

**DRAFT GUIDANCE  
BANKING STANDARDS BOARD CONSULTATION**

**Certification Regime: Regulatory References**

JANUARY 2019

# 1 About this guidance

## 1.1 Introduction

**Disclaimer:** *The proposals in this paper are intended to operate as voluntary practice guidance to support the BSB's work on the Certification Regime. They are draft and should not be used in the current form as the basis for any decision or action.*

1.1.1 This Statement of Good Practice is intended to help firms implement the regulatory reference requirement of the Senior Managers and Certification Regime (SM&CR) effectively, by providing a high-level set of principles and good practice guidance.

## 1.2 Status of this document

1.2.1 The Banking Standards Board's (BSB) Statements of Good Practice are living documents and are kept under review. Please contact [certification@bankingstandardsboard.org.uk](mailto:certification@bankingstandardsboard.org.uk) if you have any comments or queries regarding this Statement. BSB good practice guidance on the SM&CR allows member firms and others in the sector to reference their own policies and procedures against a statement of what 'good' looks like. It is developed in partnership with BSB members through the BSB's cross industry Certification Regime (CR) Working Group and reflects a pooling of industry knowledge and experience. It does not impose any legal or regulatory obligations on BSB members, nor does it replace regulation. Users of this guidance are advised to read it in conjunction with the Prudential Regulatory Authority (PRA)<sup>1</sup> and Financial Conduct Authority (FCA)<sup>2</sup> rules, PRA supervisory statement<sup>3</sup> and FCA guidance<sup>4</sup> on regulatory references. The guidance references relevant regulatory requirements but does not claim to be exhaustive. In the event of inconsistency, applicable laws, rules and regulations prevail.

1.2.2 References in the document to the 'regulators' refer to both the PRA and FCA.

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<sup>1</sup> PRA [Policy Statement 27/16](#)

<sup>2</sup> FCA [Policy Statement 16/22](#)

<sup>3</sup> PRA [Supervisory Statement 28/15](#)

<sup>4</sup> FCA Handbook [SYSC 22](#)

## 1.3 Introduction

- 1.3.1 In September 2016, the FCA and PRA published their final requirements for regulatory references.<sup>5</sup> These came into effect in March 2017 and are part of ‘a range of measures whose overarching goal is to prevent the ‘recycling’ of individuals with poor conduct records between firms’<sup>6</sup>. The purpose of regulatory references is to establish a regulatory framework that allows and requires firms to share relevant information on certain individuals’ prior conduct and fitness and propriety (F&P) to support their assessment of potential new recruits as fit and proper. A key aim of these rules is to prevent the damage (financial, legal and / or reputational) that individuals in risk-taking roles and with a history of misconduct could cause to firms and the industry as a whole, and the negative consequences this could have for customers, clients and wider society. Regulatory references are also a response to the recommendation of the 2016 Fair and Effective Markets Review (FEMR) that regulators consult on a mandatory reference system to prevent the movement of individuals with poor conduct records between firms<sup>7</sup> (sometimes referred to as ‘rolling bad apples’).
- 1.3.2 The rules on regulatory references set out three principal responsibilities for firms: to seek regulatory references when considering the appointment of individuals to senior management functions (SMFs), certification functions or notified non-executive director (NED) functions; to provide regulatory references when requested; and to revise and, if necessary, update references if information comes to light that would affect a firm’s assessment of an individual’s F&P. These rules require firms to put policies and processes in place to comply with their responsibilities as they relate to recruitment and certification processes. The requirements include a template reference form that sets out where firms need to provide information, but also includes a box for ‘any other information that we reasonably consider to be relevant to your assessment of whether the individual is fit and proper’<sup>8</sup>.
- 1.3.3 These processes rely to some extent on firms making a judgement about the type of conduct information that should be included or updated in a reference. Firms must address both the legal and ethical risks of under or over-disclosure, balancing fairness to the individual in disclosing information about him or her with the need to help prevent damage (whether that be financial, legal or reputational) by making a prospective employer aware that the individual could pose a conduct risk.
- 1.3.4 If implemented effectively, regulatory references have the potential to ensure that individuals demonstrating poor conduct cannot move untraced through the sector into SMFs, certified roles and notified NED positions as well as providing positive information about individuals demonstrating good conduct. From the perspective of fairness to the individual, effective implementation should also mean minimising the risk of unfair outcomes through transparency in investigating and recording potential issues.

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<sup>5</sup> While the final requirements were published in September 2016 ([PRA / FCA](#)), the most up to date guidance (as at January 2019) is Chapter 6 of PRA [Supervisory Statement 28/15](#); and [SYSC 22](#) of the FCA Handbook. The final policy statements were PRA [Policy Statement 27/16](#) and FCA [Policy Statement 16/22](#).

<sup>6</sup> SS 28/15 6.2

<sup>7</sup> [Fair and Effective Markets Review Final Report](#)

<sup>8</sup> SYSC 22 Annex 1, Question G

- 1.3.5 If implemented ineffectively, by contrast, regulatory references could simply amount to bland statements confirming job roles and might even hamper firms in their efforts to assess F&P (as insufficient information could lead to the wrong outcomes).
- 1.3.6 The practices related to this requirement of SM&CR are particularly important because they affect such a large population. Regulatory references apply to SMFs, employees in certified roles and notified NEDs in banks. The extension of the requirements to all FCA-regulated firms will bring a significant increase in the number of in-scope individuals.<sup>9</sup> The extension will also, of course, lead to more requests for regulatory references. The way in which banks and building societies implement regulatory references will set an important precedent and example for other financial services firms.

