

**BY E-MAIL**

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Dear Ms McCafferty

**CONSULTATIVE PAPER 10/7 – RECORDING TELEPHONE CALLS**

This response is made by the Regulatory Committee of the British Private Equity and Venture Capital Association. The BVCA represents the overwhelming majority of UK-Based private equity and venture capital firms.

We have considered the FSA's Consultative Paper 10/7 on the extension of its telephone recording rules and in particular the proposed additional COB rule set out on page 67. Subject to what is said below we would not object to the changes proposed - provided that the existing exemptions contained in COBS 11.8.6 continue. We doubt however that the perceived enforcement benefits will arise.

The CP asks 3 questions and we would answer them as follows:

Q1. Do you agree that mandatory recording of mobile phones should be restricted to devices issued by firms for business purposes only? If not, why not?

A Yes. We do not see it as practical to insist upon the recording of conversations etc on devices bought by an employee for their personal use but occasionally used for business purposes.

We believe however that there are likely to be material privacy issues, which are unaddressed in the CP, raised in the proposal to record all calls on mobile phones provided by an employer. There tends to be no such thing as "devices issued by firms for business purposes only" and recording all calls on them is likely to capture details of medical and other personal appointments and domestic arrangements. Has the Information Commissioner expressed a view on this? Are firms expected or required to provide some form of warning to recipients of telephone calls?

Q2: What justifications are there for allowing 'relevant conversations' to continue to take place on private mobile phones? (We understand that some firms are highly dependent on private mobile lines for business as well as personal calls.) What circumstances make 'relevant conversations' on private mobile phones essential and diversion/resumption to a fixed line impractical?

A We would suggest that provided that the conversation is recorded by another or otherwise falls within COBS 11.8.6 then the question of whether the phone is owned by the employee or the employer is irrelevant. We can envisage circumstances where, for example, an employee is on holiday or a business phone is not working for some reason, that conversations could take place on private mobile phones in circumstances where diversion to a recorded fixed line is impractical. We think that the proposed drafting of the reasonable steps obligation on the employer is unfair, a firm cannot prevent an employee from making or receiving such calls. It is difficult to envisage what steps a firm could actually take to prevent an employee from making communications on his own equipment, and it is unreasonable to draft the rule in this way. If the FSA retains the drafting of the rule then it will be very important that it gives guidance as to the steps it considers that a firm could take to prevent an employee from making, sending or receiving such communications. The obligation is particularly difficult to meet in the context of receipt of communications, an employee's private details may be known to other business contacts who may use them to send business communications. However, a firm can require an employee not to make such calls other than in exceptional circumstances and report such calls to the firm after they are made, and so we suggest the rule is rephrased.

Q3: Do you have any observation on this cost benefit analysis?

A: We have doubts as to whether the enforcement benefits claimed will accrue. Calls made from mobile phones – whether issued by an employer or bought for personal use and with the aim of trading shares are already recorded in the vast majority of cases by the broker.

It further seems to us that a person is unlikely to commit the offences of market abuse or insider dealing on equipment provided by his employer which he knows to be recorded when 'pay as you go' mobile phones are so readily available.

We would be available to discuss any of the above if that would assist. Please contact me in the first instance on +44 (0)207 295 3233 or at [margaret.chamberlain@traverssmith.com](mailto:margaret.chamberlain@traverssmith.com).

Yours faithfully



**Margaret Chamberlain**  
**Chair BVCA Regulatory Committee**