



Lessons from the Libor Scandal:

Why Electronic Communications Require Better Management & Control



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Executive Summary

The financial services industry has faced a number of compliance challenges in recent years, stemming from not having the supervisory and control systems in place to prevent misconduct and conflicts of interest. First, revelations about the manipulation of the London Interbank Offered Rate (Libor) and more recently, those of foreign exchange (Forex) rates, has renewed regulatory focus and scrutiny of the way electronic communications are being used within regulated firms.

With employees of regulated firms now accessing and using multiple electronic communication platforms within their workday, and with new communication platforms being launched, the electronic communications landscape has never looked more complex. In addition, these electronic communications allow employees to send and receive information, in real-time, both within the company, as well as to peers working in other organizations. This creates added complexity for firms needing to manage and control the flow of information for the purposes of managing confidentiality and conflicts of interest.

In recent years, regulators have refreshed or brought online new guidance and regulations around the compliant use of electronic communications. Following the investigations into Libor and Forex manipulation, regulators and law courts have demonstrated an appetite for enforcement in the form of expensive fines and criminal charges. For regulated firms, there has never been a more urgent requirement to re-assess if the electronic communications in use within their organizations are being appropriately supervised and controlled.

How the Libor Story Unfolded

In recent years, global banking institutions found themselves in the headlines for their involvement in the manipulation of the Libor. In essence, Libor is the rate at which banks in London lend money to each other for the short-term in a particular currency. Traders from the banks at the centre of this crisis colluded to fix the rate.

Since these revelations, banks have faced sanctions and eye-watering fines from regulators on both sides of the Atlantic, traders have been dismissed, and brand reputations have had to be repaired.

Key Events in the Libor Timeline

2005	Evidence suggests that at least one bank tried to manipulate dollar LIBOR and EURIBOR (Eurozone lending) rates at the request of its derivatives traders and other banks. Misconduct was said to be widespread, involving staff in New York, London and Tokyo as well as external traders.
2008	Awareness of the problem percolates to the surface. The Wall Street Journal ¹ publishes a report questioning the integrity of LIBOR. Tim Geithner, the head of the New York Fed at that time, sends Sir Mervyn King, then the governor of the Bank of England a list of proposals to tackle LIBOR's credibility. The British Banking Association (BBA), responsible for the administration of Libor, begins consulting with banks on how to modify Libor.
2009	The BBA circulates guidelines on setting Libor rates.
2011	The first employee dismissals by a bank for Libor-fixing.
2012	The U.K. regulator at that time, the Financial Services Authority (FSA), the U.S. Department of Justice and the Commodity Futures Trading Commission (CFTC) issue their first fines in relation to Libor. The Serious Fraud Office in the U.K. launches a criminal investigation into Libor manipulation and the first arrests are made in connection with investigations into Libor. In the U.K., the FSA confirm that BBA would no longer administer Libor, and would be replaced by a data provider (an organisation such as Bloomberg or Reuters) or a regulated exchange. The first criminal charges are brought against two traders for their role in Libor rate fixing in the U.S. The Swiss financial services regulator, FINMA, joins the fray and issues its first fine.

¹Bankers Cast Doubt On Key Rate Amid Crisis, April 16, 2008, <http://www.wsj.com/articles/SB120831164167818299>

2013	NYSE Euronext takes over from BBA, setting and administering Libor. First fine over \$1billion issued by a group of regulators on a single bank.
2014	Ice takes on responsibility for Libor calculation after acquiring NYSE Euronext. Federal Deposit Insurance Corporation (FDIC) sues 16 big banks for Libor manipulation from August 2005 until at least mid-2011, on behalf of 28 smaller banks that collapsed post-crisis allegedly due to Libor rigging. A lawsuit brought by Guardian Care Homes (Graiseley Properties Ltd.) against one of the banks over claims it mis-sold the company two interest rate swaps linked to Libor is settled for close to £40million. The European Union charges three banks over suspected participation in Euro interest rates derivatives. A senior banker charged in the U.K. for his role in Libor manipulation, pleads guilty.
2015	Those charged with Libor manipulation due to face trial in U.K. court.

