COMPLIANCE CONSIDERATIONS
SMS IN UC-BASED CALLING AND PHONE APPS

THETALAKE

This brief sets out the compliance considerations around the capture, retention, and supervision of communications that financial services firms need to consider when using SMS in unified collaboration (UC) based calling and in native SMS applications on mobile phones. It explains the features and capabilities of the tools which generate digital communications, encompassing audio, text and visual content. Additionally, it outlines the applicable regulations in the U.S., UK and Canada for capturing and supervising communications, depending on whether user populations fall within regulated or non-regulated roles. Finally, we analyze a few use cases for SMS in UC-based calling and phone apps and consider how regulatory compliance mandates apply to those scenarios.

SMS TOOLS & HOW THEY ARE USED

Short Message Service, or “SMS,” are applications that allow for the sending and receipt of “short messages” between mobile phones. Over time, SMS features have evolved to include the ability to send not only text, but other types of multimedia content between mobile phones like images, emojis, links, videos, reactions, and more. In addition, SMS is now standard in “virtual” phone applications such as those offered by Zoom, RingCentral, and other UC providers expanding the connectivity and reach of these platforms.

Examples of SMS in UC-based calling and phone apps include RingCentral phone, Zoom phone, Dialpad, Microsoft Teams, Avaya, Salesforce, Symphony, Truphone, Webex and Gotomeeting. Global mobile carriers like Verizon, AT&T, T-Mobile, Vodafone, O2, and Rodgers offer SMS natively on phones. SMS is also offered through messaging providers like Movius, LeapExpert, and CellTrust.

UC-based SMS apps can be installed and run on mobile devices in conjunction with broader deployment of UC applications like meeting and chat, or on their own. Of course, native mobile phone SMS applications can also be used for communication purposes.

To illustrate, here are some real-world examples of how the SMS tools are used in financial services organizations.

Example A: Non-regulated users

A firm is organizing a fun run to raise funds for local charities. Firm-wide communications are sent via SMS. Field organizers also set up separate group SMS chains to finalize the details of the run. None of the communication about the fun run is regulated.

Example B: Mix of regulated and non-regulated users

A firm has board members and other senior management located in a number of different locations and is working through its corporate governance process to agree the board papers for the next meeting. This collaborative work via SMS will include a mix of individuals whose roles require regulatory supervision and records to be retained, alongside others whose roles are not subject to the same obligations. The topics in the board papers range from strategic matters to an update on the latest quarterly financial results which may be price sensitive as the firm is listed.

Example C - Regulated users

A firm’s equities trading desk is using SMS for both internal and external discussions regarding the state of the market, transaction volumes and likely price-sensitivity of a forthcoming issue. All activities are front office and regulated.