#### 1.4 Relationship to existing BSB guidance

- 1.4.1 Building on the BSB's existing guidance on the CR and on input from member firms participating in the BSB's CR Working Group, this BSB guidance focuses on regulatory references in relation to candidates for certification functions, although parts of it may, of course, also be relevant to candidates for SMFs and notified NED functions. It also focuses on firms with a UK banking licence (i.e. banks and building societies) subject to the SM&CR, though may also be relevant to other in-scope firms.
- 1.4.2 The purpose of a regulatory reference is to provide firms recruiting people into certified roles<sup>10</sup> with information relevant to the assessment of that person's F&P that they may not gain through other information supplied to them during the recruitment process. It is also to reduce the risk of damage (financial, legal and / or reputational) to firms arising from the potential actions of individuals in risk-taking roles and with a history of misconduct. It is therefore a key input into the assessment of F&P and is strongly linked to the BSB's work and good practice guidance on the CR and the assessment of F&P<sup>11</sup>.
- 1.4.3 F&P assessments are a key way of identifying and managing certification risks and issues<sup>12</sup> associated with certified individuals, and the associated potential risks (as outlined above) to the firm. Part of the role of a regulatory reference is therefore to provide the new firm with the previous firms' experience of any certification issues.

#### 1.5 Principles for implementing regulatory references

- 1.5.1 For regulatory references to work well, it is clearly important that those implementing this aspect of the SM&CR do so to high standards. No single firm can, on its own, ensure that regulatory references operate as intended: a firm that

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<sup>9</sup> In 2015, [HM Treasury](#) estimates based on FCA data suggested that the extension of the SM&CR would increase the number of in-scope individuals from 42,352 to 140,652

<sup>10</sup> Individuals designated by the PRA as [significant risk takers](#) (unless subject to the Senior Managers Regime) or in FCA specified significant harm functions ([SYSC 5.2.29](#))

<sup>11</sup> See '[Assessing Fitness and Propriety; Principles, definitions and sources of information](#)' and '[Dealing with risks and issues associated with assessing Fitness and Propriety](#)' for BSB guidance and BSB website for additional commentary on the CR.

<sup>12</sup> In this document, as in our guidance on assessing F&P, a 'certification risk' is defined as a situation which, should it materialise, could call into question an individual's F&P. A 'certification issue' is defined as a situation that has materialised and is calling into question an individual's F&P.

invests time and resource in producing high-quality references cannot control the quality of those it receives. Achieving high standards requires the commitment of the whole industry and is facilitated by the pooling of experience and the identification and dissemination of good practice.

1.5.2 In implementing the regulatory reference requirements firms must balance a range of significant considerations. These relate in part to legal and regulatory obligations (employment law, data protection, the requirement to give to another firm full and accurate information of relevance to an individual's F&P), but also to more general ethical principles such as transparency of process, and consideration of the importance of a regulatory reference to an individual's career and livelihood. Extensive discussion with the member firms participating in the BSB's CR Working Group has generated a set of three high-level principles to help firms navigate these considerations. The first and second of these principles expand upon existing PRA and FCA rules and guidance as follows:

- the first builds on the PRA and FCA guidance relating to 'fairness'<sup>13</sup> (both to the employee, through the firm's duties under general law, and the recipient firm in exercising due skill and care) in the preparation of the reference and ensuring any views contained therein are based on documented fact; and
- the second expands upon the PRA and FCA rules that firms not disclose information that hasn't been properly verified<sup>14</sup>.

1.5.3 Building on these rules and guidance, and considering both the providing and receiving ends of the process, the BSB's view is that regulatory reference practices and policies should be:

- **fair** both to the individuals about whom they are written without compromising the integrity of a reference, and in the way that they are used by firms when recruiting individuals;
- **proportionate** in relation to other firms and individuals when fulfilling regulatory reference requirements, in particular by taking reasonable steps to identify and verify relevant information, and when considering issues raised by regulatory references and updates; and
- **consistent** in the way that individuals are treated by firms providing and receiving references; with other processes and policies within a firm; and, as far as possible, between firms in the quality and quantity of information included. This should not preclude, especially in the early period of regulatory references implementation, learning from honest mistakes and changing course to address them.

1.5.4 As good practice, firms should design their policies and processes with these principles at the centre and use them in evaluating outcomes. If implemented without due regard for fairness, proportionality and consistency, there would be a risk of regulatory references treating certified individuals unfairly or unreasonably. Such treatment could, at the individual level, incentivise risk aversion, disincentivise owning up to mistakes, or increase levels of stress and anxiety. At the firm level,

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<sup>13</sup> SS 28/15 6.43 / SYSC 22.5.4

<sup>14</sup> Fitness & Propriety 5.4 / SYSC 22.5.1

unfairness and lack of transparency in the regulatory reference process could have an adverse impact on openness, accountability and resilience, and could increase the risk of legal action.