The Libor Fallout

- 1. Regulatory fines from multiple regulators.** It has been estimated that banks have paid out more than £3 billion² in fines, levied by U.S. and U.K. authorities, with new revelations and fines continuing to add to that tally.
- 2. Costly legal fees.** The crippling cost of litigation continues to have a negative impact on balance sheets. One of the banks³ involved revealed that €1.5 billion had been set aside to cover legal costs over the course of just one quarter.
- 3. Loss of market capitalization as a result of reputational damage.** There is evidence⁴ that the loss of confidence by trading partners of banking institutions led to a steep decline in stock price and market capitalization greater than the amount of penalties imposed.
- 4. Criminal charges.** The U.S. Department of Justice, and the U.K. Serious Fraud Office brought charges against both the banking institutions and individuals involved, with some cases already resulting in guilty convictions or expensive settlements.
- 5. Pressure of ongoing monitoring.** It has been reported that as a result of recent settlements, the New York's Department of Financial Services could install a monitor⁵ in order to oversee compliance and reform within the banking institution involved.
- 6. Increased regulatory scrutiny.** In the U.K., the Wheatley Review of Libor⁶ proposed changes to the way Libor is administered, and increased regulatory oversight into how the rate is set. In addition, regulators have stepped up their review of practices within financial institutions for managing conflicts of interest, supervision and control.

²Banks pay out £166bn over six years: a history of banking misdeeds and fines, The Guardian, Nov 12, 2014, <http://www.theguardian.com/business/2014/nov/12/banks-fined-200bn-six-years-history-banking-penalties-libor-forex>

³Deutsche Bank Said to Pay \$2.14 Billion in Libor Case, Bloomberg, Apr 22, 2015, <http://www.bloomberg.com/news/articles/2015-04-22/deutsche-bank-said-to-pay-2-14-billion-to-resolve-libor-probes>

⁴The Price of Reputation: Lessons from the Barclays LIBOR Scandal, John Armour, University of Oxford, <http://www.clmr.unsw.edu.au/article/ethics/libor-manipulation/price-reputation-lessons-barclays-libor-scandal#sthash.rUaRX34w.dpuf>

⁵Deutsche Bank Said to Pay \$2.14 Billion in Libor Case, Bloomberg, Apr 22, 2015, <http://www.bloomberg.com/news/articles/2015-04-22/deutsche-bank-said-to-pay-2-14-billion-to-resolve-libor-probes>

⁶The Wheatley Review of Libor, Martin Wheatley, Sep 2012, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf

The Role of Real-time Messaging and its Future

Investigations into the Libor manipulation by regulators like the U.K.'s FSA, the predecessor to the Financial Conduct Authority (FCA), and the CFTC in the United States, led to emails, electronic messages and recorded telephone calls being subpoenaed as evidence. Incriminating evidence of misconduct was found in instant messages sent using Bloomberg's messaging service.

There has since been a huge amount of publicity about instant messaging and its intended use – that is – to speed up communications and decisions in an industry where every second could make the difference between profit and loss. As well, there has been much talk from regulators and press on what to do about the small minority who used it to collude in unlawful activity.

There have been reports⁷ that financial institutions were banning the use of instant messaging by their trading departments. Compliance and legal departments might favor this approach. After all, an outright ban on the use of this collaboration technology could be seen as the most straightforward way of closing the door on any opportunities for future misdemeanours.

The reality is that communications in the workplace have evolved. Two decades ago, email was perhaps the only available electronic communication offered within the workplace. Its use within the workplace has since become ubiquitous. However, email is just one of the many communication tools available with the modern enterprise. Companies are deploying new forms of communication to enhance productivity and enable collaboration, and the pace at which new communication channels are being adopted is only accelerating.

Within the modern enterprise today, it is highly likely that employees are using a number of communication tools. In the financial services industry, community services like Reuters and Bloomberg offer instant messaging facilities. Then there are also Unified Communications platforms like Microsoft Lync and IBM Sametime, collaboration tools like Chatter, IBM Connections, or Jive. Some could be using public instant messaging networks such as Yahoo! Messenger. And, more recently, there has been an increase in the use of social networks - Facebook, LinkedIn, and Twitter within the workplace.

A recent survey⁸ found that social communication tools are now being used by every generation at work. Millennials use social for communicating with co-workers (69%), and

⁷JP Morgan, Deutsche: Bank Instant Messaging Headache Gets Worse, Dec 17, 2013, <http://www.forbes.com/sites/leoking/2013/12/17/jp-morgan-deutsche-bank-instant-messaging-headache-gets-worse/>

⁸Infographic - Communicating in the Modern Workplace, Queens University of Charlotte, <http://online.queens.edu/resource/business-leadership/infographic/communicating-in-the-workplace>

customers/clients (50%). Boomers and Gen X are not far behind, with 70% using them with co-workers and 50% with customers/clients.

