

Chapter 10A

Recording telephone conversations and electronic communications

10A.1 Application

Application

10A.1.1

R

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

- (1) that is a:
 - (a) *MiFID investment firm*; or
 - (b) *full-scope UK AIFM*; or
 - (c) *small authorised UK AIFM or residual CIS operator*; or
 - (d) [deleted]
 - (e) *UCITS management company*; or
 - (f) *MiFID optional exemption firm*, performing activities covered by the exemption; or
 - (g) [deleted]
 - (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 UK 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 a *UK 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* which is an *onshored regulation*, apply to the extent relevant to the subject matter of this chapter as if the *firm* 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
- (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]