

RECOMMENDATION NO. 11

Recommendation for recording of investment services over the telephone and documentation of communication through other electronic communication channels

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Adopted by the Board of Directors of the Norwegian Securities Dealers Association on 8 September 2020 with effect from 15 September 2020. Section 2 updated 3 December 2021. Modified 2 March 2022.

1. Background and purpose

Investment firms are required to record telephone conversations and store all electronic communication related to the provision of investment services and the conduct of investment activities. This documentation must also include conversations and communications intended to lead to the provision of investment services or the conduct of investment activities. The purpose of this recommendation is to define the scope of the legal obligations of investment firms and to provide guidance on appropriate/practical measures for recording and storing electronic communication.

According to Section 9-16, first paragraph, item 8, of the Securities Trading Act (STA) (No. Verdipapirhandeloven):

The firm shall ensure documentation of all investment services and all investment activities, including all executed transactions, which shall at minimum be sufficiently comprehensive to enable the Financial Supervisory Authority of Norway (No. Finanstilsynet) to verify compliance with the rules within the Financial Supervisory Authority area of responsibility. Such documentation shall be retained for at least five years, or for a longer period if so decided by the Financial Supervisory Authority.

The obligation to record telephone conversations and other electronic communication is stipulated in Section 9-17 of the STA:

(1) Documentation pursuant to section 9-16 subsection (1) no. 8 shall include recording of all telephone conversations and retention of all electronic communications relating to the provision of investment services and the performance of investment activities as mentioned in section 2-1 subsection (1) nos. 1 to 7. The documentation shall also include conversations and communications intended to result in the provision of investment services or the performance of investment activities.

The relevant investment services are specified in the STA. Section 2-1 first paragraph nos. 1 to 7:

(1) Investment services and investment activities means:

- 1. reception and transmission of orders relating to one or more financial instruments,*
- 2. execution of orders on behalf of clients,*
- 3. dealing in financial instruments on own account,*
- 4. portfolio management,*
- 5. investment advice,*
- 6. underwriting of financial instruments or placing of financial instruments on a firm commitment basis,*
- 7. placing of financial instruments without a firm commitment basis,*

Unless the communication can reasonably be expected to lead to the provision of investment services, investment firms are generally not obligated to record telephone conversations or document other communication related to the provision of ancillary services under Section 2-6 of the STA:

(1) Ancillary Services means:

- 1. safekeeping and administration of financial instruments on behalf of clients, including management of cash and collateral, as well as other management services. This does not include activities that comprise providing and maintaining securities accounts under section A(2) of the annex to Regulation (EU) No. 909/2014,*
- 2. granting of credit to an investor carrying out transactions in financial instruments, where the undertaking granting the credit is involved in the transaction,*
- 3. advice to undertakings on capital structure, industrial strategy and related matters, as well as advice and services relating to mergers and the purchase of undertakings,*
- 4. foreign exchange services where these are connected to the provision of investment services,*
- 5. preparation and provision of investment recommendations, financial analyses or other forms of general recommendation relating to transactions in financial instruments,*
- 6. services relating to underwriting,*
- 7. services relating to the underlying of derivatives and commodity derivatives defined in section 2-4, subsections 7 and 8, where these services are connected to investment services or ancillary services.*

Investment firms must establish, implement, and maintain guidelines that ensure compliance with the recording and documentation obligations in an effective manner.¹ These guidelines must be written and proportionate to the firm's size and complexity. The guidelines should take into account applicable data protection regulations and include procedures for access control and for avoiding the recording of private conversations.

2. Scope

This recommendation applies to Norwegian investment firms, their branches, and tied agents in Norway and abroad. It also applies to branches and tied agents established in Norway by investment firms headquartered in other EEA states² and to branches in Norway of investment firms headquartered outside the EEA.³

MiFID II⁴ sets minimum requirements for which investment services and activities must be documented through the recording of telephone conversations and the storage of electronic communication. As a minimum, such documentation must be available for transactions conducted on own account and for services related to the receipt, transmission, and execution of client orders (services 1, 2, and 3 as specified in Section 2-1, first paragraph, of the STA). Norwegian law exceeds the minimum requirements of MiFID II by making additional investment services subject to recording and storage obligations.

Before the implementation of MiFID II in Norway, recording and storage obligations applied to conversations and electronic communication "related to the provision of investment services." In the preparatory works to the Act, this was interpreted as requiring the recording of telephone conversations "that can reasonably be expected to lead to the provision of an investment service."