This all adds up to a very complex communications landscape that organizations, especially those that operate within regulated industries, have to effectively manage. To add to that complexity, the communications landscape is constantly shifting, with new technologies, such as Snapchat, being brought online.

In 2014, a new instant messaging platform, Symphony,⁹ was launched. This new platform is backed by a consortium of financial services institutions, and aims to provide better security and controls while enabling regulated employees to communicate instantaneously with each other. This latest development illustrates that real-time messaging is not going away, not even within the heavily regulated financial services industry. Why would it? It has become a vital and proven business communications and productivity tool. To remove it would be to remove a vital communications lifeline that many traders have come to rely on. Secondly, new communication platforms are being launched all the time. Today's social network darling could be tomorrow's MySpace.

For regulated organizations, there is a need to thoroughly assess and mitigate the risks posed by communication channels regardless of whether it is Reuters, Bloomberg, Symphony, Facebook, Twitter, Snapchat, or any other number of communication platforms to the organization, prior to deployment.

Electronic Communications Back in the Spotlight with Forex Manipulation

Following the Libor revelations, the financial services industry has come under scrutiny for alleged manipulation of foreign exchange rates. The world's biggest banks, regulators in three continents, potentially hundreds of traders, and the U.K's central bank are now involved in the investigations. There is evidence¹⁰ that traders colluded with colleagues from other firms to fix foreign exchange rates. The traders are thought to have used the chat room functionality of their Bloomberg terminals to exchange gossip, insults, and other information that could have an impact on the markets. Transcripts from instant messages between traders have played an important part in bringing them in front of formal investigations and into court.

⁹Consortium of Leading Financial Firms Invest in New Communication and Workflow Platform, Oct 1, 2014, <http://symphony.com/consortium-leading-financial-firms-invest-new-communication-workflow-platform/>

¹⁰Forex manipulation: How it worked, CNBC, Nov 12, 2014, <http://www.cnbc.com/id/101482959>

Analysts have estimated that the organizations involved in this misconduct could face \$20billion - \$30billion¹¹ in litigation costs and other legal issues. According to the CCP Research Foundation (formerly the Conduct Costs Project at the London School of Economics), this has had a detrimental impact on the earnings and capital generation for ten of the largest banks in Europe and the U.S.

Electronic Communications – Understanding the Regulatory Requirements

From the regulatory standpoint, instant messaging or real-time messaging is just another form of electronic communications. U.K. financial services regulator, FSA, issued this policy statement back in 2008, which had an explanation of its view on electronic communications:

2.34. The term electronic communication has a wide application. It includes fax, email, Bloomberg mail, video conferencing, SMS, business to business devices, chat and instant messaging. But is not limited to these as it captures any electronic communications involving receiving client orders and the agreeing and arranging transactions. We will not produce an exhaustive list of electronic communication because of the continuing innovation and advancement in technology which would mean the list frequently becomes out of date. We also feel that it is inappropriate to limit the obligations to a prescriptive list and an outcome based approach is more suitable in implementing such rules. We would expect senior management to exercise their judgement in this area.

Excerpt from: FSA Policy Statement 08/1 - Telephone Recording: recording of voice conversations and electronic communications, March 2008

Other regulators such as FINRA (U.S.) and FINMA (Switzerland) have similarly broad definitions of electronic communications as they are aware that any set list could quickly become outdated as new technologies come online. Instead regulators have emphasized that they are interested in any and all communications that relate to the business (for instance, client orders and transactions).

Financial services, pharmaceuticals, healthcare, the public sector, and energy and utilities are some of the most heavily regulated industries in the world. And over the last three years, no fewer than ten regulations relating to electronic communications have been issued or updated by regulators around the world. The fact that regulators in these industries are either issuing new regulations for electronic communications or updating existing regulations, reflects the increasing pace with which business communications has switched from email to other electronic communication channels.

¹¹Big banks face up to €10bn in legal costs, Financial Times, Mar 9, 2014, <http://www.ft.com/cms/s/0/46f950f2-a76d-11e3-9c7d-00144feab7de.html#axzz3ZUCqapZh>

Within the financial services industry, new regulation of benchmarks and swaps means that firms need to be aware of cross-border jurisdiction from overseas regulators. A list of regulations relating to the use of electronic communications across various industries can be found in *Appendix 1*.

