Telephone and electronic recording

In the UK, we already have telephone and electronic communication recording obligations imposed by the FCA. However, MiFID II goes further than the current domestic regime, so many firms will need to make changes to stay compliant.

Which calls and communications need to be recorded?
Records need to be made and retained of telephone conversations or electronic communications that relate to (at least) transactions concluded when:

1. Dealing on own account
2. Receiving and transmitting orders
3. Executing client orders.

How is the regime changing?
The current FCA recording requirements are not as wide in scope as under MiFID II so firms will see the following changes:

1. Removal of the exemption currently provided for discretionary investment managers
2. Firms will need to record all telephone calls and electronic communications even if the transaction is not concluded
3. The FCA is required to extend ‘at least analogous’ requirements to firms which are exempt from MiFID under Article 3 (which largely captures financial advisers and corporate finance firms). Therefore, the current UK proposal is to extend the recording requirement to include all Article 3 firms
4. The retention period is longer than the existing UK regime (six months). You will need to retain records for five years, and be able to extend the retention period to seven years at the request of the Regulator in specific cases.

What else do you need to do to comply?
You need a written, effective telephone conversations and electronic recording policy, appropriate to the size and organisation of the firm, and the nature, scale and complexity of its business. Your Board must have oversight and control over this.

You will need to take all reasonable steps to record relevant telephone conversations and electronic communications made with, sent from or received by equipment provided by the firm to an employee or contractor. Going further, you will need to take all reasonable steps to prevent employees or contractors from making, sending or receiving relevant telephone conversations and electronic communications on privately owned equipment that the firm is unable to record or copy. You need a register of the employees that are using firm devices, or privately owned devices approved for use and provide staff with training.

Why do we record calls?
Three reasons:

1. To help to deter and detect market abuse.
2. To evidence or prove the terms of any orders given by clients and its correspondence with transactions executed by firms.
3. To assist regulators to supervise firms.
You must also notify new and existing clients that telephone communications or conversations between them and the firm that result or may result in transactions will be recorded. The notification must be made before the provision of any investment services.

**Can you charge our clients to access recordings?**
Yes, but you need to be reasonable. MiFID II enables clients to request access to records of telephone conversations and electronic communications and permits firms to make their own decision on whether to charge a client for access. ESMA has stated though, if a firm decides to charge its client, any charge must be reasonable in order not to deter clients from making such requests.

**Do you need to monitor the calls that we have recorded?**
Yes. The monitoring should:
- Assess compliance with your recording procedures
- Assess the adequacy of such procedures
- Ensure that the records are readily accessible
- Ensure that the records accurately reconstruct the audit trail of a transaction.

The monitoring should be risk based and appropriate to the nature, size and complexity of your business. Your approach should consider the likelihood of misconduct in relation to market manipulation or non-compliance with the obligation to act in the best interest of clients. You should take into account the following criteria to determine the appropriate frequency and scope of monitoring:
- The volume and frequency of dealing on own account
- The volume, frequency and characteristics of client orders
- The characteristics of clients and the financial instruments and services offered
- Current market conditions with regard to specific securities
- Compliance or audit findings (including any risk assessments).

The monitoring should be conducted regularly and, when necessary, on an ad-hoc basis.

**What does this mean for you?**
There are many things to think about – specific rules and also guidance from ESMA. Compliance might not be as straight forward as it sounds, and some of the questions you should consider in your project plan are:
- Identify what needs to be recorded – records will include telephone conversations, emails, video conferencing, SMS, faxes etc.
- Decide how to record and retain such records
- Decide how you are going to inform new and existing clients
- Appoint a policy owner
- Ensure management have effective oversight
- Train your staff – make sure they understand the requirements
- Develop a monitoring programme.

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**Record keeping policy:**
- Records must be kept for at least 5 years, and where requested by the Regulator, for a period of up to 7 years.
- Relevant communications will need to be identified and stored in a durable medium. They must be able to be copied and replayed, and in a format that does not allow for the original to be edited or deleted.
- They must be readily accessible.

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**We know MiFID**
We have been helping clients comply with MiFID I for years and we’re now working with colleagues across the industry to implement MiFID II. Bovill can work with you in whatever way you need as you prepare for MiFID II. We’ve been studying MiFID II in detail and mapped every element into a toolkit for our consultants to use with clients. The Bovill team have a vast collective knowledge of MiFID and we have live implementation experience in complex multi-jurisdictional asset managers. Give us a call to find out how we can help: 0207 620 8440.

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