¹ Article 76 of Commission Regulation (EU) 2017/565

² Finanstilsynet assumes that branches established in Norway by investment firms with their head office in another EEA state must make sound recordings to the same extent as Norwegian investment firms. Finanstilsynet notes that this follows from Section 20-4 of the Securities Trading Act and is considered to be in line with MiFID II Articles 16(11) and 86(2).

³ Cf. STA. Section 9-37 first paragraph no. 1

⁴ Article 16(7) of Directive 2014/65/EU

When MiFID II was implemented in Norwegian law, the wording of Section 9-17, first paragraph, of the STA was slightly modified. The new wording specifies that the recording of telephone conversations and storage of all electronic communication "shall also include conversations and communication intended to lead to the provision of investment services or the conduct of investment activities." The phrase "related to" was retained.

In the preparatory works⁵ to Section 9-17 of the STA, the Ministry stated that "the rules being continued do not expand the obligation to record and store communication."

Nevertheless, VPFf assumes that the addition "intended to lead to" constitutes a substantive change in the uniquely Norwegian regulation of the recording obligation. This change expands the obligation to include conversations and electronic communication intended to lead to the provision of investment services or the conduct of investment activities, as stated in Section 9-17, first paragraph, second sentence, of the STA. The rationale for this interpretation is that the minimum requirements of MiFID II Article 16 must be uniform across the EU/EEA.

Examples of communication subject to recording and storage obligations include pure order placement, order indications, specific investment advice, etc.

ESMA has⁶ stated the following in its Q&A on the recording of conversations and the storage of electronic communication: "ESMA expects firms to record all internal telephone calls or electronic communications regarding the handling of orders and transactions." ESMA elaborates in the Q&A as follows:

«Internal telephone conversations and electronic communications that “are intended to result in transactions” or “relate to” the reception and transmission of orders, execution of orders on behalf of clients and dealing on own account are subject to the MiFID II Article 16(7) recording requirement.

Recital 57 of MiFID II sets out that: “such records should ensure that there is evidence to prove the terms of any orders given by clients and its correspondence with transactions executed by the investment firms, as well as to detect any behavior that may have relevance in terms of market abuse, including when firms deal on own account”.

VPFF assumes that internal telephone conversations/electronic communication related to the handling of orders in connection with the execution of transactions are subject to recording and storage obligations. An example of such internal communication could be when sales (broker) obtains quotes from the trading desk via telephone, chat, email, SMS on a financial instrument before executing a transaction for a client. Conversely, internal communication between a broker and an analyst regarding the latter's analyses/assessments would fall outside the recording obligation.

In cases of outsourcing, the investment firm must ensure that all telephone conversations/electronic communication related to the provision of investment services outsourced by the firm are recorded. The recording and storage obligation applies to outsourcing to foreign subsidiaries. The specifics of what constitutes outsourcing are not addressed in this recommendation.

⁵ Prp 77 L (2017-2018) item 5.2.6.5

⁶ ESMA's Q&A on MiFID II and MiFIR Investor Protection topics, chapter 3, question 1

3. Obligation to Record and Document

Investment firms must ensure that telephone conversations subject to recording obligations are conducted on telephones connected to recording equipment and must prohibit the use of phones (including private mobile phones) not connected to such equipment for conversations intended to lead to the provision of investment services.

Furthermore, investment firms must ensure that all electronic communication subject to storage obligations with clients is conducted via approved communication channels subject to storage. The firm must maintain an up-to-date overview of permitted communication channels.

Communication via Microsoft Teams, Skype, Zoom, and similar platforms constitutes electronic communication subject to recording obligations if the communication is intended to lead to the provision of investment services. The audio component is subject to recording. Recording/storing video raises significant data protection concerns and should not be stored. Written communication via electronic channels is subject to storage obligations when intended to lead to the provision of investment services.

If employees of investment firms communicate with clients using such platforms and these are not subject to recording, the employees must switch to a communication solution that is recorded before providing investment services subject to recording and storage obligations.

Physical meetings are not subject to recording obligations. However, if investment services subject to recording and storage obligations are provided during a physical meeting, the content of the discussions must be documented in written protocols or notes stored in a durable medium⁷.

4.1 Further Details on Various Business Areas

To delineate the scope of the documentation obligation, this recommendation is structured around various functions/areas of activity within an investment firm.