- 1.5.5 This good practice guidance aims to help firms implement the principles of fairness, proportionality and consistency. Annex A provides a summary of the guidance.

## 1.6 Structure of this guidance

- 1.6.1 This guidance is intended to provide a framework for firms providing, requesting and using regulatory references. It focuses initially on the practices that apply to all or most references. It then considers circumstances that may be more challenging for firms, and seeks to outline fair, proportionate and consistent good practice in these scenarios.

## 2 Good practice when providing regulatory references

### 2.1 Receiving a request for a regulatory reference

- 2.1.1 The regulations state that a firm looking to appoint someone to a certified role is required to seek a regulatory reference covering the previous six years of their employment<sup>15</sup>. For this reason, firms are likely to be asked to provide references not just for current employees, but also for individuals who no longer work at the firm and may not have done for several years. These may be individuals who were not carrying out certified roles at the time they were working at the firm but are looking to do so in their prospective employers.
- 2.1.2 In most cases, Human Resources (HR) will be the likely first port of call for a firm seeking a regulatory reference. However, it is also possible that line managers will be approached directly. Firms therefore need to ensure that managers understand what a regulatory reference is and how the firm deals with it (for example, through a central team). This will ensure that regulatory reference requests do not 'slip through the cracks' or are otherwise unanswered, given that FCA guidance<sup>16</sup> suggests that firms should provide them within six weeks of the request<sup>17</sup>. More broadly, of course, it is important that line managers of certified staff are aware of the need to highlight potential issues relating to F&P to allow these to be investigated as necessary. This is important not just from the perspective of the firm's own responsibilities regarding the assessment of F&P, but also with regard to its regulatory reference duties.
- 2.1.3 There are some key questions to ask in relation to every request for a regulatory reference, of which two of the most important are 'who is the request from?' and 'what is being requested?'

#### Who is the request from?

- 2.1.4 The regulations require firms to provide a regulatory reference for individuals moving into certified roles<sup>18</sup> when requested<sup>19</sup>. Firms are not required, however, to provide such information about an individual who will not be taking up a certified role. Where third parties, such as recruitment consultants, request references, firms should satisfy themselves that the request is legitimate<sup>20</sup>. This may involve taking steps to contact the individual to verify the request. Some firms have received requests for references from third parties that could be considered "fishing trips" e.g. where a recruitment consultant is conducting research into a potential

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<sup>15</sup> The six-year limit does not apply in cases of serious misconduct: if a firm requests a reference about an individual who has committed an act of serious misconduct, the supplier firm will need to include this information in a reference even when the act took place more than six years ago (SS 28/15 6.38 / SYSC 22.2.2R(3)(c)).

<sup>16</sup> SYSC 22.5.17

<sup>17</sup> Fitness and Propriety 5.1(1) states 'as soon as reasonably practicable'

<sup>18</sup> As well as SMFs and notified NED roles.

<sup>19</sup> Fitness and Propriety 5.1 / SYSC 22.2.2

<sup>20</sup> PRA and FCA guidance states that the requirement to provide a regulatory reference must also be observed when this has been outsourced to an unregulated third party as long it is clear that this third party is acting on behalf of the firm requesting the reference (SS 28/15 6.30 / SYSC 22.5.6).

candidate but lacks a definite job offer for that individual. Firms can help determine if such requests are legitimate by asking for details of, for example, the job on offer and the prospective employer's registration number though they may also wish to take further steps within the recommended time scale for supplying a reference.

What is being requested?

2.1.5 While a template has been provided by the FCA for firms to use<sup>21</sup>, firms are not prevented from asking for more information than is included in the template. Some firms have amended the template<sup>22</sup> to gather additional information about an individual, usually for completeness. This could be relatively minor information, such as job title. Some firms respond to regulatory reference requests on their own "branded" template, rather than on the template provided by the requesting firm or the FCA's template. Such "branded" templates typically differ from the FCA template only in appearance. Whatever template is used to respond to the request, a firm should consider whether it is reasonable not to respond to any additional questions asked by the requesting firm.<sup>23</sup> This might arise if, for example, the request concerned information that the firm did not hold or was not required to hold<sup>24</sup>, or would require disproportionate resources to generate. Where a firm does not supply additional information, it may wish to provide a short explanation of why the information is not being provided.

## 2.2 The role of central functions

2.2.1 A key challenge for firms in implementing the regulatory reference requirements is ensuring that such references are completed in a consistent manner across the firm and between different roles. This may not be straightforward, particularly in large organisations. Regulatory references are needed for certified roles, SMFs and notified NED positions, each of which is subject to different regulatory requirements; firms will be asked for references not only for current employees, but also former ones; and not everyone will have been subject to the Senior Managers Regime (SMR) or CR while employed by the firm, and therefore may not have been subject to the same (or any) individual accountability regime while employed.

2.2.2 Many firms have placed the responsibility for regulatory references with a central team, often in HR. The full remit of the central team will vary depending on the processes firms already have in place for providing references, but a core element will be to ensure that regulatory references are provided in a consistent manner. Where references are provided by a third (outsourced<sup>25</sup>) party, for example, the central team may use a range of approaches to ensure the application of fairness, proportionality and consistency. These could include reviewing a sample of

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<sup>21</sup> [SYSC 22 Annex 1](#). The PRA rules on regulatory references also reference the FCA's template (Fitness and Propriety 5.1(3)).