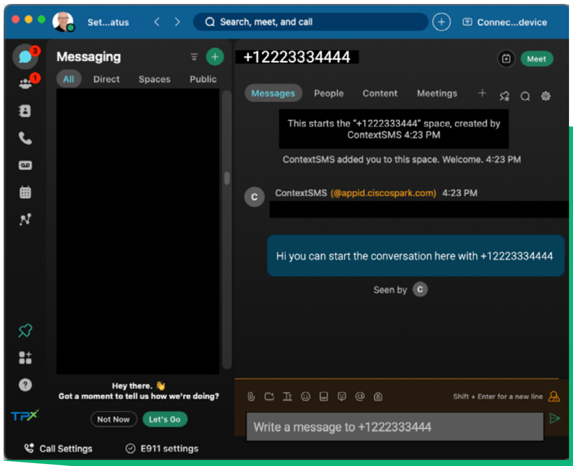
THE KEY CAPABILITIES OF SMS APPS THAT GENERATE ELECTRONIC COMMUNICATIONS

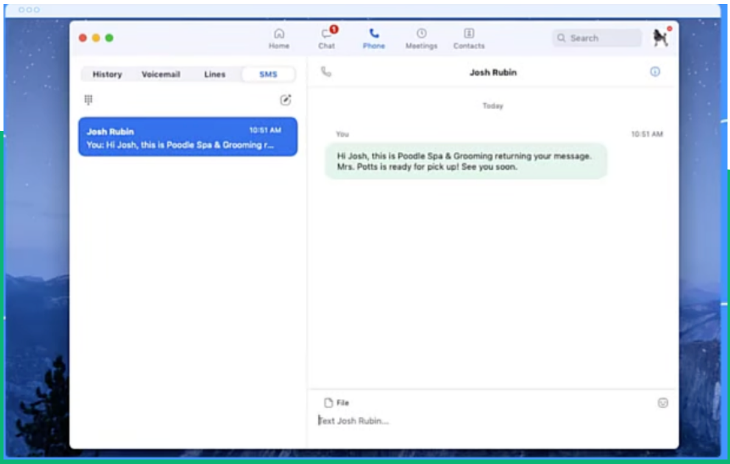
Understanding how and where eComms are used or included within the tools is critical for firms to be able to capture and supervise them in accordance with regulatory obligations.

The various features of eComms facilitated by both native and UC-based calling and phone SMS applications include:

- Text-based messages sent and received
- Communications can be sent to one or many recipients
- Automation of communication including outreach and responses
- Communications can include file attachments, links, GIFs, reactions, voice notes/clips, and videos
- Conversations can be shared in a number of ways - for example a Zoom SMS can be ‘released’ to enable those other than the original recipient(s) to see the communication and a Microsoft Teams SMS can be ‘exported’
- Filters can be applied to hide messages
- SMS messaging can be meshed with other forms of communication with a single phone number being used for text, calling and email

One advantage of UC-based SMS is its inherent flexibility–UC SMS apps allow users to send and receive messages via mobile phone apps as well as from desktop apps or through online, browser-based interfaces. UC SMS apps allow for simple and straightforward device-agnostic communication.





Most major Unified Communications platforms offer SMS capabilities, either natively like Zoom through Zoom Phone, Cisco through Webex Calling, and RingCentral’s RingEX, RingCX and Contact Centre platforms.—or through the convenience of embedded apps like Microsoft Teams.

KEY REGULATIONS THAT APPLY TO THE CAPTURE AND SUPERVISION OF SMS COMMUNICATIONS

Capture and Retention Requirements

The applicable regulations for capturing and supervising communications are set out by regulators across the U.S., UK and Canada including the Securities & Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), Commodity Futures Trading Commission (CFTC) and National Futures Association (NFA) in the US; the Financial Conduct Authority (FCA) in the UK and the Canadian Investment Regulatory Organization (CIRO).

Rules such as the SEC's **17a-4** and **204-2**, FINRA's **2210**, the FCA's SYSC **10A.1.6**, and CFTC Regulations **23.202** and **1.35** mandate the capture and retention of written electronic communications such as email, chat, SMS, and other text-based components of collaboration platforms. Under 17a-4, firms and their registered representatives must retain records of communications related to their "business as such", the application of the requirement being determined by the content of the communication, not the type of device or technology used to receive or send the communication. So if the content of a SMS communication relates to the business of a firm it would need to be captured.

The need to retain "business as such" communications was at the heart of the $3bn+ fines imposed by the SEC and others "for widespread and longstanding failures to maintain and preserve electronic communications." As just one instance of enforcement action taken, in September 2023, the SEC sanctioned 5 broker-dealers, 3 dually registered broker-dealers and investment advisers, and 2 affiliated investment advisers with the firms agreeing to pay combined penalties of $79M. The SEC specifically **cited** failures whereby "employees communicated through personal text messages about the business of their employers, and the investment adviser firms admitted that their employees sent and received off-channel communications related to recommendations made or proposed to be made and advice given or proposed to be given. The firms did not maintain or preserve the substantial majority of these off-channel communications, in violation of the federal securities laws."

FINRA Regulatory Notice **17-18** covers the regulatory expectations around text messaging in FAQs stating:

"[E]very firm that intends to communicate, or permit its associated persons to communicate, with regard to its business through a text messaging app or chat service must first ensure that it can retain records of those communications as required by SEA Rules **17a-3** and 17a-4 and FINRA Rule **4511**. SEC and FINRA rules require that, for record retention purposes, the content of the communication determines what must be retained."

The point is also reiterated in FINRA Regulatory Notice **11-39**. "Whether a particular communication is related to the business of the firm depends upon the facts and circumstances. This analysis does not depend upon the type of device or technology used to transmit the communication, nor does it depend upon whether it is a firm-issued or personal device of the individual; rather, the content of the communication is determinative."