4.1.1 Trading Desk/Brokers

All telephone conversations and electronic communication with clients relating to the investment services of receiving and transmitting orders (service no. 1) and executing orders (service no. 2) must be recorded.

Orders submitted in writing via letter, email, fax, SMS, etc., must be stored in a durable medium.

4.1.2 Traders/Market Makers/Proprietary Traders

All telephone conversations and electronic communication with counterparties relating to the investment service of trading financial instruments on own account (service no. 3) must be recorded.

4.1.3 Asset Management (Portfolio Management)

Telephone conversations and electronic communication with clients and investment firms in connection with order placement/execution (service no. 4) must be recorded and documented.

⁷ Cf. STA. cf. Section 9-17 fourth paragraph and Section 2-2 of the Securities Trading Regulations, cf. Article 76(9) of Commission Regulation (EU) 2017/565

4.1.4 Investment Advisers

All telephone conversations and electronic communication with clients involving the provision of personal recommendations on transactions related to specific financial instruments (investment advice – service no. 5) must be recorded.

4.1.5 Investment Banking / Corporate Finance

Investment Banking/Corporate Finance departments in investment firms primarily assist issuers with capital raising through equity or debt transactions, general advisory services, and M&A activities. Normally, the Investment Banking/Corporate departments assist issuers with the structuring and preparatory work for transactions, while the firms' brokerage departments typically execute the placement of the relevant instruments. For the firms, this usually involves a mix of investment services/investment activities as defined in Section 2-1 of the STA, as well as ancillary services as defined in Section 2-6 of the STA. The obligation to record conversations covers electronic communication related to the provision of investment services mentioned in Section 2-1, first paragraph, numbers 1–7 of the STA, as well as calls and communications intended to result in the provision of investment services or investment activities.

Since the obligation to record and store includes calls and written communication via electronic communication channels "intended to result in the provision of investment services or investment activities," VPFf recommends that all oral and written communication by Investment Banking/Corporate staff with issuers, investors, or potential investors should occur via communication tools linked to recording and storage equipment. This would reduce the operational risk for firms by relieving Investment Banking/Corporate staff from making discretionary decisions on whether the communication falls within the recording and storage obligations.

4.1.5.1 Placement

The placement of public offers, issues, underwriting guarantees, and offers to purchase financial instruments are investment services (services no. 6 and 7) and involve the requirement to record and store telephone conversations and electronic communication with investors related to the distribution of subscription offers and the receipt of customers' subscription orders. Additionally, there is a specific obligation to record during market sounding—see below.

Investment firms may use the trading desk, ECM (Equity Capital Markets), and DCM (Debt Capital Markets) for order reception, where all phones are presumed to be connected to recording equipment.

According to the Market Abuse Regulation (MAR)⁸, when market sounding, with or without inside information, is conducted via phone, the phone must be connected to recording equipment. Furthermore, the contacted investor must consent to the call being recorded. In VPFf's view, market soundings with investors should not take place via phone unless the call is recorded.

4.1.5.2 Advisory Services

Advisory services regarding corporate capital structure, industrial strategy, and related matters, as well as advisory services and assistance related to mergers and acquisitions, are ancillary services and generally fall outside the provisions of the STA concerning recording.

⁸ As of 15 September 2020, MAR has not entered into force in Norway, but has entered into force in the EU

However, if the purpose of the conversation is such that it can reasonably be expected to result in the firm receiving an assignment to provide investment services such as “placement” or “execution” of orders, the obligation to record applies.

4.1.5.3 Examples

Examples of conversations subject to the recording obligation within investment banking/corporate finance are provided below.

a) Examples of conversations subject to recording - not an exhaustive list

- Conversations about the purchase/sale of shares/bonds, including order solicitation:
 - Includes, for example, conversations with shareholders of target companies related to potential sales orders in connection with bid acceptance in M&A transactions.
 - Includes, for example, conversations with selling shareholders in IPOs, public and private placements, when the conversations are related to orders.
- Conversations where investors are placed in an insider position, including pre-sounding of investors on the feasibility of conducting a share issue/bond issuance (with or without inside information). Recording obligations arise under MAR—see section 4.1.5.1.
- Internal conversations to/from ECM and DCM when related to executing client orders or proprietary trading.
- Planning of issues/acquisitions/resales/sales of companies that are expected to occur.

b) Examples of calls from Corporate Finance that are not subject to recording provided that the calls are not intended to lead to an investment service - non-exhaustive list

- Conversations with issuers about amended terms of loan obligations.
- Conversations with other arrangers.
- Conversations with other partners/involved institutions such as lawyers, auditors, trading venues, etc.