<sup>22</sup> As permitted by Fitness and Propriety 5.1(4) and SYSC 22.4.2R(2).

<sup>23</sup> SYSC 22.3.5 permits firms to ask for more information than is set out as a minimum in the regulations. However, where firms are unable to provide complete information for these minimum requirements FCA guidance is that they should note this in the reference (SYSC 22.5.8).

<sup>24</sup> See Fitness and Propriety 5.5(2) and SYSC 22.9.3

<sup>25</sup> Firms must also ensure they are compliant with the [PRA's](#) and [FCA's](#) outsourcing rules (SYSC 8.1).

regulatory references produced by a third party on a regular basis; passing all regulatory references to line managers or HR before they are finally sent to the requesting firm; creating a “pyramid of escalation” to facilitate decisions about what to include in the reference; and ensuring there are clear trigger points for outsourced providers to consult on compiling less straightforward references.

- 2.2.3 One of the core roles of any central team is likely to be ensuring that a consistent set of information is prepared for each regulatory reference. This does not necessarily mean that the central team needs to generate information; the different information required for each regulatory reference is likely, to some degree, to be dispersed around different areas of the firm. The central team is, however, likely to act as the co-ordinating point within the firm, to ensure that the full range of information is consistently prepared. Table 1 illustrates the types of information firms may wish to use in compiling a regulatory reference. Not all of this information will be needed for every reference, but firms may wish to ensure that they are gathering the same range of information for all regulatory references. The table is not exhaustive, nor is every listed type of information required for each reference, but it illustrates the range of information that may be relevant.

Table 1 – Example information sources when collating a reference

<b>Type of information</b>	<b>Likely source of information</b>	<b>Example</b>
Role information	HR system/ line manager	Confirmation of role
F&P information	HR system/ line manager/ F&P assessor	Confirmation of certification Details of any non-issuance or remediation
Incomplete processes	HR system/ F&P assessor/ line manager	F&P assessment still in progress Disciplinary still in progress Disciplinary not yet commenced Incomplete remediation
Previous role information	HR system/ line manager (at the time)	Previous roles within the firm, particularly certified roles
Disciplinary and conduct rule breach information	HR/ Compliance	Circumstances and outcome of concluded disciplinary processes or conduct rule breaches
Serious misconduct	HR/ Compliance	Details of circumstances of misconduct
Complaints	Compliance	Details of upheld complaints

## 2.3 Supporting central functions

- 2.3.1 The rules require firms to have policies and practices that allow central functions (where relevant) to access and request the full range of relevant information for

compiling a regulatory reference in a timely manner.<sup>26</sup> Such policies may include acceptable response times for requests for information (e.g. to line managers), a requirement for individual employee records to be kept up to date (e.g. with correct information about line managers) and a requirement to retain records for six years.

## 2.4 Data security

- 2.4.1 Regulatory references contain sensitive information about employees. As such, firms should be mindful of their duties under data protection legislation and consider sending references and requests in encrypted form with the password supplied separately.

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<sup>26</sup> Fitness and Propriety 5.5 / SYSC 22.9.1

## 3 Good practice in obtaining a regulatory reference

### 3.1 Timeliness

3.1.1 Firms have observed that regulatory references can be difficult to obtain within the six-week period recommended by the FCA guidance<sup>27</sup> (or, indeed, at all), when the supplying firm is outside the scope of SM&CR or is having difficulties compiling the reference. As firms have gained greater understanding of the regulatory reference requirements since their introduction in March 2017, these difficulties have diminished but not disappeared. There are several reasons why a firm may be uncooperative or reluctant to give a reference or find it difficult to do so. These include:

- the employing firm is not a financial services firm or is overseas and not bound by the obligation to provide a reference;
- the individual concerned has not previously been in the SMR or CR and the providing firm cannot easily generate the required information (which may not be recorded in one place);
- it may be difficult to find the person or team responsible for providing a reference, e.g. if an individual worked for a large group containing banking and non-banking companies, it could be unclear which part of the business had employed him or her;
- the providing firm, while regulated, finds it difficult to supply a reference within six weeks because of the complexity of the individual's circumstances; or
- the firm that employed the individual is no longer trading.

3.1.2 There are several practical steps that firms seeking a regulatory reference can take to alleviate these difficulties. Where requests for references are going to firms outside the scope of the SM&CR, whether in the UK or abroad, the regulators state that firms must *'take reasonable steps to obtain [appropriate] references'*<sup>28</sup>. They suggest that firms should consider providing a short explanatory text outlining the background to the request and setting out the information required.<sup>29</sup> Where appropriate, this could also explain that, although the individual may not have been in a certified role at the original firm, they (as the new firm) still need to obtain a reference as the employee would be moving into a certified role.

3.1.3 Firms could also consider providing a regulatory reference email address on their website so that other firms can communicate easily with a central point in the firm.

