AND ELECTRONIC COMMUNICATIONS)
INSTRUMENT 2008**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 138 (General rule-making power);
 - (2) section 156 (General supplementary powers); and
 - (3) section 157(1) (Guidance).
- B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 6 March 2009.

Amendments to the Handbook

- D. The Senior Management Arrangements, Systems and Controls sourcebook (SYSC) is amended in accordance with Annex A to this instrument.
- E. The Conduct of Business sourcebook (COBS) is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as the Conduct of Business Sourcebook (Recording of Telephone Conversations and Electronic Communications) Instrument 2008.

By order of the Board
28 February 2008

Annex A

Amendments to the Senior Management Arrangements, Systems and Controls sourcebook (SYSC)

In this Annex, underlining indicates new text and striking through indicates deleted text.

8 Outsourcing

8.1 General outsourcing requirements

...

8.1.5 R Without prejudice to the status of any other function, the following functions will not be considered as critical or important for the purposes of this chapter:

- (1) ...
- (2) the purchase of standardised services, including market information services and the provision of price feeds;

[Note: article 13(2) of the *MiFID implementing Directive*]

- (3) the recording and retention of relevant telephone conversations or electronic communications subject to COBS 11.8.

Annex B

Amendments to the Conduct of Business sourcebook (COBS)

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

Insert the following new section after COBS 11.7. The text is all new and is not underlined.

11.8 Recording telephone conversations and electronic communications

Application - Who?

- 11.8.1 R This section applies to a *firm*:
- (1) which carries out any of the following activities:
 - (a) receiving *client* orders;
 - (b) executing *client* orders;
 - (c) arranging for *client* orders to be executed;
 - (d) carrying out transactions on behalf of the *firm*, or another person in the *firm's* group, and which are part of the *firm's* trading activities or the trading activities of another person in the *firm's* group;
 - (e) executing orders that result from decisions by the *firm* to deal on behalf of its *client*;
 - (f) placing orders with other entities for execution that result from decisions by the *firm* to deal on behalf of its *client*;
 - (2) to the extent that the activities referred to in (1) relate to:
 - (a) *qualifying investments* admitted to trading on a *prescribed market*;
 - (b) *qualifying investments* in respect of which a request for admission to trading on such a market has been made;
 - (c) investments which are *related investments* in relation to such *qualifying investments*.
- 11.8.2 R This section does not apply to the carrying on of the following activities:
- (1) activities carried on between operators, or between operators and depositories, of the same *collective investment scheme* (when acting in that capacity);

- (2) *corporate finance business*;
- (3) corporate treasury functions.

11.8.3 R This section does not apply to the following *firms* or *persons*:

- (1) a *service company*;
- (2) a *non-directive friendly society*;
- (3) a *non-directive insurer*;
- (4) a *UCITS qualifier*.

Application - Where?

11.8.4 R This section applies only with respect to a *firm's* activities carried on from an establishment maintained by the *firm* in the *United Kingdom*.

Recording telephone conversations, etc

11.8.5 R A *firm* must take reasonable steps to record relevant telephone conversations, and keep a copy of relevant electronic communications, 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 sanctioned or permitted by the *firm*;

to enable that employee or contractor to carry out any of the activities referred to in *COBS* 11.8.1R.

11.8.6 R The obligation in *COBS* 11.8.5R does not apply to:

- (1) telephone conversations and electronic communications (except emails) made with, sent from or received on a mobile telephone or other mobile handheld electronic communication device; or
- (2) a *discretionary investment manager*, in respect of telephone conversations or electronic communications made with, sent to or received from a *firm* which the *discretionary investment manager* reasonably believes is subject to the recording obligation in *COBS* 11.8.5R in respect of that conversation or communication; or
- (3) a *discretionary investment manager*, in respect of telephone conversations or electronic communications made with, sent to or received from a *person* who is not subject to the recording obligation in *COBS* 11.8.5R, provided that such telephone conversations or electronic communications are made with, sent to or received from such *persons* on an infrequent basis, and represent a small proportion of the total telephone conversations and electronic communications

made, sent or received by the *discretionary investment manager* to which *COBS* 11.8.5R apply.

- 11.8.7 G Electronic communications includes communications made by way of facsimile, email and instant messaging devices.
- 11.8.8 R For the purposes of *COBS* 11.8.5R, a relevant conversation or communication is any one of the following:
- (1) a conversation or communication between an employee or contractor of the *firm* with a *client*, or when acting on behalf of a *client*, with another *person*, which concludes an agreement by the *firm* to carry out the activities referred to in *COBS* 11.8.1R as principal or as agent;
 - (2) a conversation or communication between an employee or contractor of the *firm* with a *professional client* or an *eligible counterparty*, or when acting on behalf of a *professional client* or an *eligible counterparty*, with another *person*, which is carried on with a view to the conclusion of an agreement referred to in (1) above, and whether or not it is part of the same conversation or communication as in (1).
- 11.8.9 G (1) *COBS* 11.8.8R(2) includes conversations and communications relating to specific transactions which are intended to lead to the conclusion of an agreement by the *firm* to deal with or on behalf of the *client* as principal or agent, even if those conversations or communications do not lead to the conclusion of such an agreement. It does not include conversations or communications which are not intended to lead to the conclusion of such an agreement, such as general conversations or communications about market conditions.
- (2) The *FSA* would not usually expect the obligation in *COBS* 11.8.5R to include conversations or communications made by investment analysts, retail financial advisers, and persons carrying on back office functions, as such persons will not normally make relevant conversations or communications when acting in those capacities.

Retention of records

- 11.8.10 R A *firm* must take reasonable steps to retain all records made by it under *COBS* 11.8.5R:
- (1) for a period of at least 6 *months* from the date the record was created;
 - (2) in a medium that allows the storage of the information in a way accessible for future reference by the *FSA*, and so that the following conditions are met:
 - (a) the *FSA* must be able to access the records readily;
 - (b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections and

amendments, to be easily ascertained;

- (c) it must not be possible for the records to be otherwise manipulated or altered.

Amend the following, as shown.

18.2 Energy market and oil market activity

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Energy market activity and oil market activity – non-MiFID business

18.2.3 R

...

COBS	Description
...	...
5.2	E-commerce
<u>11.8</u>	<u>Recording telephone conversations and electronic communications</u>
...	...

...

18.3 Corporate finance business

18.3.1 R Corporate finance business - MiFID business

...

COBS	Description
...	...
11.6	Use of dealing commission
<u>11.8</u>	<u>Recording telephone conversations and electronic communications</u>
...	...

...

18.5 Operators of collective investment schemes

Application or modification of general *COBS* rules for *operators*

18.5.2 R ...

Table: Application of conduct of business rules

Application of conduct of business rules

Chapter, section or rule	Description	Modifications
...		
11.6	Use of dealing commission	
<u>11.8</u>	<u>Recording telephone conversations and electronic communications</u>	
...		

Sch 1 Record keeping requirements

...

COBS Sch 1.3G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
...				
<i>COBS</i> 11.7.4.R
<u><i>COBS</i> 11.8.5R</u>	<u>Telephone conversations and electronic communications subject to the taping obligation (see <i>COBS</i> 11.8.5R)</u>	<u>Telephone conversations and electronic communications recorded under <i>COBS</i> 11.8.5R</u>	<u>When the conversation or electronic communication is made, sent or received</u>	<u>6 months</u>

<i>COBS</i> 12.4.6R
...				