4.1.6 Research

Analysts generally do not provide investment services, as they deliver investment recommendations based on general advice about a company or a sector/industry. Such general investment recommendations are an ancillary service⁹ and fall outside the recording obligations of the STA. Since such conversations cannot be considered intended to result in an order or investment service, there is no obligation to record or otherwise document conversations analysts have with clients.

It is assumed that the analyst does not provide personal advice (investment advice - service no. 5). If the analyst does provide investment advice, the conversation must be recorded/stored. Investment advice means a personal recommendation to a client, on the client’s or the firm’s initiative, regarding one or more transactions involving specific financial instruments¹⁰.

⁹ Cf. STA. Section 2-6 first paragraph no. 5

¹⁰ Cf. STA. Section 2-3 fourth paragraph

Particularly in conversations with non-professional clients, the threshold is low for a recommendation to be considered the provision of investment advice. The Financial Supervisory Authority has, for example, established that if the client perceives the recommendation as investment advice, it may be considered personal and thereby constitute an investment service.

4.1.7 Settlement

The settlement function is generally not a licensable investment service and is not subject to recording obligations. However, the settlement function performs tasks closely related to investment services, making it appropriate to record telephone conversations and electronic communication to document what has been communicated between the investment firm and its clients regarding this function.

4.1.8 Support functions

Support functions within investment firms (compliance, risk, IT, administration, etc.) do not provide licensable investment services and fall outside the recording obligations of the STA.

5 Storage and retrieval of documentation:

Recordings of telephone conversations and documentation of electronic communication must be stored in a durable medium and retained for at least five years or longer if determined by the Financial Supervisory Authority¹¹.

Recordings of telephone conversations must at a minimum be retrievable using the following search criteria¹²:

1. Incoming and outgoing telephone numbers,
2. Time of the conversation,
3. Employees of the firm who conducted the conversation.

Where dedicated phones linked to recording equipment are used (including mobile phones not assigned to an individual employee) in connection with the provision of investment services, the investment firm must document which employee conducted the conversation.

Communication via other communication channels than telephone must be retrievable using the following search criteria:

1. The identity of the client,
2. The time of the communication,
3. Employees of the firm who conducted the communication.

6 Duty to inform

Investment firms must inform their clients that telephone conversations or electronic communication between the firm and its clients will be recorded and stored.¹³ According to privacy legislation, clients must be informed before the conversation begins that the

¹¹ Cf. STA. Section 9-17 fifth paragraph and ESMA's Q&A on MiFID II and MiFIR Investor protection topics, chapter 3 question 4

¹² Cf. vpf. § 9-7

¹³ Section 9-17 third paragraph of the Employment Act

conversation is being recorded, the purpose of the recording, and that more information is available on the firm's website.¹⁴

It is sufficient to provide this information once before investment services are rendered, for example, when establishing a client relationship.

If a conversation not initially subject to recording changes in nature and meets the criteria for recording, the client must be informed during the conversation that it will henceforth be recorded and stored, etc.

When establishing a client relationship, the investment firm must inform all clients in writing that recordings of telephone conversations can be retrieved based on specific criteria. The criteria for retrieval must be specified.

According to the supervisory practice¹⁵, of the Data Protection Authority (No. Datatilsynet), it has been established that calls to the switchboard/reception of investment firms are not subject to recording obligations. There is therefore no legal basis for recording such calls unless the calls are transferred from the switchboard to phones where investment services are provided.

7 Access and deletion

Recordings and other documentation subject to recording and storage obligations must be made available to the affected client upon request¹⁶.

Investment firms should have dedicated procedures for employees' access to recordings and electronically stored communication subject to recording obligations.

Investment firms should also have dedicated procedures for deleting surplus information.

¹⁴ See guidelines from the Norwegian Data Protection Authority:
<https://www.datatilsynet.no/personvern-pa-ulike-omrader/overvaking-og-sporing/lydopptak/lydopptak-i-forskjellige-situasjoner/>

¹⁵ The Data Protection Authority's inspection at SpareBank 1 Markets, inspection report 8 July 2013

¹⁶ Cf. STA. Section 9-17 fifth paragraph