3.1.4 Where the providing firm is dealing with a complex case but in good faith, then it may simply be a case of discussing the need for additional time. This may also apply when the individual has not previously been subject to the SMR or CR and the information is not readily available. Where an in-scope firm fails to provide a reference within a reasonable time-frame and where there are no obvious mitigating circumstances, it would be proportionate first to inform the firm of its regulatory

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<sup>27</sup> SYSC 22.5.17

<sup>28</sup> SS 28/15 6.11 / SYSC 22.2.1R(1) the word 'appropriate' appears in the FCA rules.

<sup>29</sup> SYSC 22.3.3 & 22.3.4

obligations and, if this does not prompt a response or an explanation, to inform the regulators.

- 3.1.5 There may also be circumstances (for example, where the previous employer has ceased to trade and cannot provide a reference) when it may be necessary to hire an individual whose regulatory references do not cover the whole six-year period. Under these circumstances, firms should consider making a provisional F&P assessment (with additional controls as appropriate) that can then be revised in-year as more information about the employee is obtained as he or she performs the new role<sup>30</sup>.

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<sup>30</sup> In the case of an SMF, this should also be conveyed to the regulator along with an explanation of measures the firm has taken to assess the individual's F&P in the absence of a reference, as required by S60A of FSMA and the PRA's [Fitness and Propriety](#) rules.

## 4 The type of information to include in a reference

### 4.1 Introduction

4.1.1 Decisions about what to include in, or how to deal with, regulatory references will generally be straightforward for both the supplier and receiver. From the supplier perspective, the information the reference needs to contain will in most cases be clear (either because there is no poor conduct to disclose, or because a factual account of completed disciplinary proceedings relevant to the assessment of an individual's F&P can be included). The individual concerned is also likely, in most cases<sup>31</sup>, to be aware of the content of the reference with no procedural complications. From the perspective of the receiving firm, a timely reference that contains no certification issues, or a timely reference that discloses poor conduct relevant to an F&P assessment, represent equally clear-cut scenarios.

4.1.2 The following section considers good practice in less straightforward situations where more judgement may be required. It looks at four different sets of circumstances:

- regulatory references contain adverse information about an individual (i.e. information that may have a negative impact on the assessment of an individual's F&P) (section 4.2);
- disciplinary procedures are incomplete when the reference is requested (section 4.3);
- incoming regulatory references disclose certification issues (section 4.4); and
- references need revising (section 4.5).

4.1.3 For each case, we have indicated how firms could meet these challenges fairly, proportionately and consistently.

### 4.2 References contain adverse information about an individual

4.2.1 Where firms are providing adverse information about an individual, usually this will be derived (though not necessarily exclusively - see section 4.3 "incomplete disciplinary procedures" below) from the disciplinary process and decisions relating to malus and clawback and conduct rule breaches. It is important to ensure that employees are aware that the outcome of any such proceedings over the previous six years (or, in the case of serious misconduct, at any time in the past) will be included in the regulatory reference. A reference containing adverse information about an individual is a serious matter and could irreparably harm a person's career. In this context, good practice should mean that there are no surprises for the individual.<sup>32</sup>

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<sup>31</sup> The exception is likely to be any disciplinarys that took place prior to the introduction of regulatory references, where it would not have been possible to notify the individual that the information would be contained in any future reference.

<sup>32</sup> The PRA and FCA agree that fairness would normally require that an employee can comment on the information included in a reference (thereby know what is in it) / SS 28/15 6.45 and SYSC 22.5.5.

- 4.2.2 Firms will need to make a judgement about whether older disciplinary or other records remain relevant to a current assessment of an individual's F&P and should therefore be included in the regulatory reference.<sup>33</sup> To make this judgement it could be helpful to consider whether the firm would have taken the information into account had the individual remained with the firm, and the firm were required to make an F&P assessment. Where the information is deemed irrelevant, firms should exclude it from the regulatory reference to prevent recipients of the regulatory reference putting undue weight on minor historic incidents (e.g. persistent lateness some years previously that was addressed at the time and has not been an issue since). To be fair to the individual, firms will need to consider what to include or exclude on a case-by-case basis.
- 4.2.3 The regulations state that the individual should usually have the opportunity to comment on information in a regulatory reference.<sup>34</sup> They set out that the employee need not necessarily see or comment on the text that is entered into the reference; rather, he or she should have had the chance to comment on the matter itself. This may have happened some time before the preparation of the reference, e.g. at the time of the allegation or during disciplinary proceedings. If the employee did not have the chance to comment at the time it was reported or arose, then he or she should get the opportunity when the regulatory reference is being compiled.<sup>35</sup>
- 4.2.4 Good practice is that a firm should consider whether an individual should be given a second opportunity to comment on past disciplinary or other proceedings when he or she did not originally make a comment (or were not made aware at the time that their comment may inform the content of a regulatory reference). This could be particularly important where the individual had not been in a certified role at the time, or where the proceedings took place before the introduction of regulatory reference requirements. At this early stage in the life of regulatory references, this is a likely scenario. Such a step does not imply that the original disciplinary proceedings were unfair. Rather, it recognises the very different circumstances created by the SM&CR, in which the prospective employer of a certified employee has greater insight into his or her past records than before the introduction of the regime.
- 4.2.5 It is important to make it clear to the employee that a second opportunity to comment on past disciplinary action does not constitute a re-opening of the original proceedings or a chance to appeal against the outcome. Rather, it is intended to help the firm draft the regulatory reference in a way that is fair to the individual.
- 4.2.6 The guidance states that an employee's views do not necessarily need to be *stated* in a regulatory reference but should be *considered* when deciding what to include and how to draft the reference.<sup>36</sup> Indeed, if a firm attempts to summarise the individual's comments on a certification issue disclosed in a reference, there is a chance that his or her views will be misrepresented, creating unfairness (and increasing also the risk of legal action). The need to ensure that individuals' views are considered when compiling the reference should mean that discussion of the