SMS in UC-based calling and phone apps will need to be retained under the requirements which vary by regulator. Retention periods are three years under **rule 17a-4** and five years under the Investment Advisers Act rule **204(a)(7)** and CFTC **rule §1.31** - the CFTC specifies records of oral communications must be kept for a period of one year. The FCA specifies record retention periods of five years and up to seven.

Supervision requirements

The supervisory obligations for SMS include those from FINRA where there is a specific supervisory requirement to 'establish, maintain, and enforce written procedures' that are reasonably designed to achieve compliance with applicable securities laws and regulations. FINRA Rule **3110(b)(4)** requires firms to review incoming and outgoing written (including electronic) correspondence and internal communications. Rules 3110.06 -.09 cover the risk-based review of correspondence and internal communications and the need to evidence the review.

Other supervisory requirements include CFTC Regulation **23.602(a)** and **166.3** together with NFA Rule 2-9 all requiring 'diligent' supervision. Similarly CIRO rule **3900** et seq requires a firm to implement a supervisory system that provides 'reasonable assurance'. In **SYSC 6.1** the FCA requires the content of electronic communications to be reviewed for compliance in line with the nature of the communication and for that review to be evidenced.

INTERPRETATIONS OF THE RULES AND APPLICATION TO THE USE CASES

To illustrate how the recordkeeping and supervision rules apply in practice we can consider the scenarios outlined in section 2. These include both regulated and non-regulated users, and the compliance approaches and best practices therefore differ for these populations.

Example A: Non-regulated

In the scenario of using SMS to organize a charity fun run, there is no regulatory requirement to retain any of the eComms or proactively supervise it. FINRA covers this issue in Regulatory Notice **17-18**, where the relevant Q&A states:

> "Q2: If an associated person of a firm in a personal communication shares or links to content that the firm makes available in its communications that does not concern the firm's products or services, would the associated person's communication be subject to Rule 2210? For example, if the associated person posts information about the firm's sponsorship of a charitable event, a human interest article, an employment opportunity, or employer information covered by state and federal fair employment laws, would the communication be subject to Rule 2210?
>
> A: No. Whether a communication by an associated person is subject to Rule 2210 depends on whether the content relates to the products or services of the firm."

Based on this guidance, the charity fun run is clearly outside the scope of relevant FINRA, SEC, and CFTC Rules and does not require retention.

Example B: Mix of regulated and non-regulated users

In example B, a firm is using a group SMS conversation to agree the board papers for the next meeting with a mix of regulated and non-regulated users. Given the different types of employees interacting in this scenario, at minimum the firm would be subject to the e-Comms capture, retention, and supervision obligations applicable to the regulated staff using SMS. The electronic communications would all fall under SEC Rule **17a-4** and other applicable capture regulations.

While technically only the regulated members of the board would need to have their SMS captured, discussions about firm strategy and price sensitive information, a firm would be well advised to capture all participants in the SMS conversations. In the event that subsequent analysis of the corporate governance or specific employee communications is required, the full context of the conversation across all participants would be essential to providing a complete picture of the interactions. Limiting capture to only the regulated users would omit important parts of the conversation.

Firms should note the UK Prudential Regulation Authority enforcement action against a **bank** in which the failure to capture communications between board members was called into question. The PRA noted the firm's failure to "put in place effective document retention and recordkeeping policies or procedures for its business that took into account technological advances such as those relating to instant messaging platforms (e.g. WhatsApp)." Based on the facts of this enforcement action, SMS would clearly be in bounds as a relevant business communication triggering the recordkeeping obligations for capturing corporate governance conversations.

Example C: Regulated users

In example C, a firm's equities traders are using SMS to chat about trading both internally and externally with institutional clients. For a U.S. broker-dealer, the entirety of the SMS communications–both with clients and internal participants–must be captured, retained and supervised under SEC Rule 17a-4. These SMS conversations clearly meet the "business as such" standard under Rule 17a-4 given the nature of the internal strategic conversations as well as client-facing interactions. The SMS communications would require subsequent supervision as correspondence based on the requirements in FINRA Rules 2210.

Learn more

Visit our Integrations Overview Web Page