Regulators highlighted two main weaknesses within organizations involved in the Libor investigation. They have to do with violations of recordkeeping rules and the lack of supervision and control.

Recordkeeping

Regulatory guidelines around recordkeeping require firms to have policies and processes in place to capture relevant trade information and store this information for a specified time period. In particular, firms have to ensure that the records kept are:

- Relevant to the business regardless of the electronic communications format used (including for e.g. voice calls on unified communications)
- In a readily accessible place and in a reviewable format
- In a tamper-proof format

Supervision and Control

The rules in this section have to do with managing and supervising employee behaviour by identifying conflicts of interest and having policies and procedures in place to manage those conflicts. Regulators expect firms to not only physically separate departments whose business constitutes a conflict of interest for the organization, but also prevent these departments from communicating and exchanging information on any electronic communication platforms used. This rule also applies to communications with others outside of the organization whose business represents a conflict of interest.

Regulators have an increased focus on the implementation of systems of control, as Martin Wheatley, Chief Executive, FCA in an interview with CNN Money¹² explains:

“What we found specifically is that the banks did not have adequate systems and controls to manage conflict that exists on the trading floor. Key things we are demanding ... we want to check the systems and controls...”

The pervasive use of electronic communications such as real-time messaging, chat, email and

¹²CNN Money, 13 Nov, 2014, http://money.cnn.com/2014/11/12/investing/banks-currency-fx-probe/index.html?iid=TL_Popular

others, demonstrate that they have become an integral part of the workplace. By equipping employees with the ability to communicate and collaborate in real time, organizations pave the way for business transactions to take place seamlessly. However, regulated firms need to comply with regulatory requirements around record keeping, management of conflicts of interest, and supervision of employees in order to avoid costly sanctions or reputational damage. The successful deployment and adoption of electronic communications is dependent on having the right policies and processes in place to mitigate the risk of non-compliance. Technology exists today that can help in these situations and can help firms compliantly and securely manage their electronic communications.

5 Ways Regulated Firms can Ensure the Compliant Use of Electronic Communications

Here are five areas of consideration for regulated firms when assessing the adequacy of existing compliance controls for their electronic communications.

1. Implement controls at a user level. Different departments within an organization often use different electronic communication platforms for different business use cases. Some groups of employees, by regulatory standards, are subject to greater supervision than other groups. By defining what particular groups of users can or cannot do within a communication platform, the organization would be able to demonstrate compliance with the regulatory requirement for control.

2. Know your users. Where there is access to multiple communication channels, there can also be confusion and difficulty to tracing and retrieving all communications authored by a particular employee. A user might choose different user names for their social media or public instant messaging network compared to those used in communication platforms operated within the corporate umbrella. This could make it difficult for organizations facing a regulatory audit, or eDiscovery request, to comply with the request within the time frame allocated, and could lead to sanctions.

3. Apply and enforce appropriate ethical wall policies. With regulators rigorously enforcing the rules for managing conflicts of interest, regulated firms need to ensure that they have effective virtual separation of employees whose activities constitute a conflict of interest. However, many firms have opened up their communication systems to enable employees to connect with their peers in other firms. This might take the form of Bloomberg and Reuters or

Unified Communication platforms such as Microsoft Skype for Business or Cisco Jabber. To mitigate the risk of non-compliance, organizations need to put in place policies and technology to extend virtual ethical walls to prevent employees from passing information to their peers in other institutions using electronic communication channels, as happened in the Forex manipulation case.

4. Streamline and simplify compliance. Controlling the flow of electronic communications, which take place in real-time can be challenging for any company, not least of all for the highly regulated firm. In order to make it easier to manage, firms should consider using technology to enable legitimate conversations (for instance, Forex traders connecting with other Forex traders), block illegitimate ones (for example, Forex traders should not be allowed to connect with Forex benchmark submitters), and apply and enforce policies for how employees use all the communication platforms at their disposal, regardless of whether instant messaging, unified communications or email.

5. Provide the right tools to enable compliant communications. The need for compliance need not stymie the effective use of electronic communications within a regulated firm. Companies can still ensure that their employees are able to be productive, effective, and collaborative while meeting compliance requirements. For instance, firms can put in place systems that provide contact directories with user information that would enable community members to see at a glance who they can and cannot contact from both within and outside of the organization.