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<sup>33</sup> SYSC 22.2.2R(2)

<sup>34</sup> [SS 28/15 6.45](#) / [SYSC 22.5.5G](#)

<sup>35</sup> [SYSC 22.5.5G\(4\)](#)

<sup>36</sup> [SS 28/15 6.46](#) / [SYSC 22.5.5G\(8\)](#)

reference with the individual is built into the initial stages of the process and not at the point where a draft is ready to go.

- 4.2.7 Consistent messages about the regulatory reference process should be given to the individual at appropriate points so that he or she understands the connection between the regulatory reference and the processes likely to provide information for the reference, e.g. by informing individuals at the end of a disciplinary process that the outcome will be included in any subsequent reference. Firms should also consider reminding employees of regulatory reference requirements in a “leaver’s pack” or checklist of useful information when they move to another firm. An employee handbook should also include relevant information.

### 4.3 Incomplete disciplinary procedures

- 4.3.1 The regulation does not *require* a firm to disclose unverified information about an individual, but states that it *may* do so, if it wishes<sup>37</sup>. When an employee leaves before a full disciplinary process can be completed, information about alleged poor conduct should generally be considered unverified. Under these circumstances, firms face the challenge of balancing the need to alert another firm that an individual could pose a conduct risk (with all that this could entail for potential harm to customers, clients or wider society), with the need to ensure fairness for that individual when the firm can only relay unverified information.
- 4.3.2 If an allegation of poor conduct is frivolous or vexatious and it would not have been investigated further or prompted disciplinary proceedings if the employee had stayed, it would be good practice to exclude this from the reference. Where, however, there is evidence of wrongdoing that would have been pursued through further investigation or disciplinary proceedings, a firm should consider referring to this unverified evidence and/or the fact that it had been unable to complete the investigation or initiate disciplinary proceedings before the individual left.
- 4.3.3 The regulators’ guidance states that, if an individual has been notified of an allegation of poor conduct, he or she should be given the opportunity to respond to that allegation. It requires firms to seek views from the employee rather than omit the allegation from the regulatory reference.<sup>38</sup> If the firm attempts to give details of the employee’s response, there is however a risk that the firm will inadvertently misrepresent his or her comments. Given that the reference will probably not contain a full account of the employee’s views, it should be considered good practice for the firm that receives the reference to seek further detail from the individual (see section 4.4 ‘Balanced decisions about incoming references’).
- 4.3.4 Firms should consider a periodic review of outgoing references to enable them to consider the consistency of thresholds and practices. Questions a firm could ask about its own approach could include:
- Are we reporting relevant factors consistently to enable receiving firms to use regulatory references fairly in their approach to recruitment?

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<sup>37</sup> [SYSC 22.5.1R](#) and [SYSC 22.5.2\(2\)](#)

<sup>38</sup> [SS 28/15 6.47 / FCA \[SYSC 22.5.5G\\(5\\)\]\(#\)](#)

- Are we being fair and consistent with individuals in seeking and taking account their views?

#### 4.4 Balanced decisions about incoming references

- 4.4.1 As noted above, the regulatory reference requirements have brought about a significant change in the hiring process for the roles they cover, with prospective recruiters receiving more information about a candidate than before. A regulatory reference carries weight, and as such should be considered alongside other sources of information e.g. personal references, records of continuous professional development and, if appropriate, a discussion with an individual about his or her regulatory reference. Firms should seek to make balanced decisions about hiring an individual whose regulatory reference discloses negative information, rather than using the regulatory reference as a binary screening tool. Such a decision should consider factors such as the seriousness of the information provided and the risk tolerance of HR and the business area. Firms may also wish to refer to the Financial Stability Board's toolkit on 'Strengthening Governance Framework to Mitigate Misconduct Risk', which suggests various tools that firms can use in the employee screening process<sup>39</sup>.
- 4.4.2 In most cases, a blanket rejection policy for regulatory references containing details of complete or incomplete disciplinary processes, or unverified information about poor conduct, will not be fair to the individual. To ensure fairness, the firm should ask the individual during the recruitment process about issues already or likely to be disclosed in a regulatory reference. Such a conversation complements the usual pre-employment screening checks and forms part of the consolidated approach to weighing up each regulatory reference set out in paragraph 4.4.3. It is also particularly important where investigations or disciplinary proceedings are ongoing or uninitiated, i.e. when the receiving firm is considering unverified information.
- 4.4.3 Firms have different structures in place for receiving and processing incoming references. No matter how the firm is structured, however, it is important to ensure for reasons of fairness that, where an unresolved certification issue is raised, the final decision is made by both central functions and hiring managers, taking into account the risk threshold appropriate to the post under consideration. Once the individual has passed this combined pre-employment screening, any proposed mitigations, additional controls or areas for development can be addressed in a subsequent F&P assessment.
- 4.4.4 If additional controls or mitigations are developed as part of the pre-employment screening process and consideration of the regulatory reference, these should be carried over into assessment of the individual's F&P.
- 4.4.5 The responsible team (e.g. in HR) should raise awareness among hiring managers of the need for fairness, consistency and proportionality in considering regulatory references. As when providing references, firms should consider a periodic review of outcomes to enable the consistency of decisions across different teams and functions to be considered.

