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## Phone Tapping Laws Promise To Call Out Rogue Traders

By **Mark Taylor**

Law360, London (October 5, 2016, 11:30 PM BST) -- British regulators are set to widen phone and email tapping requirements to include swaths of previously untraced banking activities in a fresh bid to consign rogue traders and clandestine deals to history, a move attorneys believe could prove costly — though ultimately beneficial — for financial firms.

The third Markets in Financial Instruments Directive II paper **published last week** by the Financial Conduct Authority promises a more hardline application of the European Union's MiFID II financial services overhaul, due to enter into force from 2018.

According to financial services attorney Nigel Brahams, partner at Fox Williams LLP, there will be a particular emphasis "in identifying how you reached a particular transaction."



"Whilst most traders at regulated firms want to comply with the rules, there's always a rogue element who will look for ways to circumvent producing a paper trail," he said.

The FCA wants to extend record-keeping disclosures by broadening the scope of the types of calls to be recorded as well as the length of time data is held, as it looks to strengthen its hands in future market abuse cases.

Those subject to taping include the service of portfolio management; corporate finance business; energy market activity or oil market activity; the activities of collective portfolio managers; and financial advisers. Exemptions for discretionary managers will no longer apply.

Azad Ali, financial services regulation partner at Fieldfisher LLP, says the FCA's move isn't particularly surprising.

"This is consistent with the direction of travel we see in other areas, where we have similarly seen an uptick in record keeping requirements, for instance for market soundings under by the Market Abuse Regulation," Ali said.

In the recent Libor rigging trial, taped recordings and transcribed calls of former Barclays employees **were used** to great effect by the prosecution, who also showed emails of the accused directing accomplices to call them on mobile phones. In evidence presented by the Serious Fraud Office, the accused was found to have told an ICAP PLC broker "man you've done it, you've

moved the Libors.”

But attempts to clean up the industry will not come cheap, attorneys say. The new regulations would create a need for extra recording, monitoring and data storage equipment, in addition to an avalanche of new oversight personnel.

“There will be a huge impact in the asset management space; at the moment nobody really has the taping systems, so they will have to make a one-off investment, then continual investment,” said Monica Sah, international finance partner at Clifford Chance LLP.

Firms doing MiFID business must keep records for a period of five years and in some cases up to seven years, up from six months previously. This drive to gold-plate MiFID II puts extra pressures on firms to record historical aspects of trade generation, according to Sah.

“Internal conversations are covered but the problem often at the time is it may not be known if these conversations will lead to a transaction,” she said. “Firms already have issues regarding mobile phones; the current taping rules cover conversations regarding execution and activity leading up to an execution or order, and client-facing conversations.”

Mobile phones, personal email and Whatsapp groups are already barred from trading desks. Firms have done their utmost since 2009 to limit the ability of a wannabe Gordon Gekko or Wolf of Wall Street to roam free conducting shady deals of their own volition.

“If there are some who place orders on the hoof, as that is how they do business, then they will have to be taped, but there is a feeling that having people placing orders walking along the street is not a good idea anyway,” said Richard Frase, financial services partner at the London office of Dechert LLP.

Equipment can be bought or upgraded, Ali says, but MiFID will force cultural changes that must be drilled into employees — regardless of cost.

“Firms will need to develop a culture that filters down to employees which promotes respect for both the spirit and letter of the rule and this will be a part of how firms can ensure proper implementation,” he said.

For Brahams, the ban on personal phones and message systems like Whatsapp or other messenger services is a shift which didn’t happen overnight but is now fairly commonly accepted.

“In my experience, investment firms absolutely prohibit their employees from entering into transactions on their personal mobile phones, precisely because they can’t be recorded,” he said. “If you’ve nothing to hide there is nothing to fear from this other than the cost of imposing the solutions on firms.”

The issue of what should or could be construed as business, what should or doesn’t need to be recorded is likely to lead to internal wrangling, lawyers say.

“Most people have come to the conclusion the researcher talking to a portfolio manager may generate an idea, it’s unlikely it will be needed to be recorded for this purpose but that is the level of granularity we are at,” Frase said. “Typically, to control what is going on, many firms will bring in restrictions on the use of phones to place orders.”

Sah says firms must take a very broad interpretation of the rules, casting the net wide enough to capture the unknown areas.

“If there is an internal conversation that by chance leads to a transaction it needs to have been recorded, so one’s approach has to be broad,” she said. “The burden on compliance teams will skyrocket. Six months to five years is not a short period of time to store the data.”

A taping regime has been in place by the FCA since 2009 similar to the new MiFID II laws. Widening it creates a valuable means of gathering evidence in the context of future market abuse cases and related regulatory breaches, according to the FCA, stating it is just as relevant to the activities of non-MiFID firms.

Regulators drew up MiFID II with the 2008 crisis and Libor and FX manipulation cases still fresh in their minds, and Frase says it is important for firms to remember the recording extensions are a

small but hugely important example of the significant and costly changes it will bring.

"MiFID was meant to lay down a code of conduct for the whole European market that made sense. It was codifying best practice, it was due for review within five years as directives typically are," Frase said.

"Then the financial crisis hit in 2008, and there was a huge gear change in European regulation," he added. "It went from relatively high-level principles-based regulation to hugely prescriptive detailed regulation measured by 'never mind the quality, feel the width.'"

--Editing by Rebecca Flanagan and Emily Kokoll.

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