Conclusion

The nature of workplace communications has changed. The pervasive use of electronic communications in the workplace was confirmed by a recent survey where a significant proportion of survey respondents said they used other electronic communications such as team sites and intranets (58%), instant messaging (56%), videoconferencing (51%) and social media (31%) for business. With multiple electronic communication channels in use at an organization, it becomes imperative for organizations to monitor, manage and control how employees use these communications.

Recent revelations around the manipulation of Libor and Forex rates, the extensive investigation, criminal charges, and high fines issued by financial industry regulators, demonstrate just how vulnerable organizations that operate within highly regulated industries or

needing to adhere to strict corporate governance standards are. Technologies exist that enable organizations to mitigate the risks that arise from employee use of electronic communications. By implementing the right controls and management, organizations can protect a company's reputation and bottom-line.

Appendix 1: Regulatory Overview of Electronic Communications

Financial Services (U.S.)		
Regulator	Rule	Description
Securities and Exchange Commission (SEC)	SEA Rule 17a-4.18	This rule outlines the recordkeeping requirements for certain Exchange members, brokers and dealers. There is a requirement to preserve records for a minimum of 6 years. For the first 2 years, records should be kept in an easily accessible place.
Securities and Exchange Commission (SEC)	SEA Rule 17a-4(b)	Requires broker-dealers to preserve certain records including communications with the public, for a period of not less than three years, the first two in an easily accessible place. Records can be held on "micrographic media" or by means of "electronic storage media".

Regulator	Rule	Description
Securities and Exchange Commission (SEC) SEC and Commodity Futures Trading Commission (CFTC)	DFA Section 764 SEA Section 15F(g)(1)	Adds a new section to the Securities Exchange Act of 1934. Each registered security-based swap dealer and major security-based swap participant shall maintain daily trading records of the security-based swaps of the registered security-based swap dealer and major security-based swap participant and all related records (including related cash or forward transactions) and recorded communications, including electronic mail, instant messages, and recordings of telephone calls, for such period as may be required by the Commission by rule or regulation.
Securities and Exchange Commission (SEC) SEC and Commodity Futures Trading Commission (CFTC)	DFA Section 764 SEA Section 15F(g)(4)	Adds a new section to the Securities Exchange Act of 1934. Each registered security-based swap dealer and major security-based swap participant shall maintain a complete audit trail for conducting comprehensive and accurate trade reconstructions.
Securities and Exchange Commission (SEC) SEC and Commodity Futures Trading Commission (CFTC)	DFA 951-954	Record justification for executive compensation and related communications as these may be subject to legal hold or discovery requests.

Regulator	Rule	Description
Securities and Exchange Commission (SEC) SEC and Commodity Futures Trading Commission (CFTC)	DFA 731, 4s(j)(5) & Section 732, c(1)- Managing Conflicts of Interest	Firms need to implement processes and procedures to “establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity or swap or acting in a role of providing clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision and contravene the core principles of open access and the business conduct standards described in this Act”.
Commodity Futures Trading Commission (CFTC)	Dodd-Frank Act – Jurisdiction over benchmarking violations outside of U.S	Under section 2(i) of the CEA, as amended, the swaps provisions of the CEA (including any CEA rules or regulations) apply to cross-border activities when certain conditions are met, namely, when such activities have a “direct and significant connection with activities in, or effect on, commerce of the United States” or when they contravene Commission rules or regulations as are necessary or appropriate to prevent evasion of the swaps provisions of the CEA enacted under Title VII of the Dodd-Frank Act.

Regulator	Rule	Description
Commodity Futures Trading Commission (CFTC)	CFTC Regulation 23.201, 23.202 and 23.203	All records, including but not limited to, certain written approvals, position records, transaction records, business records, real-time reporting records or marketing and sales materials that a Swap Dealer (SD) or Major Swap Participant (MSP) are required to maintain must be maintained in accordance with 17 CFR 1.31 and shall be made available promptly upon request. This includes daily trading records. Records have to be kept at the principal place of business.
Commodity Futures Trading Commission (CFTC)	CFTC 1.31 and 1.35(a)	Oral communications that lead to the execution of a transaction in a commodity interest need to be retained for one year. Written communications should be retained for five years.
Financial Industry Regulatory Authority (FINRA)	Rule 2210(b)(4)(A)	Record keeping requirements for retail and institutional communications that incorporate the record keeping format, medium and retention period requirements of SEA Rule 17a-4.18.
Financial Industry Regulatory Authority (FINRA)	Rule 2210(c)(6)	Each firm's written and electronic communications may be subject to a spot-check procedure, and firms must submit requested material within the time frame specified by the Advertising Regulation Department.