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<sup>39</sup> See [FSB toolkit 3.4.1](#)

## 4.5 Revising a regulatory reference

- 4.5.1 The FCA and PRA rules oblige a firm to revise a regulatory reference if information arises after a reference has been issued that would have caused the providing firm to write that reference differently<sup>40</sup>. This obligation covers the six-year period after the employee has left, although in the case of serious misconduct there is no time limit<sup>41</sup>.
- 4.5.2 The three most likely scenarios in which a firm will need to revise a regulatory reference are:
- where a new allegation of misconduct is made;
  - where an allegation of misconduct was not pursued previously as there was insufficient information or it was considered frivolous or vexatious, but where new information has come to light that would have changed that decision; or
  - where disciplinary appeals that were outstanding at the time of the original reference have since been concluded and where the outcome - positive or negative - needs to be communicated to the new firm.
- 4.5.3 Revisions are likely to be required for only a minority of regulatory references. The challenges of providing a fair, consistent and proportionate regulatory reference can, however, be even greater when it comes to revising a reference. The individual may, for example, have left up to six years ago (or longer in the case of serious misconduct); he or she may be difficult to reach and involve in the process; and information may be historic and incomplete. It can also be challenging to ensure that, without the trigger of an external request, information about alleged poor conduct is shared with those responsible for revising the reference.
- 4.5.4 For both an original and a revised reference, the regulatory requirements stipulate that fairness requires firms to give an employee the opportunity to comment on an allegation if it is to be included.<sup>42</sup> In a small number of cases, new information could come to light while the individual is still employed at the firm providing the revision (e.g. if they had a long notice period and committed some form of misconduct). In most cases, however, a revised reference is likely to be issued after the individual has left.
- 4.5.5 If a revised reference is issued after the individual has left, they may know nothing about the new information and will be unlikely to have had the opportunity to respond to it. The providing firm may therefore need to contact a former employee to allow him or her to respond to an allegation. Firms should consider trying to contact the individual by more than one method to allow for e.g. absence from the last home address held by the firm, meaning that a letter might not be received. They should also give individuals a reasonable timeframe in which to respond (at least 15 working days) and should consider sending a prompt to the employee before the deadline for a response.<sup>43</sup>

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<sup>40</sup> [Fitness](#) and Propriety 5.2(1) / [SYSC 22.2.4](#)

<sup>41</sup> [SS 28/15 6.52](#) / [SYSC 22.2.6](#)

<sup>42</sup> [SS 28/15 6.45](#) / [SYSC 22.5.5](#) & [SYSC 22.6.5G\(2\)](#)

<sup>43</sup> Firms should be mindful of their obligations under the General Data Protection Regulation (GDPR) when contacting individuals - particularly if there is any doubt over current contact details for a past employee.

- 4.5.6 It is important that employees understand the requirements of regulatory references and how it could affect them. Firms should consider including relevant information during induction and onboarding processes. This would allow firms to set out their regulatory obligations at the start of an individual’s employment and ensure that individuals have an early understanding of expectations placed on them and their employer. As mentioned above, there may be other points in a career when employees can helpfully be reminded of the firm’s obligations related to the regulatory reference requirements, e.g. during a disciplinary process (which will also give employees the opportunity to comment on an allegation that may later inform the content of a regulatory reference) or as part of line manager training for those responsible for certified staff. A “leaver’s pack” could also include details about regulatory reference procedures and advise departing employees to inform the firm of their contact details.
- 4.5.7 There can be practical challenges in triggering a revised reference in the absence of a request from another firm. The business area that holds or uncovers relevant information about an individual may not know when and how to pass on this information for the purposes of revising a regulatory reference. This practical issue is likely to be addressed differently by firms of different sizes and with different approaches to issuing regulatory references.
- 4.5.8 In larger firms, teams responsible for special investigations, HR issues, complaints and compliance should have a clearly communicated responsibility to escalate relevant information to the team charged with revising references. Recognising, however, that information about poor conduct could emerge from any part of the business, there should also be a general firm-wide understanding of escalation procedures. This may be especially important in large firms, where there is unlikely to be a simple process flow from business line to regulatory reference team.
- 4.5.9 If a firm decides that a reference needs to be revised, i.e. it is satisfied that there is sufficient evidence relevant to the assessment of an individual’s F&P, it is required to make ‘reasonable’ inquiries to identify the individual’s current employer. Before sending a revised reference to another firm, it is important to confirm that this other firm continues to employ the individual. This step ensures that no data protection breach occurs by releasing personal information to a firm that no longer employs the individual.
- 4.5.10 As noted previously, in the case of serious misconduct, the six-year limit to the coverage of the regulatory reference no longer applies. If a firm discovers serious misconduct that took place more than six years ago, this will not have been captured during the normal regulatory reference process. If that individual left the firm more than six years ago there will be no existing previous reference to revise. In such circumstances, firms will need to take steps to locate the employee in order to involve them in an investigation and alert his or her current employer as necessary.<sup>44</sup>
- 4.5.11 If the new information has come to light while the employee is still working at the providing firm, or if the new information constitutes a sufficiently clear and serious