Regulator	Rule	Description
Financial Industry Regulatory Authority (FINRA)	Regulatory Notice 10-06 (Social Media Web Sites Guidance on Blogs and Social Networking Web Sites)	Every firm that intends to communicate, or permit its associated persons to communicate, through social media sites must first ensure that it can retain records of those communications. SEC and FINRA rules require that for record retention purposes, the content of the communication is determinative and a broker-dealer must retain those electronic communications that relate to its “business as such.”
Financial Industry Regulatory Authority (FINRA)	Regulatory Notice 11- 39 (Social Media Websites and the Use of Personal Devices for Business Communications)	Firms using social media need to capture and retain communications sent via social media accounts, even employee personal accounts, if they relate to the business.
Federal Financial Institutions Examination Council (FFIEC)	Bank Secrecy Act / Anti-Money Laundering Programs (BSA / AML)	Financial institutions must adhere to recordkeeping and reporting requirements which apply to electronic communications. Applies to all customers, products and services, including customers engaging in electronic banking (e-banking) through the use of social media, and e-banking products and services offered in the context of social media. Additionally, virtual internet games and digital currencies present a higher risk for money laundering and terrorist financing and should be monitored accordingly.

Regulator	Rule	Description
Federal Financial Institutions Examination Council (FFIEC)	Community Reinvestment Act (CRA)	Recordkeeping requirements for comments made by the public. Retain records of written communications made on sites run by or on behalf of the institution that specifically relate to the institution's performance in helping to meet community credit needs.
Financial Services (Canada)		
Regulator	Rule	Description
Canadian Securities Administrators	National Instrument 31-303 (CSA NI)	Retain records for 2 years, in a manner that allows "rapid recovery to a regulator".
Investment Dealers Association of Canada	IDA29.7	Requires the retention of records related to business activities regardless of its medium of creation.
Investment Industry Regulatory Organization of Canada IIROC	Universal Market Integrity Rules 10.12	Records of orders to be retained for 7 years - during the first 2 years, this should be kept in a readily accessible location.
Investment Industry Regulatory Organization of Canada IIROC	Notice-0349, Guidelines for the Review of Advertisements, Sales Literature and Correspondence	Requirement to retain records of business activities, financial affairs, customer transactions and communications, regardless of the "methods" used. This includes but is not limited to "Facebook, Twitter, YouTube, blogs and chat rooms, are subject to the IIROC Dealer Member Rules."

Financial Services (U.K.)		
Regulator	Rule	Description
Financial Conduct Authority (FCA)	Policy Statement 08/1 – Telephone Recording: recording of voice conversations and electronic communications	Clarification that all relevant electronic communications must be retained. The FCA states that electronic communications “includes fax, email, Bloomberg mail, video conferencing, SMS, business to business devices, chat and instant messaging. But is not limited to these as it captures any electronic communications involving receiving client orders and the agreeing and arranging transactions. We will not produce an exhaustive list of electronic communication because of the continuing innovation and advancement in technology which would mean the list frequently becomes out of date. We also feel that it is inappropriate to limit the obligations to a prescriptive list and an outcome based approach is more suitable in implementing such rules. We would expect senior management to exercise their judgement in this area.”
Financial Conduct Authority (FCA)	COBS 11.5 Record keeping: client orders and transactions	Investment services firms need to maintain full and proper records of each and every client, the orders placed, who has dealt with the order, what was executed and any transactional prices.

Regulator	Rule	Description
Financial Conduct Authority (FCA)	COBS 11.8 Recording telephone conversations and electronic communications	Firms need to “take reasonable steps to record relevant telephone conversations, and keep a copy of relevant electronic communications, made with, sent from or received on equipment”. The definition of “relevant” is said to be those which have been conducted between the firm and their client or client’s representative. Telephone conversations and electronic communications need to be preserved in an easily accessible location, for at least 6 months from the date the record was created, and in a tamper-proof format.
Financial Conduct Authority (FCA)	Senior Management Arrangements, Systems and Controls (SYSC) 9 Record-keeping	Encapsulates the obligations that firms have under MiFID and the UCITS Directive (from the European Commission), such as keeping related business records for a period of at least five years. This rule stresses a number of principles of good record-keeping – the need to save records in a readily accessible place, and to ensure that the records are kept in a tamper-proof format.
Financial Conduct Authority (FCA)	Guidance Consultation: Social Media and Customer Communications	Firms should keep their own records of social media communications and not rely on digital media channels to maintain records.

Regulator	Rule	Description
Financial Conduct Authority (FCA)	SYSC 10 – Conflicts of Interest	Under this rule, firms need to take “reasonable steps” to identify conflicts of interest between the firm and its clients or between clients. Conflicts of interest need to be documented and disclosed and firms should also provide a written conflicts of interest policy to its employees.
	SYSC 10.2 – Chinese Walls	Under this rule, firms need to establish and maintain Chinese walls to prevent the transfer of privileged information between parts of the business who might be able to use that information to prejudice business outcomes.
Financial Services (Europe)		
Regulator	Rule	Description
European Securities and Markets Authority (ESMA)	MiFID II Article 16(7)– Recording of Telephone Conversations and Electronic Communications	Telephone conversations or electronic communications relating to investment services such as the reception and transmission of orders, execution of orders on behalf of clients, and dealing on own account are required to be recorded.
Swiss Financial Market Supervisory Authority (FINMA)	Market Conduct Rules	Retention of all electronic communications (e.g. email and instant messages sent by Bloomberg and Reuters) sent by employees in securities trading for 2 years. Firms need to be able to produce electronic communications sent by employees in securities trading to FINMA without alteration.

Regulator	Rule	Description
Swiss Financial Market Supervisory Authority (FINMA)	Operational Risks at Banks Circular 2008 (FINMA-Circ. 08/21): Principle 3	Prevent the unauthorised alteration, copying, access or other unauthorised processing of client data.
Swiss Financial Market Supervisory Authority (FINMA)	Operational Risks at Banks Circular 2008 (FINMA-Circ. 08/21): Principle 5	Banks must diligently select, supervise and train staff and third parties (eg, external IT providers) with access to client-identifying data.
Financial Services (International)		
Regulator	Rule	Description
International Organization of Securities Commissions (IOSCO)	Principles for Benchmark-Setting Processes, C.5	Benchmark Submitters are required to keep records of all relevant aspects of the submission process for a period of at least five years in line with the requirements on record keeping in MiFID. Records should be retained in a medium that allows the storage of information in a way accessible for future reference, and in a tamper-proof form.
International Organization of Securities Commissions (IOSCO)	Principles for Benchmark-Setting Processes, D.2 & D.3	Benchmark Calculation Agents need to document and keep records of all interactions with submitting parties, audit records of the data used for calculating the Benchmark and records of contacts with the Benchmark and make these available to Supervisory Authorities upon request.

Regulator	Rule	Description
Commodity Futures Trading Commission (CFTC)	Dodd-Frank Act – Section 731	The Dodd-Frank Act added new obligations for registered swap dealers and major swap participants. The requirement calls for daily trading records of the swaps and all related records (including related cash or forward transactions) and electronic communications, including electronic mail, instant messages, and recordings of telephone calls, for one year. This information needs to be stored safely and in a manner that allows for easy retrieval and review by regulators. <See attached deck for more on DF>
Pharmaceuticals (U.S.)		
Regulator	Rule	Description
Food and Drug Administration (FDA)	Prescription Drug Marketing Act (PDMA)	Includes recordkeeping requirements associated with marketing and advertising drugs, such as presenting risk information, etc.
Food and Drug Administration (FDA)	Food Safety Modernization Act (FSMA)	FDA is granted record access authority (Sections 101/204) with this Act. Most requirements are for record retention for two years after they have been superseded or obsolete.

Regulator	Rule	Description
Food and Drug Administration (FDA)	Fulfilling Regulatory Requirements for Postmarketing Submissions of Interactive Promotional Media for Prescription Human and Animal Drugs and Biologics (Draft)	In these draft guidelines, firms wanting to use social media need to submit the material posted on social media to the FDA after the event. The FDA requests that ‘It is preferable for the company to submit the interactive or real-time communications in an archivable format that allows FDA to view and interact with the submission in the same way as the end user (e.g., working links). Alternatively, companies should submit screen shots or other visual representations.’
Food and Drug Administration (FDA)	Draft Guidance for Internet/Social Media Platforms: Correcting Independent Third-Party Misinformation About Prescription Drugs and Medical Devices ¹³	Firms are not required to submit corrections to the FDA but will need to keep records of corrections made should the FDA have questions.
Other guidelines born out of an international regulatory harmonization effort and which are enforced and cited by FDA, EMA, Health Canada, and other health agencies:		