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<sup>44</sup> In 2018, the FCA consulted on the scope and shape of a public Directory of certified employees to help customers and firms check the status and history of individuals working in financial services (see [CP18/19: Introducing the Directory](#)). If it is set up, such a Directory is likely to facilitate the task of establishing the employee’s current employer by providing up-to-date information about certified employees.

case of misconduct (e.g. if the regulator is involved or the individual is the subject of malus and clawback provisions), the decision to revise a reference may be straightforward. It may, however be more difficult if an allegation is less clear (e.g. an internal investigation has been completed but the extent of the individual's involvement could not be ascertained and there has been no attempt at a disciplinary process (because there was no opportunity), or when an individual strongly contests an allegation.

- 4.5.12 Consistency in revising a regulatory reference means that, as far as possible, the threshold for disclosing certification issues in a revision should be the same as for a requested reference. It is also important to ensure that a revised reference contains the same quality of information as a requested reference. The principles of fairness, consistency and proportionality should be applied at all stages of the regulatory reference process.

## Annex A - Principles for providing, revising and using regulatory references

### Principle 1: Fairness

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When providing or revising a regulatory reference, a firm should:

- ensure that information is generated and recorded in a fair way that allows the individual's perspective to be considered;
- consider whether an individual should be given a second opportunity to comment on past disciplinary or other proceedings when he or she did not originally make a comment, in particular when these proceedings took place before the introduction of regulatory reference requirements;
- exclude information about uninvestigated allegations of poor conduct that are considered vexatious or frivolous;
- provide a factual account of uninvestigated allegations of poor conduct relevant to an F&P assessment that would have been pursued had the individual stayed at the firm;
- ensure that individuals are aware of the content of the reference, and, where appropriate, are informed during an internal process (such as disciplinary proceedings) where a negative outcome would be recorded in a subsequent regulatory reference;
- consider excluding disciplinary information from a reference where this is not or no longer relevant to an assessment of Fitness and Propriety; and
- ensure the regulatory references it supplies to other firms are appropriately transmitted (e.g. via encryption) in consideration of the sensitive personal information they contain.

When requesting and using a regulatory reference, a firm should:

- consider providing an explanation of its obligations under the regulatory reference requirements of the Senior Managers and Certification Regimes (SM&CR) when it requests a reference from firms outside the UK or not subject to SM&CR;
- explain why it is requesting further information based on a regulatory reference, when it needs to do so;
- talk to a prospective employee about negative information included or likely to be included in a regulatory reference;
- have a balanced decision-making process that does not use the regulatory reference as a binary screening tool; and
- in the case of a revised reference, give the individual the opportunity to respond to the information in the revision.

## **Principle 2: Proportionality**

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When providing or revising a regulatory reference, a firm should:

- satisfy itself that a request for a reference is legitimate (i.e. it is being made by a regulated firm for its stated purpose);
- consider what factors are relevant to deciding whether it is proportionate to include information in a regulatory reference;
- consider what constitutes ‘reasonable steps’ when sourcing information for a reference;
- have a clear policy and processes in place around what information is recorded on an ongoing basis;
- have a clear policy on what information on mitigating circumstances is included in a regulatory reference;
- provide an explanation to the requesting firm, when it does not consider that firm’s request for additional information to be fair or proportionate and therefore does not propose to supply the information; and
- ensure key teams and others involved in the F&P assessment process are (as far as possible) aware of the need to escalate an allegation of poor conduct against a former employee for the purposes of considering a revision of the original regulatory reference.

When using a regulatory reference, a firm should:

- consider what constitutes ‘reasonable steps’ in:
  - identifying relevant former employers and seeking references (from those outside the sector); and
  - requesting regulatory references for intra-firm transfers and role changes; and
- consider how to assess information in a reference or update.

## **Principle 3: Consistency**

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When providing or revising a regulatory reference, a firm should:

- consider what factors are relevant in deciding what information to include in a regulatory reference;
- use consistent messages to individuals about regulatory reference requirements at appropriate points (e.g. on recruitment, during disciplinary proceedings, on leaving the firm);
- ensure that the information it includes is consistent with that included for other regulatory references provided by the firm;
- have processes in place to ensure that all relevant information is gathered consistently and systematically from around the firm;
- ensure that the content of the reference is consistent with information previously communicated to the individual, for example, at the time of a disciplinary process; and

- ensure that the threshold for disclosing certification risks and issues remains the same for revised references as for requested references.

When requesting and using a regulatory reference, a firm should:

- have in place a process to ensure that the firm seeks further information from the providing firm(s) and/or individuals as necessary, for example, to request disciplinary documentation where relevant.