¹³<http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM401079.pdf>

Healthcare (U.S.)		
Regulator	Rule	Description
Department of Health and Human Services	HIPAA	Organizations need to retain records in a large number of areas to demonstrate compliance and also to respond to requests, for instance, from patients.
State Governments	The Affordable Care Act	<p>Requires organizations to adopt comprehensive recordkeeping practices e.g. health insurance issuers offering individual health insurance coverage are required to maintain for six year records of all claims and notices associated with the internal claims and appeals process.</p> <p>If a consumer completes a qualified health plan (QHP) selection using an agent or broker's Internet website, the site is required to maintain related audit trails and records in an electronic format for a minimum of 10 years.</p>
Department of Labor	Employee Retirement Income Security Act (ERISA)	The Department of Labor has issued general guidance for record retention of journals, ledgers, checks, invoices, contracts, agreements, vouchers, worksheets, receipts, claim records, and applicable resolutions to name a few. Actual records, not summaries, are required, although electronic versions are acceptable if certain standards for electronic retention are met. Companies planning to use social media need to ensure that their social media records are complete, secure and tamper-proof.

Regulator	Rule	Description
International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH)	ICH E6 Good Clinical Practice	The types of records to be retained for clinical trials.
International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH)	ICH Q7 Good Manufacturing Practice for Active Pharmaceutical Ingredients	The harmonized standard for pharmaceutical companies for record retention under current Good Manufacturing Practices (cGMPs).
	ISO 15489: Records Management Standard	An international industry consensus standard that provides a high level framework for records retention.

Public Sector (U.S.)		
Regulator	Rule	Description
President's Office	Memorandum on Building a 21 st Century Digital Government ¹⁴	The memorandum emphasizes the importance of good record keeping practices for accountability and transparency. Federal agencies and public sector organizations face a deadline of 2019 for adoption of these practices.
National Archives and Records Administration (NARA)	Bulletin 2014-02 ¹⁵	The Bulletin reminds federal agencies of The Federal Records Act (44 U.S.C. 3301) which defines Federal records as “any material that is recorded, made or received in the course of Federal business, regardless of its form or characteristics, and is worthy of preservation”. In other words, the content, not the form of transmission, is determinative. Therefore, public records could include email and other electronic communications.
Federal Government	Freedom of Information Act (FOIA)	This Act allows for the full or partial disclosure of previously unreleased information and documents controlled by the United States government if requested by a member of the public. By this document, records of official business may be interpreted to include any type of electronic communications such as email, texts, public instant messages, unified communications, collaboration tools and social media.

¹⁴<http://www.whitehouse.gov/the-press-office/2012/05/23/presidential-memorandum-building-21st-century-digital-government>

¹⁵National Archives and Records Administration, NARA Bulletin 2014-02, Oct 2013

Energy and Utilities (U.S.)		
Regulator	Rule	Description
Federal Energy Regulatory Commission (FERC)	FERC 18 CFR Parts 35 and 284	Requires firms to keep records of any type of communication for five years.
Federal Energy Regulatory Commission (FERC)	FERC Part 125	Specifies the retention periods for records maintained by public utilities and others.
Federal Energy Regulatory Commission (FERC)	FERC Order No. 717	Requires the creation of ethical walls between marketing and transmission functions of vertically integrated companies and also imposes retention requirements.
Cross-Industry		
Regulator	Rule	Description
Federal Rules of Civil Procedure (FRCP)	Rule 16(b)	Scheduling order must include “provisions for disclosure or discovery of electronically stored information”
Federal Rules of Civil Procedure (FRCP)	Rule 26(a)	Initial disclosures during the meet and confer include a “copy of, or a description by category and location” of ESI
Federal Rules of Civil Procedure (FRCP)	Rule 26(f)	Parties must “discuss any issues relating to preserving discoverable information and to develop a proposed discovery plan”. Parties have to meet and confer as soon as possible and at least 21 days before a scheduling conference or order is due.

Regulator	Rule	Description
Federal Rules of Civil Procedure (FRCP)	Rule 34(a)	An extensive list of what is considered electronically stored information (ESI) which can be requested by either party involved in litigation for inspection by the opposing party.
EU	Model Requirements	This formal requirements specification for electronic records management was published by the European Commission for use across the European Union. Widely regarded as the de facto standard for the retention, administration, and deletion of electronic records.

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